30/09; [2009] VSC 512

SUPREME COURT OF VICTORIA

SKORDOS v MAGISTRATE GARNETT & ORS

Cavanough J

14 October 2009 (revised reasons published 12 November 2009)

PRACTICE AND PROCEDURE – ACCIDENT COMPENSATION – CLAIM FOR LUMP SUM COMPENSATION IN MAGISTRATES' COURT – BELATED REQUEST TO MAGISTRATE FOR REFERRAL OF QUESTIONS TO MEDICAL PANEL – REQUEST REFUSED AS AN ABUSE OF PROCESS – LATER REQUEST TO MAGISTRATE TO RECONSIDER DECISION REFUSED – PLAINTIFF OUT OF TIME TO CHALLENGE MAGISTRATE'S FIRST DECISION – NO "SPECIAL CIRCUMSTANCES" TO WARRANT EXTENSION OF TIME TO REVIEW FIRST DECISION – NO JURISDICTIONAL ERROR OR ERROR OF LAW BY MAGISTRATE IN EITHER DECISION – PROCEEDING DISMISSED: *ACCIDENT COMPENSATION ACT* 1985, SS45, 98, 98A; *SUPREME COURT (GENERAL CIVIL) PROCEDURE RULES* 2005, R56.02.

S. took proceedings against his former employer and the Victorian WorkCover Authority under the *Accident Compensation Act* 1985 ('Act'). A defence was filed in May 2008 and at a directions hearing on 8 August 2008 it was listed for hearing on 16 October 2008 some 5½ years after the relevant claim was lodged and some 11½ years after the injury was allegedly suffered. Two days prior to the scheduled hearing date, S. gave notice that he intended to apply pursuant to s45 of the Act for the referral of certain questions to a medical panel. When the application came on for hearing the Magistrate found that S's delay in applying for the referral constituted an abuse of process. As S. was not ready to proceed, the matter was further adjourned after further applications to 29 January 2009. On that date the Magistrate was asked to reconsider his previous decision and order a referral. No new circumstances had intervened and a referral would involve further delay. The Magistrate refused to reconsider his earlier decision to refuse to refer the matter to a medical panel. Upon appeal—

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.**

CAVANOUGH J:

1. I am not persuaded that any part of the relief sought by the plaintiff should be granted.[1]

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*[2] as discussed and explained in *Phillip Morris Ltd v Attorney-General Victoria*[3]). 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*[4], in a passage[5] 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.

5. I note that the task facing Mr Hurley was a very difficult one. He needed to persuade me either that there was some legally irrelevant matter that was taken into account or some imperatively relevant matter that was left out of account or alternatively that the decision was simply not open to the Magistrate, notwithstanding that s45(1B) of the Act commits the question of abuse of process to the "opinion" of the Magistrate "in all the circumstances".

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.[6] 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.

7. His main point in that regard was to say that the Magistrate failed to take into account the nature of the proposed questions and in particular the fact that they were relevant questions; thereby, Mr Hurley says, failing to take into account the policy underlying the provisions of section 45 of the Act. I am simply not persuaded that the Magistrate failed to have regard to the questions or to their relevance. In fact, it is apparent from his reasoning of 16 October 2008 that he was fully aware of the nature of the questions and their potential relevance.

8. Nothing was said to the Magistrate to the effect that the nature of the particular questions made them especially suitable for a referral to the medical panel.[7] Nor has Mr Hurley been able to point to any particular features of the questions that made them especially suitable for referral. The relevance of the questions should be regarded as having been duly taken into account by the Magistrate. It was not incumbent upon him to state the obvious, on pain of being found to have overlooked an imperatively relevant consideration.

9. To the extent that Mr Hurley made other criticisms of the reasoning of the Magistrate of 16 October 2008 I have already dealt with them in the course of discussion with counsel and I reiterate my responses to those particular submissions.[8]

10. The plaintiff's position was even worse in respect of the ruling of 29 January 2009. The plaintiff did not need an extension of time in order to attack that ruling but it was, in my view, a perfectly sound ruling in law. There was no jurisdictional error. Mr Hurley really just adopted or incorporated the complaints he had made about the prior ruling in his attack on the ruling of 29 January. In my view there was no substance in any of the attacks made on the prior ruling and similarly there was no substance in any of the attacks made on the ruling of 29 January.

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*[9]; cf *Phillip Morris Ltd v Attorney-General Victoria.*[10]

14. There is one other difference between the hearing on 29 January 2009 and the earlier hearing that might at first glance seem to help the plaintiff. The matter had not been fixed for trial on 29 January 2009 whereas it had been fixed for trial on 16 October 2008. On the other hand, the Magistrate was prepared to offer a very early hearing, within a week or two of 29 January 2009. In the end, after a discussion with counsel about the convenience of counsel, the parties and the witnesses, a date of 10 March 2009 was fixed. That date was considerably earlier than the date to which the case would need to have been adjourned had the application for referral been acceded to. In any event, it is not appropriate for the plaintiff to seek to take advantage of the fact that, as a result of the late application he himself had made on the earlier occasion, the matter had not in fact been listed for hearing on 29 January 2009. In that regard I refer to what was said by French CJ in *Aon Risk Services Australia Ltd v Australian National University*[11].

15. The proceeding will be dismissed. [Discussion ensued about costs.]

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.

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[1] The plaintiff applied under Order 56 of the *Supreme Court (General Civil Procedure) Rules* 2005 for orders quashing two related interlocutory decisions made by the first defendant, a Magistrate, in a proceeding brought by the plaintiff as a worker against his (insolvent) former employer and its insurer, the Victorian WorkCover Authority ("the VWA"), under the *Accident Compensation Act* 1985 ("the Act"). The plaintiff applied if necessary for an extension of the 60 day period specified by r56.02(1) of the Rules within which to commence a proceeding in relation to the first of the decisions. To that extent he was required to demonstrate "special circumstances": r56.02(3).

The proceeding in the Magistrates' Court arose out of the rejection of a claim made by the plaintiff under ss98 and 98A of the Act (as in force prior to 12 November 1997) for lump sum compensation for a leg injury allegedly suffered by the plaintiff in the course of his employment on 7 May 1996 and alleged associated pain and suffering. A prior claim under ss98 and 98A in respect of the injury had led to an award of some compensation in December 1997. The relevant (second) claim had been made on 27 February 2003 (almost 6 years after the incident) and was rejected on 6 May 2003. A request for conciliation was lodged and a "genuine dispute" certificate was issued by the conciliator under s49 of the Act on 23 September 2003. A further period in excess of 4 years passed before the plaintiff issued the Magistrates' Court proceedings on 19 December 2007.

In effect, the VWA conducted the whole defence of the proceeding in the Magistrates' Court. A defence was filed on 7 May 2008. The case was the subject of a directions hearing on 8 August 2008 where it was listed for hearing on 16 October 2008, some 5½ years after the relevant claim was lodged and some 11½ years after the injury was allegedly suffered. On 14 October 2008, less than 2 clear days before the scheduled hearing date, the plaintiff gave notice to the defendants of his intention to apply to the Magistrates' Court pursuant to s45 of the Act for the referral of certain proposed questions to a medical panel. The power to refer medical questions to a medical panel under s45 is expressed to be conferred on the County Court, but by virtue of s43(3) of the Act the same power is conferred on the Magistrates' Court. Powers of referral are also conferred