ABUSE OF PROCESS

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1. Dictionary definition of "Abuse of process"

(a) Abuse of legal process: A frivolous or vexatious action as, e.g. setting up a case which has already been decided by a competent court. If the plaintiff induces the defendant by fraud to come under the jurisdiction so that he may be served with a writ, the court will set aside the service as an abuse of process of the court. *A Concise Law Dictionary*, 5th edn 1964, by PG Osborn.

(b) The gist of an action for "abuse of process" is improper use or perversion of process after it has been issued. A malicious abuse of process occurs where the party employs it for some unlawful object, not the purpose which it is intended by the law to effect, in other words, a perversion of it. Action for "abuse of process" rests upon improper use of regularly issued process. *Black's Law Dictionary*, 6th edn, 1990.

2. Judicial Definition of "Abuse of process"

(a) In *Ridgeway v The Queen* [1995] HCA 66; (1995) 184 CLR 19 at 74-75; (1995) 129 ALR 41; (1995) 69 ALJR 484; (1995) 78 A Crim R 307; (1995) 8 Leg Rep C1.

Per Gaudron J:

> "The powers to prevent an abuse of process have traditionally been seen as including a power to stay proceedings instituted for an improper purpose (*Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509; 107 ALR 635; (1992) 66 ALJR 585; 61 A Crim R 431), as well as proceedings that are 'frivolous, vexatious or oppressive' (See, eg, *Metropolitan Bank Ltd v Pooley* (1885) 10 AC 210; [1881-85] All ER 949). 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 (See, eg, *Oceanic Sun Line Special Shipping Company Inc v Fay* [1988] HCA 32; (1988) 165 CLR 197 at 242-243, 246-247, and the cases there cited; 79 ALR 9; (1988) 62 ALJR 389; [1988] ACL 36085). That is necessarily so.
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> Abuse of process cannot be restricted to 'defined and closed categories' (*Hamilton v Oades* [1989] HCA 21; (1989) 166 CLR 486 at 502; 85 ALR 1; (1989) 63 ALJR 352; 15 ACLR 123; 7 ACLC 381, citing *Jackson v Sterling Industries Ltd* [1987] HCA 23; (1987) 162 CLR 612 at 639; 71 ALR 457; [1987] Australian High Court and Federal Court Practice 96; 61 ALJR 332; [1987] ATPR 40-792 and *Tringali v Stewardson Stubbs & Collett Ltd* (1966) 66 SR (NSW) 335 at 340, 344; [1966] 1 NSWR 354. See also *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23 at 25-26, 47-48, 74; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307; *Walton v Gardiner* [1993] HCA 77; (1993) 177 CLR 378 at 393-395; (1993) 112 ALR 289; (1993) 67 ALJR 485; (1993) 112 A Crim R 289; *Rogers v The Queen* [1994] HCA 42; (1994) 181 CLR 251 at 255, 285-286; (1994) 123 ALR 417; (1994) 68 ALJR 688; 74 A Crim R 462) 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 (See *Dietrich v The Queen* [1992] HCA 57; (1992) 177 CLR 292 at 328-329, 364; (1992) 109 ALR 385; (1992) 67 ALJR 1; 64 A Crim R 176).
>
> 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 (As to what constitutes improper purpose, see *Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509 at 526-530, 532-537, 553-556; see also at 543-551; 107 ALR 635; (1992) 66 ALJR 585; 61 A Crim R 431) and it is clear that it extends to proceedings that are 'seriously and unfairly burdensome, prejudicial or damaging' (*Oceanic Sun Line Special Shipping Company Inc v Fay* [1988] HCA 32; (1988) 165 CLR 197 at 247; 79 ALR 9; (1988) 62 ALJR 389; [1988] ACL 36085) or 'productive of serious and unjustified trouble and harassment' (*Hamilton v Oades* [1989] HCA 21; (1989) 166 CLR 486 at 502; 85 ALR 1; (1989) 63 ALJR 352; 15 ACLR 123; 7 ACLC 381)."

(b) Per Gobbo J:

> "The basis of the application is that the court should grant a stay in order to prevent an abuse of its own process. I accept that there is a power in superior courts and possibly also in courts of inferior jurisdiction to stay a prosecution where it is an abuse of the process of the court. The main relevant authority is the decision of the House of Lords in *Connelly v DPP* [1964] AC 1254; [1964] 2 All ER 401; (1964) 48 Cr App R 183; [1964] 2 WLR 1145. Lord Morris said at AC p1301 as follows:
>
> > "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process. The preferment in this case of the second indictment could not, however, in my view, be characterised as an abuse of the process of the court."

Later at the same page, he said:

> "The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice."

Lord Devlin in the same case said at p1354:

> "The fact that the Crown has, as is to be expected, and that private prosecutors have (as is also to be expected, for they are usually public authorities) generally behaved with great propriety in the conduct of prosecutions, has up till now avoided the need for any consideration of this point. Now that it emerges, it is seen to be one of great constitutional importance. Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused."

A judgment that was especially relied upon by the applicants before me was that of Mr Justice Richardson in the New Zealand Court of Appeal in *Moevao v The Department of Labour* [1980] 1 NZLR 464, in particular a passage at page 482 where he said:

> "The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor in relation to the prosecution that the Court processes are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings) as to cause improper vexation and oppression."

Later in the same judgment His Honour said when referring to the difficulties of exercising a discretion in this matter:

> "The twin problems of an absence of objectively ascertainable standards and the relative unfamiliarity of the Courts with the weighing of all the considerations which may bear on the exercise of prosecutorial responsibility require the Courts to tread with the utmost circumspection. While the Court must be the master and have the last word, it is only where to countenance the continuation of the prosecution would be contrary to the recognised purposes of the administration of criminal justice that a Court would ever be justified in intervening."

Per Gobbo J in *R v Magistrates' Court at Melbourne; ex parte Holman & Ors* [1984] VicSC 245; MC 31/1984, 24 May 1984.

3. Jurisdiction of the Magistrates' Court in relation to a claim of Abuse of process

(a) Per Gobbo J:

> "In *Connelly v DPP* [1964] AC 1254; [1964] 2 All ER 401; (1964) 48 Cr App R 183; [1964] 2 WLR 1145 their Lordships were divided in their views as to whether a court had power to stay a validly instituted prosecution and in respect of which there was no valid plea in bar, though the majority would seem to have recognised that there may be such a power. All Their Lordships were agreed that the power could only be exercised in exceptional circumstances. The authorities have been put before me in a very helpful fashion. One of those authorities was the decision of the New Zealand Court of Appeal in *Moevao v The Department of Labour* [1980] 1 NZLR 464. In that case the earlier authorities were usefully reviewed. All three members of the court there were of the view that a superior court has an inherent jurisdiction to stay or dismiss a prosecution for abuse of the process of the court, but on the facts, they found there was nothing that justified such an unusual intervention. Mr Justice Woodhouse was of the view that the power extended to a Magistrates' Court. A final view on that matter was not expressed by the other judges."

Per Gobbo J in *R v Magistrates' Court at Melbourne; ex parte Holman & Ors* [1984] VicSC 245; MC 31/1984, 24 May 1984.

(b) Per Nathan J:

> "It would be extraordinary to accede to the proposition that a Magistrate, empowered with control over the procedures before him, such as to prevent repetitive or scandalous cross-examinations, should not have the power to deal with similar abuses of process. I am persuaded by the New South Wales decisions, specifically *Miller v Ryan* (1980) 1 NSWLR 93 which is on all fours with the situation before me. There, Rath J at single instance, held a Magistrate had the power to entertain an application for the dismissal of proceedings on the basis that the same amounted to an abuse of the legal process.

I am satisfied that a Magistrate does have power to hear and determine an assertion of abuse of process on the basis of delay. Whatever way he rules in committal proceedings that decision is subject to judicial review pursuant to the terms of Order 56. In any event, his ruling would amount to a decision reviewable under the terms of the *Administrative Law Act*. Even if the proceedings are not judicial, they certainly amount to arriving at a decision which is itself reviewable, and I refer to *Arno v Forsyth & Ors* (1986) 9 FCR 576; (1986) 65 ALR 125, and *Lamb v Moss* [1983] FCA 254; 76 FLR 296; (1983) 49 ALR 533; (1983) 5 ALD 446.

Turning to the South Australian decision of *Clayton v Ralphs & Manos* (1987) 45 SASR 347; (1987) 26 A Crim R 43, 16th June 1987, it is possible to suggest the majority decision of Olsson J and Jacobs J seem to tend towards the proposition that a Magistrate does not have power to halt proceedings, although the decision of Legoe J, appears to assume that he has such power. The matter was not squarely dealt with although Jacobs J, in dealing with *Whitbread v Cooke* 5 ACLC 305 and *Miller v Ryan* (1980) 1 NSWLR 93, had this to say, again reciting what Maxwell J, has said:

> "There is no doubt that the power to stay is exercisable in relation to committal proceedings."

His Honour went on to say,

> "I have been unable to discover any Australian authority binding upon this Court that extends such jurisdiction to a permanent stay of committal proceedings upon the ground that they are an abuse of process, and there are in my opinion powerful and compelling reasons for declining so to extend the jurisdiction."

In my respectful view this is not a matter of extending jurisdiction. It is a matter merely of permitting those powers which are already in place to be exercised. Investiture of the Magistrate with the authority and responsibility to hear committal proceedings takes with it the concomitant power to prevent those proceedings themselves being used in a way which abuses the entire legal process. It would be curious indeed if a Magistrate were to be invested with all power and responsibility in respect of committal proceedings, but not power at their very source to decide whether the same are abusive or otherwise. Even more so when it is considered a Magistrate has undoubted power to dismiss or halt proceedings on other grounds, should they be abusive or amount to a mis-use of the Court process. It would be incongruous, and offend commonsense, to bifurcate a Magistrate's discretion and powers in relation to prevention of abuses in such a way.

Accordingly, I am satisfied the Magistrate did have the power which he refused or declined to exercise. It was within his province to decide whether the proceedings against these policemen amounted to an abuse of process by virtue of delay. ... I have already decided that a Magistrate does have authority to entertain applications to stay committal proceedings on the basis that the same would amount to an abuse of process of the court."

Per Nathan J in *Higgins & Ors v Tobin & Winn* [1987] VicSC 484; MC 60/1987, 5 November 1987.

(c) Per the Court (Crockett, O'Bryan and Gobbo JJ):

"The question of abuse of process generally was discussed in *Barton v R* [1980] HCA 48; (1980) 147 CLR 75; 32 ALR 449. The High Court was concerned with the question as to whether a trial held without an antecedent committal was necessarily unfair. As to this the Court was evenly divided. On the general question of abuse of process, Gibbs ACJ and Mason J, with whom Stephen, Aickin and Wilson JJ agreed, said at p96: "There is ample authority for the proposition that the courts possess all the necessary powers to prevent an abuse of process and to ensure a fair trial."

But it was also observed that the Court had yet to decide if such powers extended so far as those put forward in *Connelly's Case*.

Finally, there should be considered the three recent decisions of the Supreme Court in New South Wales, in each of which a careful and comprehensive study was made of the authorities on the whole topic of abuse of process in criminal and like proceedings. There should also be noted a further decision of the same Court in *Joel v Mealey* 27 A Crim R 280, Yeldham J, 14 April 1987 where *Herron's Case* was applied. In the first case, *Herron v McGregor* (1986) 6 NSWLR 246; 28 A Crim R 79, NSW Court of Criminal Appeal, 12 September 1986, McHugh JA, speaking for the Court, said: "The right to stay criminal proceedings which are an abuse of process was again recognized in the speeches of Lords Hailsham, Salmon and Edmund-Davies in *R v Humphrys* [1977] AC 1, at pp39, 45-6, 52-3 and 55; [1976] 2 All ER 497; [1976] 2 WLR 857; (1976) 63 Cr App R 95.

The highest courts in New Zealand and Canada have also recognized the right to stay proceedings in the criminal courts: *R v Hartley* [1978] 2 NZLR 199; *Moevao v Department of Labour* [1980] 1 NZLR 464; *R v Jewitt* (1985) 20 DLR (4th) 651. In *Miller v Ryan* [1980] 1 NSWLR 93, at p109, Rath

J said that a Magistrate had power to stay criminal proceedings on the ground that they were an abuse of process. He followed the statement of Lord Parker CJ in *Mills v Cooper* [1967] 2 QB 459, at p467; [1967] 2 All ER 100; [1967] 2 WLR 1343 who said that magistrates could dismiss a charge for abuse of process and that: 'every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of process of the court'."

Per the Full Court in *R v Clarkson* [1987] VicRp 80; [1987] VR 962; (1987) 25 A Crim R 277, 12th May 1987.

(d) Per Tadgell J:

"There is perhaps a question whether a court of summary jurisdiction, such as the Magistrates' Court, has an inherent jurisdiction to order the permanent stay of a proceeding being a summary hearing of a criminal charge. Mr Justice Brennan investigated the question of such a jurisdiction in the context of the District Court of New South Wales in *Jago's* case [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307 and the matter was but briefly adverted to in the course of argument before us. Because the matter was not fully debated, I shall not attempt to investigate it. Assuming, however, that there is such a jurisdiction in the Magistrates' Court – and the case of *Holmden v Bitar* (1987) 47 SASR 509; (1987) 75 ALR 522; (1987) 27 A Crim R 255, a decision of Cox J of the Supreme Court of South Australia suggests that there may be – there was, in my opinion, no occasion to exercise it in this case."

Per Tadgell J (Ormiston & Cummins JJ agreeing) in *Barrett v Wearne* [1994] VicSC 15; (1994) 18 MVR 331; MC 14/1994, 1 February 1994.

4. DELAY

(a) Per Nathan J:

"The contention must raise in the mind of the adjudicator an immediate, reasonable and sustainable apprehension that the court's processes could possibly be abused if the proceedings were to continue. Having raised and satisfied a Magistrate or a Judge of those preliminary matters, the onus will pass to the Crown to establish the propriety of the proceedings and the fact that an abuse of the court's process will not ensue. The Courts have pronounced the factors which may amount to an abuse, and I refer to *Clayton v Ralphs & Manos* (1987) 45 SASR 347; (1987) 26 A Crim R 43, 16th June 1987, *R v Clarkson* [1987] VicRp 80; [1987] VR 962; (1987) 25 A Crim R 277, and the recitation therein with approval of the criteria enunciated by Mason J, as he then was, in *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1; 21 ALR 505; (1978) 53 ALJR 11; 37 ALT 122. However, those criteria go to establishing abuse once the initial threshold has been passed.

"It was within the Magistrate's province to decide whether the proceedings against the policemen amounted to an abuse of process by virtue of delay. I am satisfied in this case that the application is without merit, that it does not satisfy, even at its lowest and most cursory level, the criteria for establishing an abuse of the court's process."

Per Nathan J in *Higgins & Ors v Tobin & Winn* [1987] VicSC 484; MC 60/1987, 5 November 1987.

(b) Per Nathan J:

"In the case before me, as is common to most criminal proceedings, there is no statutory limitation period. The reason for that is firmly vested in legal history. That which is a criminal offence when first committed remains so. The community does not tolerate an offence when it is first committed, and the mere effluxion of time does not cure it. In those instances where there is a statutory limitation in relation to criminal offences, it is clearly laid out.

Common law has been firmly based upon the proposition that the long arm of the law reaches out everywhere and forever in respect of breaches of it. That proposition is subject only to exclusion where, as a matter of fairness, it could be said that an accused man, if he were to face trial, would be so utterly prejudiced and oppressed, an abuse of the court's process would result. There has been much law, to which I have already referred, along the lines of the American concept of due process, more strongly put in recent years than ever before, but the basic position of the common law has not altered."

Per Nathan J in *Higgins & Ors v Tobin & Winn* [1987] VicSC 484; MC 60/1987, 5 November 1987.

(c) Inordinate delay – Notice of Motion

Per Southwell J:

"When this notice of motion was issued no other court had jurisdiction to entertain this "matter". Even if there existed in the Court the general discretion to which Mr Thompson referred the Court cannot refuse to entertain an application properly brought before it, without good grounds. In my view there is no warrant for refusing to entertain the application; as it seems to me, once the matter came to the knowledge of the Attorney-General, and a decision was made that proceedings should be taken, it was open to the Attorney-General to form the opinion that it was not appropriate to lay an

information against the respondent for an offence of using threatening words contrary to s17 of the *Summary Offences Act* 1966 (which provides for a maximum penalty of two months' imprisonment). There were then only two courses open – either to launch proceedings for the indictable offence of attempting to pervert the course of justice, or to take proceedings in this Court pursuant to Rule 75.06.

Without in any way pre-empting any finding which a Judge of this Court may see fit to make upon any later hearing, it is in my opinion quite inappropriate now to rule that the Attorney-General ought not to be permitted to proceed with this application, unless there are circumstances demonstrating, upon established principles, that to do so would constitute an abuse of process. As it seems to me, the only matter pressed by Mr Thompson which could come within established principles is that of inordinate delay. It is patently clear that there was inordinate delay: however, in the present case the principal issue of fact to be decided is whether the alleged words were spoken by the respondent. By his arrest on 14 December the respondent had good cause to recall what was said: evidence was given about the matter in April 1988. It has not been shown that the delay has caused actual prejudice: or that a fair trial cannot now be had: as it seems to me the circumstances are not exceptional, within the meaning of *R v Clarkson* [1987] VicRp 80; [1987] VR 962; (1987) 25 A Crim R 277.

Other matters relied upon by Mr Thompson, and in particular the hardship, financial and mental, brought about by the renewed threat of proceedings after a considerable lapse of time do not in my opinion demonstrate an abuse of process: rather, they are matters to be considered in mitigation in the event of a finding that the respondent is guilty of contempt. As I have earlier indicated, any litigant, including the Attorney-General, who brings proceedings in this Court in accordance with the rules, will not be denied access to the Court except upon good grounds. In my opinion the ground here relied upon – that the proceedings constitute an abuse of process – has not been made out. The position might be different if these late and expensive proceedings were taken in respect of a patently trivial matter. In my opinion there are grounds for suggesting that those advising the Attorney-General are using a sledge-hammer upon a tack. I confess that I would like to be able to say that "enough is enough" and that the respondent, who I have observed in this Court during the two part-days of this hearing, has by now suffered sufficient punishment. However, I do not regard myself as at liberty to say that at this stage of the proceeding: as it seems to me I am empowered to stay these proceedings only if I find that they constitute an abuse of process, and for the reasons given, I do not make that finding."

Per Southwell J in *AG for Victoria v Ayres; ex parte Jumeau* [1989] VicSC 247; MC 43/1989, 1 June 1989.

(d) Delay in laying charges – defendant partially incapacitated before charges laid

1. Delay of itself will seldom, if ever, constitute a ground for granting a permanent stay of proceedings.

2. In the present case, having regard to the difficulties confronting the accused who, as a result of the intervening accident lacked the capacity to remember or to raise matters in his own defence, the circumstances were rare, exceptional and prejudicial so as to sustain the proper exercise of discretion to grant a permanent stay.

Per Nathan J:

"There is no question that *Jago's* case [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307 is the prime authority and has been entrenched in Australian law by frequent references to it throughout the Commonwealth. It was delivered on the same day as *Grassby v R* [1989] HCA 45; (1989) 168 CLR 1; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183 reported in the same volume of the Commonwealth Law Reports. Together the cases establish that there is no general principle that unreasonable delay in bringing a matter to trial, of itself means that there can be no trial, or that delay of itself necessarily vitiates conviction on a trial that has followed such a delay. Were this case to rest solely on the time lapse between the commission of the offence and the matching of the fingerprints the magistrate would have significantly misdirected herself and I would have set aside the exercise of her discretion. But I am satisfied that the references by her, albeit oblique, to the brain damage factor, significantly alter the tenor of this case. In *Edebone v Allen* [1991] VicRp 100; [1991] 2 VR 659 I considered *Jago's* case and the various balancing factors which must be taken into account when assessing whether a permanent stay should be granted. The head note adequately translates the judgment and in part it says this:

> "The power to grant a permanent stay undoubtedly exists as an instrument which the court exercises to prevent injustice or the abuse of its processes. Such applications should, however, be treated cautiously and will necessarily involve exceptional or unusual circumstances."

I there examined American authorities which are to the same effect as the Australian authorities. It was correct in that case and in this too, to take into account the reasons for the delay as well as the

> nature of the offence. In this case the failure of the police to match the prints earlier, the time delay factor, would not, of itself, justify the granting of a stay, but one intervening event entirely changes the situation before me and that is the brain damage factor.
>
> No general principle can be distilled from what I say in this case. I am confronted by the magistrate's remarks which fail to refer specifically to the brain damage factor but do refer to two factors; namely time delay and witnesses, neither of which would be persuasive in themselves. But the time delay and alibi witness factor, when combined with the brain damage factor, having been put to the magistrate, indicate to me that she did take those matters into account. She did so properly and her discretion did not miscarry and this notice of motion will be dismissed.
>
> By way of entrenching a proposition I have already recited, let me say again, delay of itself will seldom, if ever, constitute a ground for granting a permanent stay. Difficulties with obtaining witnesses may well fall within a separate category and I say nothing about that. But in this case so far as the defendant is concerned, an intervening, partially incapacitating event, prejudicing the presentation of a defence, does fall within the class of factors of being rare, exceptional and mightily prejudicial to the defendant as will sustain the proper exercise of discretion to grant a permanent stay."

Per Nathan J in *Ross v Tran & Anor* [1996] VicSC 441; 87 A Crim R 144; MC 03/1997, 16 September 1996.

(e) Delay in laying charges, data lost – whether an abuse of process

Respondents were charged with reckless operation of aircraft – electronic records of event giving rise to charge overwritten – delay in prosecuting offences – whether combination of delay and lost evidence justified grant of permanent stay – whether judge in error.

HELD: Appeal allowed. Order that the application for a permanent stay of proceedings be dismissed.

1. The test to be applied was whether in all the circumstances the continuation of the proceedings would involve unacceptable injustice or unfairness and that the court would only be satisfied that continuation of the proceedings constituted an abuse in an exceptional or extreme case.

Walton v Gardiner [1993] HCA 77; (1993) 177 CLR 378; (1993) 112 ALR 289; (1993) 67 ALJR 485; (1993) 112 A Crim R 289, applied.

2. In stating the test that the loss of primary data and the delay could constitute an unacceptable injustice or unfairness, the judge was in error.

3. E. sought to claim that the loss of data was the loss of an independent record of the event giving rise to the charge and was said to be productive of unfairness in that it would involve an incomplete reconstruction of the event. However, trials involve the reconstruction of events and it happens on occasions that relevant material is not available; documents, recordings and other things may be lost or destroyed. Witnesses may die. The fact that the tribunal of fact is called upon to determine issues of fact upon less than all of the material which could relevantly bear upon the matter does not make the trial unfair.

4. It is well established that the circumstances in which proceedings may be found to be an abuse of process are not susceptible of exhaustive definition. It is not necessary to consider whether there may be circumstances in which the loss of admissible evidence occasions injustice of a character that would make the continuation of proceedings on indictment an abuse of the process of the court. This is not such a case. The content of the lost data was unknown. In these circumstances it was not correct to characterise their loss as occasioning prejudice to E. The lost evidence served neither to undermine nor to support the Crown case. It is to be observed that if the Crown is unable to exclude the hypothesis, that the runway lighting was illuminated as the aircraft moved along it and that it ceased operating coincidentally at the time of take-off, it would fail to establish an element of the principal and the alternative offence. Accordingly, there was no feature of the delay that justified taking the extreme step of permanently staying proceedings on the indictment. It had not been established that any prejudice arising by reason of the delay could not be addressed by direction.

Per the High Court (Hayne, Heydon, Crennan, Kiefel and Bell JJ) in *The Queen v Edwards & Anor* [2009] HCA 20; (2009) 255 ALR 399; (2009) 83 ALJR 717; MC 15/2009, 21 May 2009.

(f) Per Nathan J:

> "The power to grant a permanent stay undoubtedly exists as an instrument which the court exercises

to prevent injustice or the abuse of its processes. See *Metropolitan Bank v Pooley* (1885) 10 AC 210; *Lawrance v Norreys* (1890) 15 AC 210; [1890] All ER 858; *Jackson v Sterling Industries Ltd* [1987] HCA 23; (1987) 162 CLR 612 at 639; 71 ALR 457; [1987] Australian High Court and Federal Court Practice 96; 61 ALJR 332; [1987] ATPR 40-792 and *Hamilton v Oades* [1989] HCA 21; (1989) 166 CLR 486 at 502-504; 85 ALR 1; (1989) 63 ALJR 352; 15 ACLR 123; 7 ACLC 381. I apply the principles of *Jago* [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307 and examine the exercise of the magistrate's discretion in the light of that authority which commences with the proposition that such applications should be treated cautiously, and will of themselves necessarily involve exceptional or unusual circumstances. The power is, as was said, to be exercised sparingly.

The delay of eight years with offences of this kind is, unfortunately, common. Information relating to paedophilic offences cannot be expected to be forthcoming. Often it is the repetition of such offences which lead to their detection. No fixed time limits for the institution of alleged paedophilic offences can be imported into the Act. No limitation period is there set out. As with every other serious criminal offence, and except in the circumstances where injustice will ensue, the horizon of the law is not limited. The long arm of the law cannot be amputated by the passing of time.

It is correct to say the nature of the offence must be taken into account as well as the reasons for the delay. For these reasons I concur with Ormiston J in *Boehm v DPP* [1990] VicRp 42; [1990] VR 475. In that case so-called "white collar" offences were involved. A consideration there to be taken account is the fact that documentary material is routinely shredded after a few years. The sheer incompetence of prosecuting authorities in bringing the matter on for trial may be relevant. See *R v Gyoerffy* [1989] VicSC 57, unreported, delivered 27th February 1989. None of these considerations are here present, for the factual reasons I have already stated.

The judiciary's function is limited to protecting its own processes by staying proceedings, if the court's own obligation to deliver justice would be hopelessly compromised. This principle also accords with common sense. If the decision to prosecute were at the option of an alleged victim, then that person could become the subject of undue pressure, intimidation or threat, in order to thwart justice. In my view, it affronts the law, to stay proceedings on the basis that the parents of an alleged victim initially decided to do nothing.

There is no principle of law which suggests that an adult or a person approaching adulthood must, perforce give unreliable evidence about an incident in childhood. In this case, the youths gave evidence of an event not of early, but of mid-childhood. It is notorious that memory of childhood events may become distorted with the passing of time. It is equally as notorious that some events can be recalled with clarity. It is the adjudicative process which a magistrate must bring to that evidence. It was not an abuse of the court's process for him to hear it, which he did. It would not have abused the court's process for him to have continued so as to reach a decision. Accordingly, there were no grounds for him to exercise his discretion on this basis.

How an alleged offence is detected by the police is not a relevant matter in granting a stay unless it taints the prosecution so that it becomes so unfair to an accused person it would abuse the court's processes to proceed. No such chain of events can be discerned from the evidence in this case. It is not for a magistrate to decide, as a matter of social policy or upon some basis of compassion for either the alleged victims or offender that a matter be interred. A magistrate's responsibility is to despatch on the evidence the Information to a point of decision. Having arrived at a conclusion beyond reasonable doubt, different and separate issues arise as to the consequences of that decision. Adjournments, bonds, community based orders, a whole panoply of alternatives are provided. It is at that juncture a magistrate may bring into play views of social policy or compassion."

Per Nathan J in *Edebone v Allen* [1991] VicRp 100; [1991] 2 VR 659; MC 24/1991, 11 February 1991.

(g) Delay in laying charge

Per Southwell J:

"Mr Uren was not able to refer to any case where an information issued within a statutory time limit had been held to have constituted an abuse of process in that there had been inordinate delay before the issue of the information. On the question of inordinate delay I accept as correct Mr Berkeley's response that firstly, the material before the Court tends to demonstrate that the question whether the delay in issuing the information was inordinate or inexcusable was never in issue in the Magistrates' Court; and secondly, there was no evidence upon which the Magistrate could have held that the delay was inordinate. Upon my reading for the reasons given by the Magistrate, he did not find that there was an abuse of process by reason of inordinate or inexcusable delay; as I understand the reasons as set out in the material before this Court, the Magistrate found abuse to exist in that the information was issued too late to enable the respondent to avail itself of a s43 defence.

> ... Parliament should not be held to have intended that a person who might have committed an offence of some seriousness in relation to dangerous goods should escape trial when the information is laid within the time prescribed by statute, merely by reason of the fact that another party escapes trial. If a defendant has a good defence, he will be acquitted; if not, the intention of Parliament, and a purpose of the criminal law, coincide, that is, that he who is guilty should suffer such penalty as the Court regards as appropriate. It should be remembered that it is not suggested that the respondent will suffer any prejudice in the conduct of the trial, so long as a s43 defence remains open."

Southwell J in *Evans v United Transport Services Pty Ltd* [1991] VicSC 428; MC 34/1991, 28 August 1991.

5. When Application for a permanent stay of proceedings should be made

(a) Whether such application should be dealt with before Prosecution evidence given

Per Nathan J:

> "The usual course to be adopted with applications to permanently stay proceedings is for them to be heard prior to the calling of prosecution evidence. In most cases the merits of the application will be based upon facts anterior to, and independent of, the evidence supporting the Crown case. The nature of such applications is essentially preliminary. That is, the proceedings be stayed because to go further would amount to an abuse of the court's processes. However, I cannot find common law authority for a proposition that an application for a permanent stay must be made prior to the Crown case commencing, nor can I find authority for the contrary proposition. Insofar as authorities have considered the issue, it has been assumed that applications of this kind are made and disposed of as a preliminary step. See *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307 and all the cases therein referred to, and also *Longman v R* [1989] HCA 60; (1989) 168 CLR 79; 89 ALR 161; 43 A Crim R 463; 64 ALJR 73.
>
> ... Despite the general rule of practice that applications for permanent stays be made prior to the Crown case commencing, there may be exceptional circumstances where the process of the trial reveals that it would abuse the court's processes if the matter were to continue. There is no rule of the common law which dictates that applications of this kind must be made at a particular time or prior to the Crown producing evidence. It follows that the appeal on this ground must be dismissed."

Per Nathan J in *Edebone v Allen* [1991] VicRp 100; [1991] 2 VR 659; MC 24/1991, 11 February 1991.

(b) Per Kellam J:

> "34. In my view, there is no rule requiring an application for a permanent stay of criminal proceedings to take place prior to the commencement of the Crown case. No doubt that is the usual course, for the reasons stated by Nathan J in *Edebone*. However, it appears to me that the application can be made at any time when it becomes apparent that there exist circumstances that may justify such an application. That said, however, it is clear that there must be established a sound evidentiary basis for the application".

Per Kellam J in *Champion v Richardson & Anor* [2003] VSC 482; (2003) 40 MVR 529; MC 31/2003, 12 December 2003.

6. Committal proceedings

(a) A magistrate has a duty to hear committal proceedings which are before the court. The power of a magistrate to decline to proceed is limited to cases where an abuse of process might occur.

Per Harper J:

> "Committal proceedings are essentially executive rather than judicial in nature: See *Ex parte Cousens, Re Blacket & Anor* [1946] NSWStRp 36; (1946) 47 SR (NSW) 145 at 146; 63 WN (NSW) 228. The authority of this case, long recognised as one of the starting points for any discussion for the juridical foundation for committal proceedings, has in recent times been reduced: (See, for example, *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1; 21 ALR 505; 53 ALJR 11; 37 ALT 122; *Wentworth v Rogers* [1984] 2 NSWLR 422; (1984) 15 A Crim R). But the proposition that committal proceedings are not judicial as much as executive or ministerial does, I think, remain good. It is certainly true that no plea of *autrefois acquit* can arise out of discharge at the committal stage, because whatever other function it may perform, the committal process does not result in either a conviction or an acquittal. For like reasons, and because in any event the doctrine has no place in English criminal law, questions of issue estoppel cannot rise out of the committal process: (*R v Humphrys* [1977] AC 1; [1976] 2 All ER 497; (1976) 63 Cr App R 95; [1976] 2 WLR 857).
>
> Subject to the Supreme Court's inherent jurisdiction to prevent an abuse of process, and subject, also, to the probability that Magistrates sitting to hear committals have the like power, the authorities may invoke the committal process even after the accused has been discharged by another Magistrate on the same charges: (*R v Manchester City Stipendiary Magistrate, ex parte Snelson* (1977) 66 Cr App R 44 at 46; [1978] 2 All ER 62).

In an English case, *R v Telford Justices, Ex parte Badhan* [1991] 2 QB 78; [1991] 2 All ER 854; (1991) 93 Cr App R 171; [1991] 2 WLR 866, the Divisional Court examined with some care the question whether committing justices have power to refuse to proceed on the ground that otherwise an abuse of process might occur. At Cr App R p178 of that report, Mann LJ said this:

> "We [speaking for his colleagues] for our part can see no reason why examining justices should not be able to decide that an initiation of the process of committal is an abuse of that process. The question of abuse is one which is within the ability of justices to decide and it is one that they admittedly have power to determine on summary trial. If complaint is made of their decision, then the complainant can come to this Court and seek judicial review. Mr Collins suggested that abuse of process should be left to the supervisory jurisdiction of this Court and to the power of the Crown Court to decide a plea in bar, and against whose decision a defendant can appeal to the Court of Appeal, Criminal Division. We disagree. We think that a plea of abuse should be open to the accused subject at the earliest opportunity. Our conclusion upon the argument which we have heard is that justices sitting to enquire into an offence as examining justices do have, as part of their inherent jurisdiction, the power to refuse to undertake the inquiry on the ground that it would be an abuse of process to do so. It is desirable that justices should have the power and previous observations in and decisions of this Court are not inconsistent with the decision in *Atkinson v United States of America Government* [1971] AC 197. We emphasise that the power which the justices have is one to prevent an abuse of process. They have no power to refuse to embark on an inquiry because they think that a prosecution should not have been brought because it is, for example, mean-minded, petty or animated by personal hostility. It is for this reason that the powers of the justices are said to be very strictly confined."

The power to decline to proceed is therefore a very limited one. In my opinion, it did not raise here. In this case, there can be no question of abuse of process. ... In an illuminating passage from *R v Humphrys* [1977] AC 1; [1976] 2 All ER 497; (1976) 63 Cr App R 95; [1976] 2 WLR 857 at AC p46, Lord Salmon says this:

> "I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not, and should not appear to have, any responsibility for the institution of prosecutions, nor has he any power to refuse to allow a prosecution to proceed merely because he considers that as a matter of policy it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is in my view of great constitutional importance and should be jealously preserved. For a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly, from any point of view, an effective substitute for the exercise by the Court of the power to which I have referred. I express no concluded view as to whether courts of inferior jurisdiction possess similar powers, but if they do and exercise them mistakenly, their error can be corrected by mandamus."

There was no proper basis in my view for either Magistrate to make the orders which were made. The committal proceedings have never been dealt with on their merits. There is a clear duty in magistrates to hear committal proceedings which are properly before them."

Per Harper J in *Leary v Hassell & Anor* [1993] VicSC 25; MC 09/1993, 29 January 1993.

(b) Whether continuation of committal proceedings an abuse of process

1. Abuse of process is the doctrine which describes the inherent power of a court to prevent abuse of its judicial processes. Axiomatically, central to that doctrine is the concept of the court protecting its own judicial processes. The doctrine of abuse of process does not extend to providing relief in non-judicial or ministerial functions of a court or of an inferior court or tribunal.

2. Committal proceedings before a magistrate are not judicial by nature but are conducted in the exercise of an executive or ministerial function. The role of the magistrate in holding a committal is essentially inquisitorial and administrative. Accordingly, a magistrate's order committing for trial or refusing to commit is not amenable to the doctrine of abuse of process.

Grassby v R [1989] HCA 45; (1989) 168 CLR 1; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183, and

Potter v Tural; Campbell v Bah [2000] VSCA 227; (2000) 2 VR 612; (2000) 121 A Crim R 318, applied.

3. In determining whether there has been an abuse of process, a balance must be undertaken between the character of the conduct complained of by the accused on the one hand, and the public interest that accused persons, charged with serious criminal offences, be duly tried for

those offences. A court invested with jurisdiction to try a serious criminal offence should not lightly refuse to exercise that jurisdiction. For, to do so, other than on the grounds of an overriding public interest to the contrary, would be an affront to justice and would undermine public confidence in the administration of justice.

4. In the present case there was no suggestion of unlawful conduct by or on behalf of the Australian authorities in securing the accused's extradition to Australia. On the contrary, the Australian authorities complied with the relevant provisions of the *Extradition Act*, the regulations under the Act and the treaty between Australia and the Hellenic republic. Given the seriousness of the charges for which the accused was extradited, it could not be rationally maintained that the prosecution of the accused for the offences for which he was extradited constituted an abuse of process.

Per Kaye J:

"1. The plaintiff, by originating motion, claims declarations against the first named defendant, the Director of Public Prosecutions (Victoria), and the second defendant, the Director of Public Prosecutions (Commonwealth), that it is an abuse of process to continue to prosecute charges which they have laid against him. The plaintiff further seeks injunctions to restrain the first and second defendants from prosecuting the charges, and an order in the nature of prohibition preventing the third named defendant, the Melbourne Magistrates' Court, from dealing with those charges. The claims by the plaintiff are based on the proposition that he should not have been extradited from Greece to Australia to face those charges, until an application by him to the European Court of Human Rights, relating to his proposed extradition to Australia, had been heard and determined.

22. It is convenient for me to state, first, my conclusions on the issues raised by the plaintiff's claim, and then to set out my reasons for those conclusions. In summary, I have reached the following two conclusions. On the basis of either, or both, of those conclusions, the plaintiff's application for relief must fail. Those conclusions are:

(1) Apart from the three trafficking charges on which the plaintiff has been committed for trial, and in respect of which a presentment has been filed in this Court, no judicial process has been engaged by the prosecution, which might be the subject of an application by the plaintiff based on the doctrine of abuse of process.

(2) Further, and in any event, in the circumstances established by the plaintiff before me, even if judicial process has been thus far engaged, no abuse of process has been established by the plaintiff.

Essentially, the doctrine of abuse of process describes the inherent (or in some cases implied) power of a court or tribunal to protect its own judicial processes from abuse. Ordinarily, the doctrine is invoked before the court whose processes, it is alleged, are the subject of the relevant apprehended abuse. However, and in any event, it is the judicial process which is the subject of the doctrine of abuse of process. In invoking its power to prevent such an abuse, the court is thereby preventing an abuse of its judicial processes, or, where it is acting on review, the judicial processes of an inferior court or tribunal. Thus, the doctrine of abuse of process does not extend to providing relief in relation to non-judicial, ministerial, functions of a court or of an inferior court or tribunal. It is now well established that committal proceedings constitute the exercise by a magistrate of a ministerial, and not judicial, process. Thus, it necessarily follows that the doctrine of abuse of process does not apply, and may not be invoked, where a magistrates' court is exercising its powers to conduct a committal proceeding.

26. Furthermore, a second, associated, principle is brought into application by the plaintiff's claim in this case. It is well established that the courts do not purport to supervise the exercise of the prosecutorial discretion, save and except where, as a consequence, there is an abuse of the court's process, or of the process of a court or tribunal in respect of which the court is exercising relevant supervision. That doctrine reflects the important distinction between, on the one hand, the judicial functions of the court, and, on the other hand, the independent functions of the prosecuting authorities.

36. ... In short, apart from the three trafficking charges, there is no court process which is capable of being the subject of an abuse. It is not for this Court to interfere with the exercise of the prosecutorial discretion in charging the plaintiff, and bringing him before the Magistrates' Court for the purpose of the ministerial function of that Court of conducting committal proceedings in respect of those charges.

38. ... It is well recognised that the classes of case in which an abuse might be found are not fixed.

Jago v District Court of New South Wales [1989] HCA 46; (1989) 168 CLR 23, 74; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307 (Gaudron J); *Hunter v Chief Constable of the West Midlands Police* [1981] UKHL 13; [1982] AC 529, 536; [1981] 3 All ER 727; [1981] 3 WLR 906 (Lord Diplock); *Rogers v R* [1994] HCA 42; (1994) 181 CLR 251, 255; (1994) 123 ALR 417; (1994) 68 ALJR 688; 74 A Crim R 462 (Mason CJ). In *Rogers v R* [1994] HCA 42; (1994) 181 CLR 251, 286; (1994) 123 ALR 417; (1994) 68 ALJR 688; 74 A Crim R 462, McHugh J nonetheless was able to identify three broad categories in which abuses of process may be found. His Honour stated:

> "Inherent in every court of justice is the power to prevent its procedures being abused. 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."

54. In determining whether there has been an abuse of process, a balance must be undertaken between the character of the conduct complained of by the accused on the one hand, and the public interest that accused persons, charged with serious criminal offences, be duly tried for those offences. *R v Latif* [1996] UKHL 16; [1996] 1 All ER 353; [1996] 1 WLR 104, 112 to 13 (Lord Steyn); *Walton v Gardiner* [1993] HCA 77; (1993) 177 CLR 378, 396; (1993) 112 ALR 289; (1993) 67 ALJR 485; (1993) 112 A Crim R 289 (Mason CJ, Deane and Dawson JJ); *Barton v R* [1980] HCA 48; (1980) 147 CLR 75, 96; (1980) 32 ALR 449; 55 ALJR 31; *Barac v DPP* [2007] QCA 112, [35] (Keane JA); *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23, 30; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307 (Mason CJ). A court invested with jurisdiction to try a serious criminal offence should not lightly refuse to exercise that jurisdiction. For, to do so, other than on the grounds of an overriding public interest to the contrary, would be an affront to justice and would undermine public confidence in the administration of justice.

Thus, it has been repeatedly emphasised that, in order that conduct constitute an abuse of the process, justifying a court in refusing to exercise its lawful jurisdiction, the conduct complained of must not simply be "venial": *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1993] UKHL 10; [1994] 1 AC 42, 77; [1993] 3 All ER 138; [1993] 3 WLR 90; (1993) 98 Cr App R 114 (Lord Lowry); *R v Raby* [2003] VSC 213, [34]; *Bou-Simon v Attorney-General* (2000) 96 FLR 325, [34]. The conduct complained of must be "extraordinarily reprehensible, heinous in the extreme" *Jarrett v Seymour* (1993) 46 FCR 521; (1993) 119 ALR 10, 36 [Foster J), so that it would constitute an "affront to justice" for the prosecution to proceed. *Jarrett v Seymour* (on appeal) (1993) 46 FCR 557; (1993) 119 ALR 46, 54; (1993) 71 A Crim R 245; *Bou-Simon v Attorney-General* (above), [32]. In *R v Latif* UKHL 16; [1996] 1 All ER 353; [1996] 1 WLR 104, 113, Lord Steyn, referring to the balancing exercise, held that the trial judge, in that case, had not erred in refusing to stay proceedings, because the conduct of the relevant officer, which was sought to be impugned, was "not so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed".

55. In my view, in determining whether the conduct of the Australian authorities is such as to constitute an abuse of process, the answer is clear cut. It is true, as asserted by Mr Priest, that the extradition of the plaintiff to Australia might have rendered nugatory any victory he might subsequently have in the European Court of Human Rights. However, the countervailing considerations are, in my view, of significant magnitude, and far outweigh that consideration. In particular, the countervailing considerations are of such gravity that, in my view, the prosecution of the accused for the charges on which he was extradited could not, on any rational view, be considered to be an abuse of process.

63. The seriousness of the offences for which the accused was extradited only serves to reinforce the conclusion to which I have otherwise come, namely, that on any view of the facts, it could not be rationally maintained that the prosecution of the accused for the offences for which he was extradited constitutes an abuse of the process. Accordingly, for the reasons which I have already set out, I reject the submission on behalf of the plaintiff that the circumstances of this case, and of the plaintiff's extradition to Australia, are such as to warrant the conclusion that the prosecution in Victorian courts of the plaintiff in respect of the charges for which he was extradited would constitute an abuse of process."

Per Kaye J in *Mokbel v DPP (Vic) & Ors* [2008] VSC 433; MC 49/2008, 28 October 2008.

(c) Committal proceedings – subsequent application by person to call witnesses – whether an abuse of process

HELD: Application rejected.

The guiding test for the appropriateness of fresh applications seeking the same thing as had

previously been rejected is whether the subsequent application amounts to an abuse of process. It is in that context that decision makers look to such matters as proof of fraud in the earlier decision or to the existence of fresh evidence that might require a different outcome from that previously reached. A party may have an entitlement to make an application more than once, but to exercise that right may be an abuse of the Court's process where the outcome can be expected to be the same. To justify the making of the same application again (that is, to justify a Court invoking the same process a second time) there must be something in the second application that may be thought to bear rationally and probatively upon the outcome that could make a difference. Whether a separate application may otherwise be bound to fail might be thought, analytically and as a matter of logic, to be an insufficient explanation for not embarking upon an enquiry which, as the reason would suggest, would, once embarked, be rejected.

Guss v Magistrates' Court of Victoria [1998] 2 VR 113; MC 22/1997, applied.

Per Pagone J:

"8. In this case the learned magistrate described the question for her to consider in these terms:

> The relevant question here is whether there is sufficient new material to justify a further application under s56A, otherwise the Court is effectively being asked to rehear the original application or review its earlier decision.

I do not think this to be a misstatement of the relevant test or principle by reference to which the new applications of the earlier rejected applications were to be considered. The use of the word "sufficient" is not to be understood as requiring any unauthorised threshold not found in the legislation but, rather, as no more than a reference to something else not previously before the Court that would bear upon the jurisdiction such as to warrant a new application on what had previously been decided. There may be "new material" filed in Court which on no view could bear upon the issue which the decision maker was called upon to determine once the jurisdiction was embarked upon. A new application made on the basis of something which was not previously available to the Court but which does not bear upon the outcome sought to be achieved would not be justified. It is in that sense that the learned magistrate must be understood as using the word "sufficient" preceding the words "new material". It was no more than a correct, convenient and shorthand way of expressing the same idea as that in *Guss* [1998] 2 VR 113; MC 22/1997, namely, that for a second application to be brought there needed to be fresh "evidence, in the sense used in relation to admission of evidence in appeals". That is, that the new material relied upon will bear upon the outcome sought in a way that is probative, relevant and admissible to the jurisdiction sought to be invoked. The new material needed to justify a second application must be "sufficient" in that sense, and I do not consider that the learned magistrate erred in law in her statement of the test to be applied.

11. It is the applicant for an order under s56A of the *Magistrates' Court Act* 1989 who bears the burden of satisfying the Court that it is in the interest of justice to make the order sought. It is also the applicant for a fresh application under s56A who bears the burden of establishing that there is something which justifies the jurisdiction previously exercised being reengaged. To discharge that burden the applicant will need to focus with care upon what material is new in the specific sense that it bears upon the justification for a reconsideration of something previously decided. The learned magistrate was not satisfied on the "new" material placed before her that it justified a different outcome after she examined it and heard submissions. There were no submissions to the learned magistrate about how any particular part of the "new" evidence bore in any probative, relevant or admissible way upon the specific applications made under s56A.

12. ... The "new" material neither established why an order under s56A should be made nor (assuming that there may be any practical difference in this case) did it establish that the application previously decided should be reconsidered. The learned magistrate's observations about the material containing inadmissible hearsay statements and the statements containing little relevant inadmissible material are, in my view, accurate descriptions of much of the material as filed. The learned magistrate was not ruling inadmissible or irrelevant any part of the material for the purposes of the application before her but, rather, was describing the material which had been provided to her. What was wholly lacking before her, and in the proceeding before me, was any successful discharge of the burden upon the applicant to show how any part of the material bore upon the statutory task required by s56A to be undertaken. The material may have been directed to show that the prosecutions had foundation, but the material (however described) was not shown to bear upon whether the jurisdiction previously exercised adversely to Mr Murdaca should be reinvoked. Accordingly, I reject the application."

Per Pagone J in *Murdaca v Magistrates' Court of Victoria* [2009] VSC 270; MC 18/2009, 29 June 2009.

7. Theft of Motor vehicle – vehicle returned to original owner

Given the evidence as to the ownership of the vehicle, it was fair and reasonable for the police to return the vehicle to its rightful owner. The defendant was not deprived of all chance of challenging the identity of the vehicle. Accordingly, the magistrate acted within constraints of fairness and propriety by rejecting the abuse of process argument.

Per Nathan J:

> "Abuses of process have their nascence in the court's obligation to deliver fairness to the parties before it and should a process be unfair, or untoward in any way, it is then said that to pursue it, or to persist in such a course, results in causing the court to abuse its powers. See *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307, a case referred to by Gallop J in *R v Reeves* (1994) 122 ACTR 1; (1994) 121 FLR 393.
>
> In the latter case the trial judge found there had been an abuse of process, when documentation essential to the defendant to establish alternative defences, had been destroyed whilst in the custody of the prosecuting authorities. The head-note recites the principle, which is thus:
>
> > "As a result of the destruction of the documents it was not possible for Reeves to receive a fair trial. That destruction created a fundamental defect which went to the root of the trial and there was nothing that a trial judge could do in the conduct of the trial that could relieve against its unfair consequences."
>
> The principles are clear and there is no need for me to list them further. In this case I am well satisfied the Magistrate was acting within the constraints of fairness and propriety by not acceding to the application to dismiss the process as an abuse. The return of the car by the police to the person they considered its rightful owner was a matter which was fair and reasonable in the circumstances. Given the material then in the hands of the police, namely that the imprinted number on the chassis, was that of a vehicle owned by Mr Ottone, one wonders what else they should have done. To deprive a man of the possession and use of his own car because it is said the defendant wants to look at the chassis number in order to ascertain whether it was Mr Ottone's car or somebody else's, is to require an extension of courtesy and facility beyond that which is reasonable in the circumstances.
>
> It was put to me that by returning the vehicle to its true owner caused the police to rely upon the notations of an investigating police officer and his evidence as to what was in fact the engraved number on the chassis. That being so, the position is to the detriment of the prosecution and to the benefit of the defendant, because it exposes the prosecution to the possibility of having its evidence disbelieved or not accepted. In fact, in this case there was a thorough-going attack upon the credit of the policeman which came to nothing. The Magistrate was quite entitled to accept the notation of the chassis number by the investigating police member and his evidence of what he visually saw. To suggest that that evidence deprived the defendant of all chance of challenging the identity of the vehicle is, in my view, misplaced.
>
> The second point raised is the manner in which the Magistrate despatched the abuse of process argument. In this case he heard the evidence from the prosecution as an omnibus and whilst delivering his reasons for judgment despatched an essentially interlocutory application. It was said that this was unfair. In my view it was not. This matter was not a trial process before a jury but before a Magistrate. He chose to assess the efficacy of the abuse of process argument by hearing the evidence as a whole. I can see, as a practical matter, it was necessary to do so. In order to dispatch the abuse argument it was necessary for him to canvass the context in which it was raised, this resulted in the entire evidence for the prosecution being before the Magistrate at the one time and place.
>
> He was accordingly entitled, in my view, to proceed to dispatch the threshold and substantive arguments at the one time and place. Courts are frequently enjoined to dispose of litigious issues expeditiously and contemporaneously. The Magistrate did nothing else. It was then put that the Magistrate erred in taking account of some limited admissions in the record of interview as establishing a consciousness of guilt. In my view the Magistrate was not deflected from the essential tasks before him and nor did he exercise any discretion improperly."

Per Nathan J in *Burnett v Galtieri* [1996] VicSC 109; MC 28/1996, 25 March 1996.

8. Intervention Order refused because one party had not paid costs awarded in prior proceedings

The magistrate struck out H's complaints without any consideration of their merits upon the footing that H. (and her children) should be denied a hearing unless H. met the order for costs made in another matter not involving the identical parties. It was an irrelevant consideration

for the magistrate to focus upon H's failure to pay costs in the other matter. Accordingly, the magistrate's exercise of discretion miscarried.

Per Ashley J:

> "27. According to grounds 1 and 3 of each of the originating motions the learned Magistrate "erred in law" by striking out the plaintiff's complaints because the plaintiff had not paid the costs which she had been ordered to pay by the County Court; and by holding that her complaints were an abuse of process because she had not complied with the costs order.
>
> 38. Again, the basis for the defendants' application, as articulated by counsel at the outset in the Magistrates' Court, was that the plaintiff's complaints constituted an abuse of process. The circumstances in which a proceeding may be permanently stayed or dismissed as an abuse of process are said not to be closed; but there is a substantial jurisprudence about the matter. See Williams, *Civil Procedure Victoria* paragraph 23.01.47. It may be supposed that the defendants sought to contend, in substance, that the plaintiff's complaints were brought for an improper purpose – simply to harass them in circumstances where they had successfully brought proceedings against the plaintiff and her husband; and that the improper purpose was discernible from evidently unreliable particularisation of the plaintiff's complaints in one respect, against the background of her past convictions for dishonesty and the large unpaid costs order. I doubt that the application, so considered, should have succeeded; but in any event it is clear that it was not considered by the learned Magistrate in that way."

Per Ashley J in *Hickman v Smith & Anor* [2003] VSC 126; MC 14/2003, 7 May 2003.

9. Drink/driving

(a) Whether laying charges under s49(1)(b) and 49(1)(f) of the *Road Safety Act* 1986 amounts to an abuse of process

Per Mason CJ and Toohey:

> "There is nothing express in the *Road Safety Act* 1986 which would require that the appellant be prosecuted under para (b) of s49(1) rather than para (f). In accordance with s51(1) of the *Interpretation of Legislation Act*, therefore, the appellant was liable to be prosecuted under either of these provisions. In the present case there can be no basis for alleging abuse of process because a decision was made to prosecute the appellant under para (f) of s49(1) rather than para (b). The appeal should be dismissed with costs."

Per Brennan J:

> "I agree with the construction placed upon s49(1)(f) of the *Road Safety Act* 1986 (Vic) by Mason CJ and Toohey J. As the facts alleged against the appellant would, if proved, establish a *prima facie* case of an offence under s49(1)(f), and there is nothing to suggest that the charge was preferred for any purpose other than the application of s49(1)(f) to the facts of the case, there is no abuse of process in prosecuting the appellant on that charge.
>
> I refer without repeating to what I said on abuse of criminal process in *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307. For these reasons I agree with the joint judgment of Mason CJ and Toohey J that the appeal should be dismissed."

Per the High Court (Mason CJ, Toohey and Brennan JJ) in *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257; noted 14 Crim LJ 375, 27 February 1990.

(b) Whether alleging offences against s49(1)(b) and (f) amounts to an abuse of process

The Victorian practice of alleging both offences under s49(1)(b) and (f) of the Act and trying them together, in itself, does not amount to an abuse of process. Further, the prosecutor by offering to withdraw the charge under s49(1)(b) or to have it struck out or dismissed was not engaging in an abuse of process.

Per Cavanough J:

> "6. It is well established that a s49(1)(b) offence and a s49(1)(f) offence are different in nature and that a driver may be charged with either or both offences: *Neill v County Court of Victoria* [2003] VSC 328, (2003) 40 MVR 265 (Redlich J). It has been the practice in Victoria to allege both offences and to try them together but in the event of a finding of guilt to seek a penalty on one offence only even though they are discretely different offences involving proof of different ingredients. There is nothing inappropriate in principle in the laying of charges and the undertaking of a prosecution in respect of both offences: they contain different elements, notwithstanding that they may be based on the same facts.

> 15. Contrary to Mr Billings' submissions, the prosecutor, by offering to withdraw the charge under s49(1)(b) or to have it struck out or dismissed, was not engaging in an abuse of process. It may be that the prosecution can obtain a forensic advantage by bringing charges under both s49(1)(b) and s49(1)(f), as Mr Billings submitted. In some cases, at least, the bringing of both charges may, as a matter of forensic reality, compel the accused to adduce evidence, such as evidence of the amount of his or her drinking and expert evidence as to the effect on persons generally of such drinking. See *Campbell v Renton* [1988] VicSC 414, unreported, Marks J, 18 August 1988; *DPP v Hore* [2004] VSCA 192; (2004) 10 VR 179 at 184 [19], 193 [58]-[59], 195 [66]; (2004) 42 MVR 520. That may be thought necessary because of the reverse onus of proof under s49(4) in respect of charges under s49(1)(f). On the other hand, evidence of that kind might be thought necessary in any event because of the special evidentiary provisions of the Act concerning breath analysing instruments and certificates of analysis. (See ss48(1)(a), 48(1A), 49(6), 55(14) and 58 of the Act.) As it happens, in the present case Mr Johnstone gave evidence that he drank 8 pots of beer – perhaps one more or one less – in the period of 5 hours or so before he was intercepted. Further, he had available evidence from an expert, Mr Graham Young, tending to show that at the time of driving his breath (and blood) alcohol concentration would have been approximately 0.067% and that at the time of the test it would have been approximately 0.091%. (That evidence happened to be exactly consistent with the *preliminary* breath test result. As to the admissibility of the result of a preliminary breath test, see *R v Ciantar* [2006] VSCA 263; (2006) 16 VR 28 at 30-31 [9]-[10]; (2006) 167 A Crim R 504; (2006) 46 MVR 461.) Of course, this evidence was designed to help him with respect to the charge under s49(1)(b), not the charge under s49(1)(f).
>
> However, it is possible, I suppose, that in some other case evidence of this general kind adduced by a defendant in order to demonstrate that the breath analysing instrument was not "in proper working order" or was not "properly operated" (within the meaning of s49(4), for the purposes of s49(1)(f)) might be latched onto by the prosecution to assist it to prove the charge under s49(1)(b), whereas otherwise the onus of proof would be on the prosecution to prove its case under s49(1)(b) beyond reasonable doubt (albeit still with the help of the special evidentiary provisions). However that may be, *Neill* confirms that the Victorian practice of alleging both offences and trying them together, in itself, does not amount to an abuse of process. It seems to me that, in a case like the present, the accused's only resort is to the doctrine of double punishment. If in the circumstances that doctrine does not assist the accused to keep his or her licence, he or she cannot be heard to complain. The accused is not entitled to some other *quid pro quo* for the forensic advantage which the statute may effectively give to the prosecution. In any event, the accused is not entitled to any *quid pro quo* that would be inconsistent with the provisions of the Act."

Per Cavanough J in *Johnstone v Matheson* [2008] VSC 567; (2008) 21 VR 570; (2008) 52 MVR 1; MC 59/2008, 18 December 2008.

(c) Drink/driving – Charges laid under s49(1)(b) and (f) of *Road Safety Act* 1986

Two offences of a quite different nature are created by s49(1)(b) and (f) of the Act. It is not necessary that there be an accident before para (f) is applicable. There is nothing in the Act which would require that the person be prosecuted under para (b) rather than para (f). Accordingly, there is no basis for alleging abuse of process because a decision was made to prosecute T. under para (f) rather than para (b).

Mills v Meeking [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257, followed.

Per Charles JA (with Winneke P and Charles JA agreeing):

> "In the High Court, Mason CJ and Toohey J, with whom Brennan J agreed, held that it was not necessary that there be an accident before par.(f) was applicable. The provision was said to be clear and unambiguous. The operation of par.(f) could be very harsh in "the case of a sober person who is involved in a collision on the way home and in which no one is injured and then returns home and has his or her first drinks for the day and is then tested" ([1989] VicRp 65; [1989] VR 740 at p743; (1989) 9 MVR 1). But their Honours said there was no justification for reading the section in the manner contended for by Crockett J (see 169 CLR 214 at p222); and furthermore, there was no basis in this case for alleging abuse of process because a decision was made to prosecute the appellant under par.(f) of s49(1) rather than par.(b). As their Honours said at pp226-227,
>
> > "There is nothing in the Act which would require that the appellant be prosecuted under par.(b) of s49(1) rather than par.(f)".
>
> Although s49(1) has since been amended so that a person charged under par.(f) is no longer guilty of an offence if the alcohol shown to be present in his or her blood was not due solely to the consumption of alcohol after driving, and to introduce the s48(1A) defence, the reasoning in *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257; noted 14 Crim LJ 375, in my view, clearly continues to bind this court. I should add

> that no question of the appellant having consumed alcohol after being intercepted while driving arises in this case. The appellant was in the company of police officers from the moment of being intercepted until he was tested and expressly stated before Judge Byrne that he had not consumed alcohol in the relevant period. There is no issue therefore of any s48(1A) defence."

Charles JA (with Winneke P and Hayne JA agreeing) in *Thompson v His Honour Judge Byrne & Ors* [1998] 2 VR 274; (1997) 93 A Crim R 69; MC 33/1997, 15 April 1997.

(d) Standard alcohol solution destroyed

Per Tadgell J (Ormiston and Cummins JJ agreeing):

> "Counsel for the appellant submitted that the preservation of the standard alcohol solution used by the operator of the breath analysing instrument in question was necessary in order that the appellant might have had the opportunity to mount a defence under s49(4). The argument was that, the solution having been destroyed, the chance of a successful defence under s49(4) was destroyed with it. What I have said shows that that argument must be wrong. The defence under s49(4) remained open notwithstanding the destruction of the solution.
>
> In any event, there is no suggestion in the relevant legislation – the Act or the Regulations – that the operator of the breath analysing instrument should preserve the standard alcohol solution that was used or that a person tested is entitled to have the solution preserved so that he might make use of it in order to seek to make out a defence under s49(4). It will be convenient for a moment to postpone further reference to this matter and to consider the question whether the defence under s49(4) was made out, as counsel for the appellant alternatively contended. ...
>
> Counsel for the appellant submitted, in essence, that the appellant had been prejudiced by the destruction of the standard alcohol solution, which destruction benefited only the respondent and it struck directly at the availability of a defence under s49(4). It was said to follow that any hearing at which a standard alcohol solution could not be produced was, of necessity, unfair because the defendant could not rely upon that defence.
>
> The appellant had no necessary legitimate expectation that the standard alcohol solution would be routinely preserved until the hearing on the off-chance that it might be proved on analysis to be irregular. The appellant is not deprived of the opportunity of making out a defence under s49(4) merely because of the destruction of the solution. He was, moreover, entitled to rely on evidence of the destruction of the solution – for what that evidence was worth – in seeking to persuade the Magistrate that the informant had, at the end of the day, not proved his case beyond reasonable doubt.
>
> There may well be cases in which a serious question is raised by evidence as to whether the breath analysing instrument was properly operated. In such a case it might be relevant – I do not say that it would necessarily be relevant – to consider that the standard alcohol solution had been destroyed, if that is what had happened to it. In this case, however, the appellant could not, in my opinion, seek to raise a serious question as to the operation of the instrument with reference to the standard alcohol solution merely by saying that the solution could not be tested by him. The solution was not part of the subject matter of the charge, and the case of *Holmden v Bitar* (1987) 47 SASR 509; (1987) 75 ALR 522; (1987) 27 A Crim R 255, to which we were referred by counsel and on which he relied, is of no help to him for the reasons given by the learned primary judge. ... As it was, the absence of the standard alcohol solution neither proved nor tended to prove anything."

Per Tadgell J in *Barrett v Wearne* [1994] VicSC 15; (1994) 18 MVR 331; MC 14/1994, 1 February 1994.

(e) Drink/driving – blood samples lost and destroyed – whether charge an abuse of process

1. It is a long established principle that Australian courts have jurisdiction to stay proceedings which are an abuse of process. The jurisdiction is said to have the purpose of preventing "an abuse of process or the prosecution of a criminal proceeding ... which will result in a trial which is unfair". However, it is equally well settled that a permanent stay of criminal proceedings should be ordered only in rare and exceptional or extreme circumstances. The court exercising the discretion must engage in a process of balancing the right of an accused person to a fair trial with the legitimate public interest in the disposition of criminal charges, and in the conviction of those who are guilty and the need to maintain public confidence in the administration of justice. In judging fairness, the court must balance the expectation of the community that people charged with offences will be brought before the courts with the requirement that the trial of the charges will be fair. The onus is upon the person seeking the stay. It has been described as "a heavy onus".

2. The Magistrate erred in the exercise of her discretion by placing too much weight on the loss of the blood sample and the contribution it may have made to R's defence was a matter of

conjecture or speculation. The Magistrate determined that there should be a permanent stay of the proceedings on the basis of the concession made by the prosecutor that the sample previously held by police and after analysis had been destroyed. No other evidentiary material, save for the untested affidavit of R. was before the Magistrate. In circumstances where the grant of a stay of proceedings is an exceptional and extreme step, the reliance upon the loss of the blood sample and any contribution it may have made to the defendant's defence was speculative in circumstances where there was no other evidence of any substance before the Magistrate, in particular, as to the taking of the sample, its safe keeping and its analysis.

3. It was premature for the Magistrate to rule that the absence of the blood sample meant that the prosecution of the defendant would be unfair and unjust, in the circumstances of the limited state of the evidence before her and particularly in circumstances where the evidence about the taking of the blood sample, its analysis and certification had not been tested in any way.

4. In an application for a permanent stay of proceedings it is imperative that the issue of the public interest in having cases brought to trial be considered and weighed in the balance as to whether or not a stay should be granted. The discretionary power to grant a permanent stay of criminal proceedings is a power confined by general principle. It is confined by matters which "may be taken into account and by the matters, if any, which must be taken into account in its exercise". One matter which must be taken into account is the balancing exercise which "generally speaking, is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account, is deserving of punishment" against the interest of the accused person in having a fair trial. The magistrate does not appear to have given any consideration to this issue.

Per Kellam J:

"20. The submission of Mr Saunders of Counsel who appears on behalf of the informant is that a permanent stay of proceedings was not justified in the circumstances of this case. It is submitted by him that the fact that the police had destroyed their sample of the blood sample taken from the defendant is not a fundamental defect which goes to the root of the trial. It is submitted that a permanent stay should be granted only in an exceptional case and that the case before the Magistrate was not such a case. In this regard Mr Saunders relies upon *Jago v The District Court of New South Wales & Ors* [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307, where Mason CJ said at p34:

> "To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences: *Barton* [1980] HCA 48; (1980) 147 CLR 75 at 111; (1980) 32 ALR 449; 55 ALJR 31, per Wilson J."

21. Furthermore, Mr Saunders submits that the Magistrate granted the permanent stay of the proceedings without giving any or any adequate consideration to, or exploring what other matters may have been capable of being considered, in order to overcome any prejudice suffered by the defendant by reason of the loss of the blood samples held by the hospital and the police. In this regard he relies upon the following statement of Mason CJ, Dawson, Toohey and McHugh JJ appearing in *Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509 at 519; 107 ALR 635; (1992) 66 ALJR 585; 61 A Crim R 431.

> "If a permanent stay is sought to prevent the accused from being subjected to an unfair trial, it is only natural that the court should refrain from granting a stay unless it is satisfied that an unfair trial will ensue unless the prosecution is stayed. In other words, the court must be satisfied that there are no other means, such as directions to be given by the trial judge, of bringing about a fair trial."

22. In particular, Mr Saunders submits that the question of whether or not the defendant could be accorded a fair trial was entirely speculative at the time that the Magistrate ruled that there should be a permanent stay of the proceeding.

42. Whilst it is true, as Nathan J observed in *Edebone v Allen* [1991] VicRp 100; [1991] 2 VR 659; MC 24/1991 that the usual course to be adopted with applications for permanent stay proceedings is for them to be heard prior to the calling of the prosecution case, that does not mean that the grant of such an application should be made in the absence of appropriate evidence. In the circumstances of this application before the Magistrate, the only evidence of any relevance which was before her was the concession made by the prosecutor that the police had destroyed their sample of blood on

a date shortly prior to the hearing of the matter, and the affidavit of the defendant, much of which contained hearsay in relation to the matters of possession of the sample by the Alfred Hospital, and which affidavit was prepared by the applicant for a purpose entirely different from the application to stay proceedings. The prosecution was given no opportunity to challenge the version of the defendant in relation to issues of delay, and her reasons for not obtaining her sample from the Alfred Hospital soon after she was advised by the Alfred Hospital that the sample was held by them. There was no evidence before the court as to the procedures undertaken by the Alfred Hospital in relation to the taking of the blood sample and the keeping of samples, nor was there any evidence in relation to continuity matters. There was no evidence as to the analysis of the blood sample by the police. There was no evidence as to the circumstances of the destruction of the sample by police. In my view, evidence in relation to these, and other matters was relevant to the application before the Magistrate.

43. In my view, the question of whether a permanent stay should be granted in the balance of the community interest could not be considered until these matters were articulated before the Magistrate. There is, of course, a possibility that after these matters had been considered the Magistrate might have concluded that the failure of the police to keep the sample in question was such that it went to the root of the trial and justified a stay. It is also possible that the Magistrate might well have concluded that the loss of the opportunity to further analyse the sample could be taken into account in favour of the defendant, in ways other than ordering a permanent stay of the proceedings. In this regard, it should be noted that notwithstanding the statutory provisions, that a certificate in the absence of evidence to the contrary is proof of the facts and matters contained in it, that the prosecution nevertheless maintains the burden of establishing the guilt of an accused person beyond reasonable doubt."

Per Kellam J in *Champion v Richardson & Anor* [2003] VSC 482; (2003) 40 MVR 529; MC 31/2003, 12 December 2003.

10. Where particulars of offence provided

Per Gobbo J:

"Once it is found that sufficient particulars had been given, then ordinarily abuse of process would not arise."

Per Gobbo J in *Cooke v Deluise* [1990] VicSC 19; MC 16/1990, 26 January 1990.

11. Where conspiracy charges withdrawn and summary charges issued

(a) Per Gobbo J:

"In substance the case for the applicants was that they could not receive a fair trial of their hearing of the summary charges whilst they were exposed to the risk of conspiracy charges. Mr Weinberg, who put the main argument on behalf of the applicants, put the matter graphically as follows, that there was an abuse of process in that either what the prosecution was seeking to do was to turn the Magistrates' Court into an arm of the investigative procedures of the Royal Commission to seek out evidence of conspiracy or that a conspiracy charge was being left hanging over the heads of the applicants to prevent them from going into the witness box or to prevent them from giving evidence in mitigation. ... The particular matters that were relied upon were that here charges of conspiracy were actually laid though now withdrawn and, secondly, a request for an indemnity has not been granted and that the applicants have been informed that no limited immunity will be given by the Director of Public Prosecutions pursuant to s9 sub-s6 under the *Director of Public Prosecutions Act*.

In the present case these matters are, in my view, not present and the factors relied upon are not of that character. They could readily arise in similar form as a matter of course and they would not require, in my view, an exceptional or an unusual scenario to bring them about. There is a further consideration that tells against the applications. The most helpful *dictum* that was relied upon so far as the application was concerned was the following statement by Lord Devlin in *Connelly v DPP* [1964] AC 1254; [1964] 2 All ER 401; (1964) 48 Cr App R 183; [1964] 2 WLR 1145 at page 1353:

> "In my opinion, if the Crown were to be allowed to prosecute as many times as it wanted to do on the same facts, so long as for each prosecution it could find a different offence in law, there would be a grave danger of abuse and of injustice to defendants. The Crown might, for example, begin with a minor accusation so as to have a trial run and test the strength of the defence. Or, as a way of getting round the impotence of the Court of Criminal Appeal to order a new trial when, as in this case, it quashes a conviction, the Crown might keep a count up its sleeve. Or a private prosecutor might seek to harass a defendant by multiplicity of process in the different courts."

The typical intervention of the court referred to by His Lordship is to prevent the Crown reopening what is in effect the same matter. But that is not this case here; the present prosecution is not a reopening. There has not yet been an opening and the possible reopening would only occur if, after these prosecutions were disposed of, the prosecution were contrary to its statement of intent to resurrect charges of conspiracy. That would be the point to seek recourse to the doctrine of the plea

of abuse of process and in that sense there is, in my view, substantial weight in the argument relied upon by Mr Merkel who appeared for the Director of Public Prosecutions that the time to ascertain oppression is at the time when the second matter comes forward. That is the tenor of the speeches in *Connelly's case* and it, in my view, accords with the way in which oppression and even unfairness is discussed. By analogy with the doctrine of double jeopardy, the applicants here are in effect raising an equivalent plea before they face their first jeopardy."

Per Gobbo J in *R v Magistrates' Court at Melbourne; ex parte Holman & Ors* [1984] VicSC 245; MC 31/1984, 24 May 1984.

(b) Conspiracy charges plus a number of counts charging particular offences
Per The Court:

"The Court does not look with favour on charges of conspiracy realising the disadvantage at which an accused can be placed thereby and although the Court retains the power, in the interests of justice, to quash a conviction which is the result of oppression, it will rarely, if ever, do so except where the charge is brought as an abuse of the process of the Court. It was no doubt considerations such as these which drove Mr Sher to concede that he had to show an abuse of process. Mr Sher did not shrink from attempting to do so, but in our opinion, there is nothing in the present proceedings to suggest that the Crown proceeded in abuse of the Court's process and this argument must therefore fail."

Per Young CJ, Crockett and King JJ in *R v Mills* [1986] VicRp 21; [1986] VR 179; (1985) 17 A Crim R 214; [1985] VicSC 539; MC 54/1985, 23 October 1985.

(c) Defendant pleaded guilty to County Court charges on condition that the adjourned charges in the Magistrates' Court would be withdrawn
Per O'Bryan J:

"If the accused satisfied the court that his legal advisers reached the agreement as alleged, the Crown and/or the informant could not resile from such an agreement and any subsequent hearing of the summary charges would constitute an abuse of process.

Mr Silbert who appeared for the first defendant conceded that the Magistrates' Court has jurisdiction to determine an application to stay a proceeding as an abuse of process. In my opinion, as a matter of convenience and fairness, this issue should have been determined before the court began to hear the charges against the plaintiff. If the plaintiff satisfies the court that his legal advisers reached an agreement with the prosecutor for the Queen that in consideration of him pleading guilty in the County Court to a number of indictable offences, proceedings pending in the Magistrates' Court in respect of 59 summary offences would not be prosecuted, the subsequent hearing of those charges on 3 May 1996 constituted an abuse of process.

The Crown and/or the informant could not resile from such an agreement: Cf. *Williamson v Trainor* [1992] 2 Qd R 572; (1991) 56 A Crim R 102, a decision of the Queensland Court of Criminal Appeal; *R v Swingler* [1996] VicRp 17; [1996] 1 VR 257 at 264-265; (1995) 80 A Crim R 471. In *Swingler* the Court of Appeal said:

'It is by now well accepted that a superior court can, in the exercise of its supervisory jurisdiction, stay a prosecution if it is satisfied that, in the circumstances, it would be oppressive to allow the prosecution to proceed.

'The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the Court which exist to administer justice with fairness and impartiality may be converted to instruments of injustice or unfairness.'

Walton v Gardiner [1993] HCA 77; (1993) 112 ALR 289; (1993) 67 ALJR 485; (1993) 177 CLR 378 at 392-3 per Mason CJ, Deane and Dawson JJ. See also *Moevao v Department of Labour* (1980) 1 NZLR 464 at 481-2 per Richardson J.

This jurisdiction has been exercised in recent years permanently to stay proceedings in a variety of circumstances: for example, to stay a hearing of disciplinary charges alleging conduct where the court had previously granted a permanent stay of other charges alleging the same conduct (*Walton v Gardiner*, above); where the Crown had presented the accused for trial on charges in respect of which he had previously been granted an immunity from prosecution (*R v Georgiadis* [1984] VicRp 82; [1984] VR 1030); where an investigating police officer, with apparent authority, had promised a suspect that he would not be prosecuted because it was believed he would be a Crown witness (*R v Croydon Justices; Ex parte Dean* [1993] QB 769; [1993] 3 All ER 129; (1993) 98 Cr App R 76; [1993] Crim LR 759; [1993] 3 WLR 198) or for other good reason (*R v Tilley* (1992) 109 FLR 155); or even in circumstances where the prosecuting authority had used its power to file an *ex officio* indictment after discharge by committing magistrates: *R v Gagliardi & Fillipidis* (1987) 45 SASR 418; (1987) 26 A Crim R 391.

The circumstances which will lead a court to exercise this jurisdiction have variously been described as "exceptional" or "rare". It is a power which should be used "sparingly and with the utmost caution": *Jago v District Court of NSW* [1989] HCA 46; (1989) 168 CLR 23 at 76; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307 per Gaudron J. It is a jurisdiction which will only be exercised where it is readily apparent that it should be exercised to prevent "prosecutorial oppression". It is a power which

> 'is not concerned with the manner of a person's trial, but is concerned with the question whether that person should be tried at all. There are no set categories of case. Whilst instances of the exercise of the power will be rare, it will certainly be invoked where the evidence indicates that it would be unacceptably oppressive or unfair to an accused or an affront to the public conscience to permit the prosecution to proceed.' *R v Gagliardi & Fillipidis* at 433."

Per O'Bryan J in *Brown v Wynd & Anor* [1996] VicSC 326; MC 29/1996, 24 July 1996.

(d) Driver acquitted of culpable driving charges; summary charges proceeded with

Although evidence of the driving at the hotel, in Melbourne and prior to the collision was given at the trial as relevant to the issue whether the defendant was the driver of the vehicle at the time of the collision, the earlier alleged driving some 8-9 kilometres away from the scene could not be fairly or reasonably seen or accepted as being part of the same "transaction" the subject of the charges on which the defendant was acquitted. To prosecute on the charges before the Magistrates' Court did not deprive the defendant of the full advantage of her acquittal in the County Court. Nor did the prosecution of the charges constitute an abuse of the process of the court, was neither vexatious or oppressive nor gave rise to unfairness to the defendant.

Per McDonald J:

"Barwick CJ in *R v Storey* [1978] HCA 39; (1978) 140 CLR 364; 22 ALR 47; 52 ALJR 737 in his judgment said at CLR p372 when addressing the matter of the admissibility in a subsequent trial of an accused's evidence which had been given in an earlier trial of that person which had resulted in an acquittal:

> "... a verdict of acquittal shall not be challenged in any subsequent trial: the accused in the hearing of a subsequent charge must be given the full benefit of his acquittal on the earlier occasion. Evidence which was admissible to establish the earlier offence is, in my opinion, not inadmissible merely because it was tendered in the earlier proceeding: but it may not be used for the purpose of challenging, or diminishing the benefit to the accused of, the acquittal. Such evidence will be admissible, provided it is relevant to the subsequent charge or to a defence to it but must only be allowed to be used to support the charge or negative a defence. Where evidence which would tend to prove the earlier charge or some element of it is admitted in the subsequent charge, the jury must be duly warned that they must accept the fact of the earlier acquittal and not use the evidence in any wise to reconsider the guilt of the accused of the earlier offence or to question or discount the effect of the acquittal."

In *R v Young* (1996) 90 A Crim R 80, Ormiston, Charles JJA and Vincent AJA in their judgment at p100 expressed the view that the statement of Barwick CJ last cited, "may be thought to have made the most comprehensive statement of the relevant principles" there being addressed. In *Rogers* the majority of the court held that a record of interview the tender of which had been rejected by the judge in an earlier trial on the grounds that it had not been made voluntarily could not be tendered on a subsequent trial of the accused as in the circumstances such course would be an abuse of process. In *Rogers case* [1994] HCA 42; (1994) 181 CLR 251; (1994) 123 ALR 417; (1994) 68 ALJR 688; 74 A Crim R 462 at CLR p255 Mason CJ said –

> "The concept of abuse of process is not confined to cases in which the purpose of the moving party is to achieve some foreign or ulterior object, in that it is not that party's genuine purpose to obtain the relief sought in the second proceedings. The circumstances in which abuse of process may arise are extremely varied and it would be unwise to limit those circumstances to fixed categories. Likewise, it would be a mistake to treat the discussion in judgments of particular circumstances as necessarily confining the concept of abuse of process."

In *Walton v Gardiner* [1993] HCA 77; (1993) 177 CLR 378; (1993) 112 ALR 289; (1993) 67 ALJR 485; (1993) 112 A Crim R 289, Mason CJ, Deane and Dawson JJ at CLR p392-3 said –

> "The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness."

At p393 their Honours further said –

> "... proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings."
>
> ... Although evidence of the plaintiff driving her motor vehicle at the hotel and in Melbourne on 2nd May 1993 and before the happening of the collision was given at her trial in the County Court as relevant to the issue as to whether she was the driver of her motor vehicle immediately before and at the time of the collision, the earlier alleged driving some eight to nine kilometres away from the scene of the collision cannot, in my view, be fairly or reasonably seen or accepted as being part of the same "transaction" the subject of the charges on which the plaintiff was acquitted on her trial before the County Court.
>
> The conclusion I have reached is that to prosecute the plaintiff before the Magistrates' Court on the three charges now sought to be proceeded with does not constitute an abuse of process of the Court. To prosecute the plaintiff on charges 1, 2 and 4 presently pending before the Magistrates' Court at Melbourne does not deprive the plaintiff of the full advantage of her acquittal before the County Court in the proceedings referred to. To prosecute the plaintiff on these three charges subsequent to her acquittal before the County Court is neither vexatious or oppressive, nor gives rise to unfairness to the plaintiff. Further, to proceed with that prosecution does not bring justice into disrepute. The plaintiff is not entitled to any of the relief sought in these proceedings whether by way of a declaratory order, as sought in the terms referred to or to relief of any other nature as sought by the originating motion and summons in these proceedings."

Per McDonald J in *Jones v Tysoe & Anor* [1998] VicSC 97; (1998) 27 MVR 218; (1998) 100 A Crim R 218; MC 17/1998, 13 March 1998.

(e) Indictable charges stayed – whether summary charges an abuse of process

The offences alleged against the defendants are serious. Though they are summary offences, they are not trivial. The delay that has occurred in these proceedings is not ideal. The public interest in charges being brought to trial includes an interest in them being brought expeditiously. Similarly, persons accused of offences have an interest, if not a right to, a speedy trial. In determining the application for a permanent stay of proceedings, the magistrate considered and reasoned all relevant matters sufficiently. Accordingly, there was no error on the face of the record or jurisdictional error present.

Per Warren CJ:

> "15. Counsel for the defendants submitted that the magistrate misunderstood the nature of his jurisdiction by holding that he was not satisfied that the cases of each of the plaintiffs was an 'exceptional case'. It was submitted that the jurisdiction to order a stay is not confined to 'exceptional' cases or limited to categories of abuse but is 'wide and dynamic', citing *Rogers v R* [1994] HCA 42; (1994) 181 CLR 251; (1994) 123 ALR 417; (1994) 68 ALJR 688; 74 A Crim R 462.
>
> 16. Counsel for the informant drew my attention to *Champion v Richardson* [2003] VSC 482; (2003) 40 MVR 529, in which Kellam J said at [38]:
>
> > "a permanent stay of criminal proceedings should be ordered only in rare and exceptional or extreme circumstances."
>
> 17. Counsel submitted that the magistrate had considered and applied well established principles the substance of which was not objected to. For present purposes, whether a situation is 'exceptional circumstances' or an 'exceptional case' avoids the point of the authorities. As set out in the magistrate's reasons, the authorities are clear that a permanent stay of proceedings, particularly criminal proceedings, will occur in 'rare and exceptional or extreme circumstances' [2003] VSC 482; (2003) 40 MVR 529; a discretionary power that is 'exercisable ... only in exceptional cases' *Jago v District Court of NSW* [1989] HCA 46; (1989) 168 CLR 23, 76; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307 and 'sparingly and with utmost caution'. *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* [1987] HCA 27; (1987) 72 ALR 1; (1987) 61 ALJR 393. I consider that the magistrate used the term 'exceptional case' to articulate that which the authorities indicate is appropriate to consider in the exercise of the discretion. There is no force to the argument that by so doing the magistrate narrowed his jurisdiction.
>
> 18. It was open to the learned magistrate to exercise the discretion as to whether the proceedings gave rise to an exceptional case. There is no basis under the principles in *House v R* [1936] HCA 40; (1936) 55 CLR 499; 9 ABC 117; (1936) 10 ALJR 202 and *Australian Coal and Shale Employees' Federation v Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 to set aside the exercise of the discretion.

19. The offences alleged against the plaintiffs are serious. Though they are summary offences, contrary to counsel for the plaintiffs' argument, they are not trivial. The delay that has occurred in these proceedings is not ideal. The public interest in charges being brought to trial includes an interest in them being brought expeditiously. Similarly, persons accused of offences have an interest, if not a right to, a speedy trial. *Jago v District Court of NSW* [1989] HCA 46; (1989) 168 CLR 23, 76; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307.

20. In determining the application for a permanent stay of proceedings, I consider that the magistrate considered and reasoned all relevant matters sufficiently. I am not satisfied that there is error on the face of the record or jurisdictional error present."

Per Warren CJ in *Hadju v Breguet & Anor* [2008] VSC 183; MC 29/2008, 30 May 2008.

(f) Where two charges laid and defendant convicted on one

Per O'Bryan J:

"I turn now to answer the critical question of whether the culpable driving count is the same or substantially the same as the offence created by s49(1)(f) of the *Road Safety Act* 1986. The offence created by s49(1)(f) is clearly not the same or substantially the same as the form of culpable driving charged in the present case. Should a presentment specify driving whilst under the influence of alcohol to the requisite extent as the form of culpable driving a much stronger argument could be mounted that the elements of the offences created by s49(1)(f) and s318(1) are substantially the same. The presentment in the present case did not do so.

Applying the principles to which I earlier referred (*Connelly's case* [1964] AC 1254 at 1305-6; [1964] 2 All ER 401; (1964) 48 Cr App R 183; [1964] 2 WLR 1145) I am clear in my mind that the facts which constitute the s49(1)(f) offence would not have been sufficient to procure a conviction for culpable driving. If the test formulated by Bray CJ in *R v O'Loughlin; ex parte Ralphs* (1971) 1 SASR 219 is applied, the act or omission for which the appellant was punished in the County Court was causing death whilst driving a motor vehicle negligently. The Court accepted as an explanation for the negligence that the appellant was under the influence of alcohol when the collision occurred.

Whilst I appreciate that the appellant feels a sense of injustice on account of the second charge being pursued in the Magistrates' Court I am unable to uphold the special plea of *autrefois convict*. It follows that the respondent was entitled to proceed with the second charge and the hearing of the second charge was not an abuse of process. Each question of law will be answered in the negative. The appeal will be dismissed with costs."

Per O'Bryan J in *Reeves v Penno* [1991] VicSC 301; (1991) 14 MVR 145; MC 46/1991, 28 June 1991.

12. Sub-poenas – Whether sub-poena an abuse of process

(a) In determining whether a summons to produce documents is oppressive and an abuse of process, the fundamental consideration is whether, in all the circumstances including the identity and situation of the recipient of the summons, the class of documents required to be produced is sufficiently clearly identified.

Lucas Industries v Hewitt (1978) 45 FLR 174; (1978) 18 ALR 555, applied.

Per Kaye J:

"In *National Employers' Mutual General Association Ltd v Waind* [1978] NSWLR 372 at 382, Moffitt P said:

> "It is oppressive to place upon a stranger the obligation to form a judgment as to what is relevant to the issue joined in a proceeding, to which he is not a party. Hence it is an abuse of the use of a subpoena to impose this obligation. It follows that it is an abuse to use any subpoena, i.e. even to a party to obtain discovery. This was the reasoning in *Commissioner for Railways v Small* [1938] NSWStRp 29; (1938) 38 SR (NSW) 564 (at p573); 55 WN (NSW) 215. Of course, discovery as such is otherwise available to a party. It follows that a subpoena can only properly be used for the production of documents described in particular or general terms which does not involve the making of such a judgment."

To reject as oppressive or as an abuse of process a subpoena because it directs production of documents by reference to those relating to a specific subject-matter within the recipient's knowledge, suggests an excessive indulgence in legalism. Determination of whether the description of documents by that mode satisfies the required test of specification by reasonable particularity ought to be made by taking into account the facts and circumstances within the knowledge of the party to whom the subpoena is addressed. It ought to be expected of the addressee, being mindful of the facts about the subject-matter known to him, that he will read the subpoena sensibly."

Per Kaye J in *McColl v Lehmann* [1987] VicRp 46; [1987] VR 503; (1986) 24 A Crim R 234; MC 41/1986, 16 October 1986.

(b) Sub-poena must specify with reasonable particularity the documents which are required to be produced

Per O'Bryan J:

> "Before departing from this ground it should be observed that the subpoenas represented, *prima facie*, a misuse of the Court's process. It is well established that a subpoena *duces tecum* directed to a stranger must specify with reasonable particularity the documents which are required to be produced. If a subpoena can be seen to be oppressively wide, or a mere fishing expedition, it may be set aside as an abuse of process. The party to whom the subpoena is directed ought not to be required to go to the trouble and, perhaps, expense of ransacking records and endeavouring to form a judgment as to what documents in his possession fall into some broad category referred to in the subpoena.
>
> These considerations are referred to in the oft-cited judgment of Sir Frederick Jordan in *The Commissioner for Railways v Small* [1938] NSWStRp 29; (1938) 38 SR (NSW) 564; 55 WN (NSW) 215. After drawing a distinction between the subpoena procedure and discovery, the learned Chief Justice said at pp574-5:
>
> > "It would greatly impede the trial of actions at *nisi prius*, and impose an intolerable burden upon the trial Judge, if he were required from time to time to suspend proceedings and wade for himself through masses of documents for the purpose of endeavouring to determine whether any of them were relevant. Especially is this so when the documents may be called for whilst the case is still at the stage when it is difficult or perhaps impossible for the Judge to know what may become relevant and what may not."
>
> Later, on p575, His Honour also said:
>
> > "Even if the documents are specified, a subpoena to a party will be set aside as abusive if great numbers of documents are called for and it appears that they are not sufficiently relevant."
>
> Cf. *Waind v Hill* [1978] 1 NSWLR 372; *Lane v Registrar of the Supreme Court of New South Wales* [1981] HCA 35; (1981) 148 CLR 245 at p259; (1981) 35 ALR 322; 7 Fam LR 602; 55 ALJR 529.
>
> ... There is no doubt that a County Court Judge has an inherent power to set aside proceedings which amount to a misuse of the Court process. (*Mason v Ryan* [1884] VicLawRp 115; (1884) 10 VLR (L) 335; 6 ALT 152 1884). This power should be used in circumstances such as the present, whether or not the party issuing the subpoena is legally represented. The views expressed do not conflict with the judgment in *Alister v R* [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41; (1984) 58 ALJR 97 where the objection to the subpoena which was upheld by the trial Judge was based only upon public interest immunity."

Per O'Bryan J (with whom Gray and Vincent JJ agreed) in *R v Dietrich* [1989] VicSC 200; MC 46/1989, 8 May 1989.

(c) Sub-poena addressed to a stranger to the court proceedings

Per McDonald J:

> "If it is apparent from the face of the summons to produce documents that the documents sought to be produced are not identified with a sufficient degree of particularity, or from the summons and the circumstances existing, that that which the party causing the summons to be issued was engaging in is a "fishing exercise" or a form of non-party discovery, the court should set aside the summons on application. To not do so would be to permit a party to engage in an abuse of the process of the court and it would be wrong in law. In this case by reference to each summons it is to be seen that the documents sought to be produced were described in the widest terms and without sufficient necessary particularity with respect to the subject of the committal proceedings before the court, so as to show that the documents sought to be produced had relevance to issues in those proceedings.
>
> On the facts, it would appear that each of Seabridge and the informant was engaging in a process, by use of the summons issued by the court and directed to the plaintiff to inspect documents which related to proceedings before the Medical Board, in order to see if any of those documents would be of relevance to issues in proceedings before the court, and would be of assistance to either of them. Such process is not permissible. The Magistrate was in error in rejecting the plaintiff's application to set aside each summons. Accordingly, I order that the ruling of the Magistrate that "Both subpoenae ruled valid and NOT set aside as an abuse of process", be set aside."

Per McDonald J in *Smith v Seabridge & Ors* [1994] VicSC 394; MC 40/1994, 6 July 1994.

13. Witness not available to attend court – Magistrate refused to allow witness' statement to be tendered in evidence as an abuse of process

Per The Court:

The trial Judge (Pagone J) found that the Magistrate was in error in reaching the conclusion that the application for the admission of the statement was an abuse of process. Amongst the errors committed by the Magistrate was the erroneous conclusion that what was meant by 'not available' was not defined in the legislation when it is so defined, in the 'Dictionary' section at the back of the *Evidence Act*. It is defined in a manner that includes where 'the person is mentally or physically unable to give evidence and it is not reasonably practicable to overcome that inability'. The trial Judge found that the Magistrate failed to consider whether that condition was satisfied, and her failure to do so contributed to her conclusions about abuse. Had she been alert to the relevant definition she may have considered that a policy objective of s65 was to provide for evidence to be adduced in the circumstances before her, if the statutory pre-conditions were satisfied on the facts. It was necessary for the statutory definition of a person's availability, upon which s65 depends, to have been considered before determining whether or not reliance on s65 in the circumstances of the case was an abuse. The failure of the Magistrate to consider the statutory definition of 'not available', and the consequent failure to determine whether that definition was satisfied in the circumstances of the case, was an error of law.

Per Tate JA (Buchanan JA agreeing) in *Easwaralingam v DPP & Anor* [2010] VSCA 353; (2010) 208 A Crim R 122; MC 52/2010, 20 December 2010.

14. Persistence in raising legal issues previously raised

Per Hall J:

> "40. On the hearing of this appeal Mr Horn sought an adjournment because he had only received the respondent's written submissions a few days earlier. I explained to him that as the appellant, he was required to file written submissions first but had failed to do so. Notwithstanding his failure, the respondent had filed submissions and had done so within time. I told him that the appellant did not, without leave, have the right to file written submissions in response to those of the respondent and that the usual course was for any submissions that the appellant wished to make in response to be made at the hearing. For these reasons I refused the adjournment and the hearing proceeded.
>
> 41. After hearing submissions, I came to the conclusion that none of Mr Horn's grounds had any merit. In these circumstances, I refused an extension of time and dismissed the appeal.
>
> 42. In dismissing the appeal I noted that persistence in raising a legal argument that has been previously raised and ruled upon could constitute an abuse of process. In my view that point has been reached.
>
> 43. A stubborn refusal to accept the lawful judgment of the courts cannot be excused on the grounds of fidelity to one's values. Too much time and effort has been spent on an issue which has long ago been determined. It is well nigh time that Mr Horn accepted the judgment of those whose job it is to judge."

Per Horn J in *Horn v Australian Electoral Commission* [2013] WASC 72; MC 27/2013, 7 March 2013.

15. Various issues – informal tape-recording not allowed – not abuse of process

Per Coldrey J:

> "Inquiries conducted by IID led the investigating police to the conclusion that the allegations of the appellant were not substantiated. It was contended that, in reaching that conclusion, the procedures followed by the police were inadequate and misconceived and wrong questions were addressed by them. Even if these allegations were correct, (and no substantive material was placed before the Court to that effect), the remedy open to the appellant was to initiate a private information. On any view of this matter the non-charging of the informants by the IID investigators does not attract the principles of abuse of process as I have set them out. ...
>
> The procedure whereby police interview persons whom they charge with assault upon them is one which occurs frequently and often of necessity at country police stations. Even assuming for the purpose of argument that where a suspect complains that interrogating police have assaulted him (as occurred here), it may be preferable for independent members to conduct any subsequent interrogation, the fact that this did not occur cannot be characterised as constituting an abuse of process as defined in the cases. The conduct of the interview by a police officer who is the alleged victim, or indeed the alleged perpetrator of an assault, is not illegal or necessarily improper. Even if it were so, the appropriate remedy, depending upon the circumstances, would be to seek the exclusion of any evidence garnered in the process in the exercise of the Courts discretion to exclude evidence

> illegally or unfairly obtained. This was not sought in the instant case since the appellant had, on legal advice, made a "no comment" record of interview. ...
>
> In my view a procedural ruling of the nature made by Magistrate Spanos (allowing tape-recording of the case), which has nothing at all to do with the substantive hearing of the charges, but relates to the discretionary decision of a Magistrate as to the control of Court proceedings, is not inviolable and cannot be said to be binding on Magistrate Klestadt (who refused to allow informal tape-recording of the case). (See also the approach of the English Court of Appeal in *R v Wright* (1990) 90 Cr App R 325).
>
> On this issue, counsel for the appellant failed to articulate before this Court (at least to my understanding) how any asserted error by the Magistrate in either refusing to permit the informal tape-recording, or to order the prosecution to organise any formal tape-recording, of the proceedings in the instant case could sensibly be said to result in the invalidation of the prosecution."

Per Coldrey J in *Tran v Magistrates' Court of Victoria (At Broadmeadows) & Clanchy* [1997] VicSC 170; MC 31/1997, 5 May 1997.

16. Search warrant issued to seize medical records of accused – whether abuse of process

The existence of privilege is not relevant to the exercise of the discretion to issue a search warrant pursuant to the provisions of s465 of the *Crimes Act* 1958. However, a magistrate may refuse to issue a warrant where to do so would be futile or an abuse of the process. There could be extreme cases where a document sought was clearly privileged and there was evidence that privilege would inevitably be claimed and claimed successfully. Further, a magistrate may decline to exercise the discretion in the very extreme situation where it came to the notice of the magistrate that the officer seeking to execute the warrant intended to abuse the procedure.

Allitt v Sullivan [1988] VicRp 65; [1988] VR 621, considered.

Per Smith J:

> "31. The discussion of the majority in *Allitt v Sullivan* provides considerable support for the conclusion that the existence of privilege is not relevant to the exercise of the discretion to issue the warrant and that His Worship erred in considering it. The Full Court, however, did not express itself in such terms and it would be fettering the statutory discretion to hold that the existence of privilege could never be relevant. The plaintiff conceded that there may be some scope under the discretion to refuse to issue a warrant where to do so would be futile or an abuse of the process.
>
> 32. There could be, at least theoretically, extreme cases where a document was sought pursuant to a search warrant which was without any question privileged and there was evidence that privilege would inevitably be claimed and claimed successfully. In such circumstances it might be appropriate for the person issuing the warrant to take the view that it would be futile and that the privacy of the person holding the document should not be invaded. Such example postulates an extreme and clear case. There might also be an extreme situation such as one where plainly some of the documents sought were privileged and it came to the attention of the magistrate that the person executing the warrant would ignore any claims to privilege and seek to inspect the documents prior to the court determining the proper disposition of the documents. Again this is a very extreme situation and one could understand a Magistrate declining to exercise the discretion in that situation because it would involve the unlikely scenario of the officer seeking to execute the warrant intending to abuse the procedure.
>
> 33. Approaching the decision as a discretionary one, and assuming that public interest immunity can be relevant, the issue to be resolved is whether it was open to His Worship to conclude, on the material he had before him, that the Victorian Institute of Mental Health would be entitled to resist production of the records on the grounds of public interest immunity and that such a claim would necessarily be successful. The question of the application of public interest immunity is one which requires information as to the nature of the contents of the documents in question and a balancing of competing public interests (see, for example, *D v National Society for the Prevention of Cruelty to Children* [1977] UKHL 1; [1978] AC 171; [1977] 1 All ER 589; [1977] 2 WLR 201; (1977) 76 LGR 5; *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1; 21 ALR 505; 53 ALJR 11; 37 ALT 122; *Alister v R* [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41; (1984) 58 ALJR 97). Until the documents were before the issuing Magistrate in response to the warrant and they and the nature of their contents capable of identification, until he had also received from the Institute an outline of the bases upon which public interest immunity was said to arise in respect of each document in the records and a response from the informant to that outline, no conclusion could properly be formed in my view as to the existence of any privilege. Thus the first ground is made out."

Per Smith J in *Clifford v Adams* [1998] VSC 98; MC 33/1998, 9 October 1998.

17. Extradition

(a) Whether Magistrate has power to stay proceeding as an abuse of process

A magistrate conducting a proceeding to determine whether a person is eligible for surrender is performing an administrative or ministerial function and the magistrate's statutory obligations, couched as they are in mandatory terms, leave no room for the implication of a discretionary power to stay the proceeding as an abuse of process.

Per Beach J:

> "It would seem to me that on its face subsection (6) of the *Extradition Act* 1988 (Cwth) has the effect of confining a magistrate to the matters specified in paras 2(a), (b), (c) and (d) of s19 when determining whether a person is eligible for extradition. This certainly was the view taken of the subsection by the Full Court of the Federal Court in *Todhunter v United States of America & Anor* [1995] FCA 1198; (1995) 57 FCR 70; 129 ALR 331. In that case the court was dealing with an appeal from the review of a magistrate's determination by a single judge of the court. ...
>
> When determining whether a person is eligible for surrender, a magistrate is confined to considering those matters specified in subsection 2 of s19. A magistrate is not concerned with provisions of an extradition treaty except those which may be relevant to subsection 2(b). It is for the Attorney-General to have regard to the provisions of any such treaty when he is determining whether the eligible person is to be surrendered. ...
>
> A magistrate conducting a proceeding to determine whether a person is eligible for surrender is performing an administrative or ministerial function and his statutory obligations, couched as they are in mandatory terms, leave no room for the implication of a discretionary power to stay the proceeding as an abuse of process."

Per Beach J in *Papazoglou v The Republic of the Philippines* [1996] VicSC 586; MC 19/1997, 10 December 1996.

(b) On appeal

1. A magistrate conducting proceedings under s19 of the *Extradition Act* 1988 (Cth) exercises an administrative function rather than a judicial function.

2. Whether the magistrate has an implied power to terminate the proceedings as an abuse of power must depend on the legislative intention as revealed by the language and structure of the *Extradition Act*. Having regard to the statutory obligations contained in s19, couched as they are in mandatory terms, there is no room for the implication of a discretionary power to terminate the proceedings in a manner other than that provided in the section itself.

Per The Court:

> "The question whether the magistrate has an implied power to stay or otherwise terminate the proceedings as an abuse of process must depend on the construction of the legislation. Despite the considerations to which we have referred, the *Extradition Act* contains provisions which suggest that there is no room for an implication that a magistrate performing the functions specified by s19 has power to stay the proceedings on the ground that they constitute an abuse of process. ...
>
> The effect of a decision by a magistrate exercising functions conferred by s19 of the *Extradition Act* is very similar, although not identical, to the effect of a decision by a magistrate conducting proceedings under s41 of the *Justices Act* (NSW). The decision of the magistrate under s19, that a person is eligible for surrender, does not determine whether the person will be surrendered to the requesting country; that is a matter for the Attorney-General. In that respect, s19 proceedings are like committal proceedings, since a decision to commit for trial does not mean that the accused will in fact stand trial; that decision rests with the prosecuting authorities."

Per Wilcox, Tamberlin and Sackville JJ in *Papazoglou v Republic of the Philippines* 144 ALR 42; (1997) 92 A Crim R 418; (1998) 74 FCR 108; MC 46/1997, 17 April 1997.

(c) Extradition – whether Magistrate has power to stay proceeding as an abuse of process

Where a magistrate is dealing with an application for extradition pursuant to s83(8) of the *Service and Execution of Process Act* 1992 (Cth) ('Act'), the magistrate is required to make one or other of the orders contemplated by s83 of the Act. If the magistrate is satisfied that the warrant or a copy of the warrant produced is not invalid, then the magistrate is required to remand the person on bail to appear in the place of issue of the warrant or order that that person be taken in custody to that place. The magistrate has no power to decline to make an extradition order on the ground of abuse of process and the Supreme Court reviewing such an order has no wider power. The question of abuse of process is a matter for the courts of the issuing State.

R v Lavelle 125 FLR 110; (1995) 82 A Crim R 187; and

Re Dalton (1995) 120 FLR 408; and

Rose v Chief Commissioner of Police [2000] VSC 281; MC 09/2001, followed.

Loveridge v Commissioner of Police for South Australia [2004] SASC 195; (2004) 89 SASR 72; 210 ALR 177; 183 FLR 228; 146 A Crim R 84, not followed.

Per Mandie J:

"8. Threshold questions arise as to the power of a magistrate under s83 of the *Service and Execution of Process Act* 1992 (Cth) ('Act') and the power of the Supreme Court on a rehearing under s86 of the Act. The first question is whether the magistrate has any discretion to decline to make an order under s83 of the Act if the statutory prerequisites are satisfied and none of the statutory exceptions applicable. More specifically, can a magistrate decline to make an order under s83 on the ground of abuse of process? Clearly, the Supreme Court has on a rehearing, at the very least, all the powers of the magistrate. However, if the magistrate has no discretion to refuse an order if the express provisions of the statute are satisfied, does the Supreme Court have a wider power or discretion on a review under s86 of the Act and, more specifically, the power to refuse to make or confirm an extradition order (either by implication or pursuant to its inherent jurisdiction) on the ground of abuse of process?

9. In my opinion, on a proper construction of Part V of the Act, a magistrate is required to make one or other of the orders contemplated by s83 if the express provisions of the Act are satisfied. The word used is "must" and there is nothing in the language or structure of Part V to suggest that a magistrate possesses any relevant discretion. Nor do I think that there is any basis for an implication that a magistrate can refuse to make an order on the ground of abuse of process.

17. I consider that the Supreme Court has no greater power on a review, by way of rehearing, than that expressly conferred upon a magistrate by s83 of the Act. The power of the Supreme Court under s86(8) to confirm, vary or revoke the order must be exercised within the confines of s83 and only in relation to the matters expressly referred to in that section.

19. For the foregoing reasons it follows that the plaintiff cannot rely, within the purview of s86 of the Act, upon the ground of abuse of process, which is the only ground upon which he does rely, to resist confirmation of the extradition order.

20. The plaintiff sought, in the alternative, judicial review under O56, again on the ground of abuse of process. It is unnecessary to decide whether the present defendant is the appropriate defendant on such an application because, for the reasons adumbrated in *Lavelle*, *Re Dalton* and *Rose v Commissioner of Police*, I consider that this alternative remedy is not available. In particular I would respectfully adopt what was said by Batt J in *Re Dalton* in relation to Part V of the Act constituting a code that covers the field and excludes the operation of State law and consequently the Supreme Court's jurisdiction as a superior court to stay a proceeding or order for abuse of process.

21. For the foregoing reasons, the plaintiff is unable to raise before this Court the questions of alleged abuse of process that he seeks to raise. However, a person in the position of the plaintiff is not thereby deprived of any right to obtain relief in respect of an abuse of process involved in or associated with the issuing or enforcement of a warrant or the laying or prosecution of the charges associated with such warrant. As the Western Australian Full Supreme Court emphasised in *Lavelle*, the question of abuse of process in this context is one that is appropriate for the courts of the State in which the warrant is issued and in which the charges are made or to be brought – and, in particular, for the Supreme Court of that State.

22. The extradition order should be confirmed and the originating motion otherwise must be dismissed."

Per Mandie J in *Berichon v Chief Commissioner, Victoria Police* [2007] VSC 143; (2007) 16 VR 233; (2007) 211 FLR 10; (2007) 171 A Crim R 496; MC 27A/2007, 14 May 2007.

(d) Extradition – Powers of magistrate

Where a warrant is found to be valid a Magistrate must make one of the two orders specified in s83 of the Act upon production of the warrant leaving broader questions of abuse of process or a stay of proceeding to the courts of the state in which the warrant was issued.

The warrant as expressed was valid. The precondition for its issue was the revocation of parole upon the Board's determination that the terms of the parole order had been breached. There was no occasion to go beyond the Board's revocation of parole or the fact of its finding of breach as the relevant precondition to the issue of the warrant, to evaluate whether the underlying facts upon which the revocation and finding was made were correctly established.

Per Pagone J:

> "2. ... Sub-section 83(10) of the *Service and Execution of Process Act* 1992 (Cth) provides that the Magistrate must order the release of the person if satisfied that the warrant is invalid but otherwise specifies no other conditions for ordering extradition beyond the production of the warrant or copy warrant. In *R v Lavelle* 125 FLR 110; (1995) 82 A Crim R 187 the Full Court of the Supreme Court of Western Australia held that where a warrant was found to be valid a Magistrate must make one of the two orders specified in the section upon production of the warrant leaving broader questions of abuse of process or a stay of proceeding to the courts of the state in which the warrant was issued. That decision has been followed by this Court in other cases. The Plaintiff, nonetheless, contended in this review that the issue of the warrant was unlawful, that the grounds upon which he may rely in these proceedings were not restricted to those in s83, and that the warrant was invalid.
>
> 4. ... The section requires the Magistrate to make orders upon the production of a warrant or copy of the warrant unless the warrant is shown to be invalid. The legislature is not to be taken to have left room for rejecting an application for extradition on wider grounds by the Magistrate, or on a reconsideration by this Court upon review. It is for the courts in the jurisdiction in which the warrant was issued to consider such questions as abuse of process or the grant of any stay. The distinction between the validity of an order and its application may be significant in some contexts but not in that of s83 where the only ground to resist the making of an order for extradition is that the warrant, intended to be applied, is shown to be invalid. I agree also with the views in that regard expressed by Mandie J (as he then was) in *Berichon* [2007] VSC 143; (2007) 16 VR 233; (2007) 211 FLR 10; (2007) 171 A Crim R 496."

Pagone J in *Rodgers v Chief Commissioner of Victoria Police & Anor* [2012] VSC 305; MC 25/2012, 12 July 2012.

18. CIVIL PROCEEDINGS

(a) Whether delay in instituting civil proceedings an abuse of process

Per the High Court:

> "69. The descriptions, rather than definitions, given in this Court and set out earlier in these reasons post-date *Birkett v James* [1978] AC 297; [1977] 2 All ER 801; [1977] 2All ER 801; [1977] 3 WLR 38 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 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* [1988] HCA 32; (1988) 165 CLR 197 at 247; 79 ALR 9; (1988) 62 ALJR 389; [1988] ACL 36085, 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]* [1935] HCA 48; (1935) 52 CLR 713 at 720; [1936] ALR 40; 8 ABC 58 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": [2005] NSWCA 20; (2005) 43 MVR 381 at 405.
>
> 72. There was no error of principle in the decision of the Court of Appeal."

Per the High Court (Gleeson CJ, Gummow, Hayne and Crennan JJ) in *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 227 ALR 425; (2006) 80 ALJR 1100; [2006] Aust Torts Reports 81-849; (2006) 45 MVR 288, 14 June 2006.

(b) Per Nathan J:

> "There is, of course, a patent difference between criminal and civil proceedings, that which may amount to an abuse by the mere effluxion of time in civil proceedings is not determinative of the issues in criminal proceedings. To this end, the *ANZ Bank & Ors v Donovan & Anor* is of no assistance to the plaintiffs in this case. That case turned on a civil dispute, there was much documentation and in which relevant statutory limitation periods prevailed."

Per Nathan J in *Higgins & Ors v Tobin & Winn* [1987] VicSC 484; MC 60/1987, 5 November 1987.

(c) Adjournment of civil proceedings refused; second application on same facts an abuse of process

Where, in civil proceedings, an application for an adjournment was refused and subsequently, a

second application was made to another magistrate based on identical material to that presented to the first magistrate, the second magistrate had jurisdiction to entertain the further application but should have refused it as an abuse of process.

Per Smith J:

> "The application mounted, however, was an abuse of process because it sought effectively to challenge the first decision and sought a re-hearing when none was provided for by the courts procedures and it was based on the identical material that had been relied on previously (*Walton v Gardiner* [1993] HCA 77; (1993) 177 CLR 378, 393; (1993) 112 ALR 289; (1993) 67 ALJR 485; *Rogers v R* [1994] HCA 42; (1994) 181 CLR 251; (1994) 123 ALR 417; (1994) 68 ALJR 688; 74 A Crim R 462; *Stephenson v Garnett* (1898) 1 QB 677; *Duncan v Lowenthal* [1969] VicRp 21; [1969] VR 180, 182). Thus it appears to me that this is a case where the remedy of *certiorari* should be refused in the exercise of the court's discretion on the grounds that the decision would have been the same if the correct approach had been taken and that the issue raised is, therefore, without merit and refusal of the relief sought will cause no real injustice (cf. *R v O'Sullivan* (1967) WAR 168, 171; *R v Knightsbridge Crown Court* [1983] 1 All ER 1148; [1983] 1 WLR 300 at 313; *Commissioner of Police v Gordon* [1981] 1 NSWLR 675, 690)."

Per Smith J in *Ho & Anor v BMW Australia Finance Ltd* [1995] VicSC 193; MC 04/1995, 3 May 1995.

(d) Rehearing application of civil proceedings – whether second application an abuse of process (cf *Tenth Vandy Case infra*)

1. Except where there has been a dismissal of the first application for a technicality or where there is fraud or where new evidence becomes available after the dismissal of the first application, a second application is almost certainly doomed to failure.

Guss v Magistrates' Court of Victoria & Anor [1998] 2 VR 113; MC 22/1997, applied.

2. The material put forward by the applicant at the hearing of the second application was not new evidence. It was available to the applicant at the time of the hearing of the first application. The magistrate hearing the second application was in error in failing to consider whether the application was an abuse of process and bound to fail because the applicant had previously applied to set aside the judgment on precisely the same grounds.

Per Beach J:

> "21. In my opinion the second Magistrate in the present case fell into jurisdictional error in allowing the first defendant's application on the basis he did.
>
> 22. In doing so he failed to consider whether the application was an abuse of process and bound to fail because the first defendant had previously applied to set aside the judgment on precisely the same grounds, there was no fraud, and there was no new evidence which became available after the dismissal of the first application."

Per Beach J in *Stragan & Co Pty Ltd v Christodolou & Ors* [2002] VSC 78; MC 19/2002, 26 March 2002.

(e) Second or subsequent Interlocutory applications – whether an abuse of process

The correct approach to apply to second or subsequent interlocutory applications is that the court should do whatever the interests of justice require in the particular circumstances of the case. It is, generally speaking at all events, open to the court to exercise a wide discretion in the interests of justice in considering whether an applicant who has failed on the merits may none the less succeed on a second application.

It follows that a court is not bound to conclude that the second reinstatement application will be an abuse of process unless there is "new evidence" in the sense in which that expression is used in connection with the admission of evidence on appeals. The extent to which the second reinstatement application is based upon evidence which was available to be produced on the hearing of the first reinstatement application, but was not so produced, will be a relevant factor in determining the second reinstatement application.

Further, new circumstances that the stay amount has been paid and a proposed further amended statement of claim has been formulated are relevant factors to be taken into account on the hearing of the second reinstatement application. In this regard also, the reasons why these circumstances did not exist at the time of the hearing of the first reinstatement application will be a relevant consideration.

Nominal Defendant v Manning [2000] NSWCA 80; (2000) 50 NSWLR 139; (2000) 31 MVR 524, followed.

National Parks and Wildlife Service v Pierson [2002] NSWCA 273; (2002) 55 NSWLR 315,

followed.

DA Christie Pty Ltd v Baker [1996] VicRp 89; [1996] 2 VR 582, considered.
Guss v Magistrates' Court of Victoria [1998] 2 VR 113; MC 22/1997, and
Stragan & Co Pty Ltd v Christodoulou [2002] VSC 78; MC 19/2002, not followed.

Per Hargrave J:

"41. My review of the authorities has led me to the conclusion that I am not bound, in considering the second reinstatement application in this case, to apply *Guss* and *Stragan*, with the effect that I am limited to considering any "new evidence" which was not available on the hearing of the first reinstatement application. I am of this view for the following reasons.

42. In the first place, although the second reinstatement application is of a similar kind to an application to set aside a default judgment, it is a different application.

43. Secondly, the decision of Mandie J in *Global Realty Development Corporation v Dominion Wines Ltd (in liq)* [2005] VSC 474; (2005) 225 ALR 361 constitutes a single judge decision which is contrary to the decisions in *Guss* and *Stragan*. In these circumstances, the weight to be attached to the fact that the decisions in *Guss* and *Stragan* concern matters of practice and procedure is diminished.

44. Thirdly, and most importantly, both Brooking and Hayne JJA in *Christie* [1996] VicRp 89; [1996] 2 VR 582 clearly stated that they were not purporting to lay down any general rules to be applied in determining whether any interlocutory application constitutes an abuse of process.

45. Fourthly, the variety of interlocutory applications and of the circumstances pertaining to each individual application dictate, in my view, that it is undesirable that there be a set of rigid rules to be applied to every case where a second interlocutory application is made after the refusal of a first application for the same relief. In this regard, I respectfully adopt the passage from the judgment of Heydon JA in *Manning* quoted above [2000] NSWCA 80; (2000) 50 NSWLR 139 at 147-8; (2000) 31 MVR 524 which was referred to with apparent approval by Maxwell P in *Philip Morris* [2006] VSCA 21 at [60]; (2006) 14 VR 538.

46. As a result, it is my view that the correct approach to apply to second or subsequent interlocutory applications is that stated in *Manning* and *Pierson* that "the overriding principle governing the approach of the court to interlocutory applications is that the court should do whatever the interests of justice require in the particular circumstances of the case." *Pierson* [2002] NSWCA 273; (2002) 55 NSWLR 315 at 318; *Manning* [2000] NSWCA 80; (2000) 50 NSWLR 139 at 161; (2000) 31 MVR 524. As I have said, this statement was referred to with apparent approval by Maxwell P in *Philip Morris* [2006] VSCA 21 at [61]; (2006) 14 VR 538. Further, this approach is consistent with the statement of Brooking JA in *Christie* [1996] VicRp 89; [1996] 2 VR 582 at 597 quoted above in respect of interlocutory applications concerning questions of practice and procedure that:

> "... it is, generally speaking at all events, open to the court to exercise a wide discretion in the interests of justice in considering whether an applicant who has failed on the merits may none the less succeed on a second application."

47. It follows that the application by the defendant to dismiss the second reinstatement application on the grounds that it is an abuse of process is not to be determined in accordance with the submissions made on behalf of the defendant. I am not bound to conclude that the second reinstatement application will be an abuse of process unless there is "new evidence" in the sense in which that expression is used in connection with the admission of evidence on appeals. Having said that, the extent to which the second reinstatement application is based upon evidence which was available to be produced on the hearing of the first reinstatement application, but was not so produced, will be a relevant factor in determining the second reinstatement application. Further, the new circumstances that the stay amount has been paid and a proposed further amended statement of claim has been formulated are, in my view, relevant factors to be taken into account on the hearing of the second reinstatement application. In this regard also, the reasons why these circumstances did not exist at the time of the hearing of the first reinstatement application will be a relevant consideration."

Per Hargrave J in *Tenth Vandy Pty Ltd v Natwest Markets Australia Pty Ltd* [2006] VSC 170; MC 09/2006, 4 May 2006.

(f) Whether legal practitioners immune from liability

1. Unless and until changed by statute, the law in Victoria in relation to the immunity of a legal practitioner from suit has been authoritatively settled by the High Court in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1; (2005) 214 ALR 92; (2005) 79 ALJR 755; [2005] Aust Torts Reports 81-784 and *Giannarelli v Wraith*[1988] HCA 52; (1988) 165 CLR 543; (1988) 81 ALR 417; [1988] Aust Torts Reports 80-217; [1988] ANZ Conv R 541; (1988) 35 A Crim R 1; (1988)

62 ALJR 611. The majority of the court in *D'Orta* held that a legal practitioner was immune from suit, whether in negligence or on some other basis, in relation to his or her conduct of a case in court or in relation to work out of court which was intimately connected with the conduct of the case in court. This conclusion is based upon the principle that the judicial process is an aspect of government. The determinative factor is that, unless there is an immunity, there would be adverse consequences for the administration of justice that would flow from the re-litigation in collateral proceedings of issues determined in the principal proceedings. In turn this factor is based upon a central and pervading tenet of the judicial system that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. The provisions of the *Legal Practice Act* 1996 expressly preserves the state of the law as it was determined in *Giannarelli*.

2. If the legal practitioners in the present case were not immune from suit, the proceeding should be dismissed as an abuse of process. In particular, for the plaintiff to show he has suffered damage by reason of the conduct of a defendant, he would need to show that he was wrongly convicted. Such a finding would undermine the criminal justice system.

Per Morris J:

> "3. In their defences each defendant claims, in substance, that the plaintiff's action concerns matters which involve decisions and work which were so intimately connected with the conduct of the case in court that the defendants are immune from liability. Further they say that the proceeding involves a collateral attack on the decision of the County Court of Victoria in a criminal proceeding and is therefore an abuse of process.
>
> 11. In the circumstances, it is unnecessary to deal with the defendants' submission that the proceeding was an abuse of process. In truth, (at least in the context of this case) this issue is closely connected with the question of whether a legal practitioner is immune from suit in relation to the conduct of a proceeding in court. It is sufficient to say that, if the defendants were not immune from suit, my inclination would be to summarily dismiss the proceeding as an abuse of process. In particular, I would have thought that for the plaintiff to show he has suffered damage by reason of the conduct of a defendant, he would need to show that he was wrongly convicted. Such a finding would undermine the criminal justice system."

Per Morris J in *Arundell v Williams Winter & Higgs & Ors* [2005] VSC 433; (2005) 158 A Crim R 16; MC 29/2005, 8 November 2005.

19. Accident Compensation claim – delay of many years – application to refer matter to medical panel refused – subsequent application refused – whether abuse of process

HELD: Proceeding dismissed.

1. A decision as to abuse of process is not a discretionary decision properly so called, but it has many similar qualities in that it is a matter of assessment and judgment, and value judgment at that. Accordingly, unless there is some distinct error of law or principle in the reasoning or decision-making process of the judicial officer, it is not an easy task to show that the decision was not open.

Walton v Gardiner [1993] HCA 77; (1993) 177 CLR 378; (1993) 112 ALR 289; (1993) 67 ALJR 485; (1993) 112 A Crim R 289, applied.

2. Delay in interlocutory steps within a proceeding can amount to or give rise to a finding of abuse of court process. Accordingly, the Magistrate had the jurisdiction and the power to arrive at a finding that undue delay might qualify as abuse of process.

Batistatos v Roads and Traffic Authority of NSW [2006] HCA 27; (2006) 226 CLR 256; (2006) 227 ALR 425; (2006) 80 ALJR 1100; [2006] Aust Torts Reports 81-849; (2006) 45 MVR 288, applied.

3. The Magistrate did not take into account any irrelevant matter or failed to take into account any relevant matter. It follows that there can be no criticism of any substance that can be erected in relation to his reasons given for the refusal of the application.

4. In relation to the ruling of 29 January 2009 there had been a further six occasions on which the matter had come before the Magistrates' Court prior to it coming before the Court again on 29 January 2009. The Magistrate was entitled to, and did, take into account that very circumstance as another reason to refuse the application for a referral. Also, the fact that the application on 29 January 2009 was a repeat application not based on any change of circumstances suffered from the *prima facie* badge of abuse of process.

DA Christie Pty Ltd v Baker [1996] VicRp 89; [1996] 2 VR 582, applied.

Per Cavanough J:

"2. In the end, the plaintiff's counsel conceded that he needed to obtain an extension of time in respect of the decision of 16 October 2008. No satisfactory explanation for the delay in seeking to review the decision of that date has been proffered. If anything, the material just confirms that there is no proper explanation available. A deliberate choice was made to go back to the Magistrate, but this was an ill-considered and ill-advised step to take, probably amounting to an abuse of process in itself (see *DA Christie Pty Ltd v Baker* [1996] VicRp 89; [1996] 2 VR 582 as discussed and explained in *Phillip Morris Ltd v Attorney-General Victoria* [2006] VSCA 21; (2006) 14 VR 538; cf *Booth v Ward* [2007] VSC 364; (2007) 17 VR 195 at 203 [33], 204-205 [39]-[40]). That alone would be sufficient to require the dismissal of the application in respect of the decision of 16 October 2008.

3. Even if I were wrong about that, nonetheless I would not grant any relief in respect of the decision of 16 October 2008. Mr Hurley, for the plaintiff, concedes that delay in interlocutory steps within a proceeding can amount to or give rise to a finding of abuse of court process. He is constrained to make that concession because of what was said in *Batistatos v Roads and Traffic Authority of NSW* [2006] HCA 27; (2006) 226 CLR 256; (2006) 227 ALR 425; (2006) 80 ALJR 1100; [2006] Aust Torts Reports 81-849; (2006) 45 MVR 288 in a passage at 267 [15] to which I referred earlier in the course of discussions with counsel. So the Magistrate had the jurisdiction and the power to arrive at a finding that undue delay might qualify as abuse of process.

4. Then there was an attack by Mr Hurley on the factors that were taken into account by Mr Garnett, the Magistrate, and factors allegedly not taken into account. I have discussed each of them with counsel in the course of the argument this morning. I am not persuaded at all that the Magistrate took into account any irrelevant matter or failed to take into account any relevant matter. It seems to me there is no criticism of any substance that can be erected in relation to his reasons.

6. The cases seem to say that a decision as to abuse of process is not a discretionary decision properly so called, but it has many similar qualities in that it is a matter of assessment and judgment, and value judgment at that. *Walton v Gardiner* [1993] HCA 77; (1993) 177 CLR 378 at 389, 395-396, 398-399; (1993) 112 ALR 289; (1993) 67 ALJR 485; (1993) 112 A Crim R 289; *Batistatos v Roads and Traffic Authority* [2006] HCA 27; (2006) 226 CLR 256, esp at 264 [6]-[7], 266-268 [14]-[16], 281 [69]; (2006) 227 ALR 425; (2006) 80 ALJR 1100; [2006] Aust Torts Reports 81-849; (2006) 45 MVR 288; *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27 at [33]-[35]; (2009) 239 CLR 175; (2009) 258 ALR 14; (2009) 83 ALJR 951 per French CJ; cf at HCA [115] per Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43 at [27]-[28] per French CJ, Gummow, Hayne and Crennan JJ, and at [48], [57]-[58], [101], [106], [113] per Heydon J (dissenting); (2009) 239 CLR 75; (2009) 260 ALR 34; (2009) 83 ALJR 1180. So, unless there is some distinct error of law or principle in the reasoning or decision-making process of the judicial officer, it is not an easy task to show that the decision was not open. Indeed, Mr Hurley has not really essayed the task of showing that the decision was not open. He nailed his colours to the mast of the various specific points he made in argument.

11. Indeed there were two differences as between the ruling of 29 January 2009 and the ruling of 16 October 2008 which were unhelpful to the plaintiff.

12. One such difference was that there had been a further six occasions on which the matter had come before the Magistrates' Court prior to it coming before the Court again on 29 January 2009. The Magistrate was entitled to, and did, take into account that very circumstance as another reason to refuse the application for a referral.

13. Then there was the very fact that the application on 29 January 2009 was a repeat application not based on any change of circumstances. As I have already mentioned, such an application suffers from the *prima facie* badge of abuse of process, at least in this kind of case, as was said in *DA Christie Pty Ltd v Baker* [1996] VicRp 89; [1996] 2 VR 582; cf *Phillip Morris Ltd v Attorney-General Victoria.* [2006] VSCA 21; (2006) 14 VR 538 and compare also *Booth v Ward* [2007] VSC 364; (2007) 17 VR 195 at 203 [33], 204-205 [39]-[40].

16. In the Magistrates' Court the defendants did not oppose the plaintiff's application for a referral to a medical panel. They maintained a neutral position on the abuse of process point in this Court. In these circumstances I consider that the parties should bear their own costs of the proceeding in this Court."

Cavanough J in *Skordos v Magistrate Garnett & Ors* [2009] VSC 512; MC 30/2009, 14 October 2009.

Patrick Street LL B, Dip Crim
19 March 2014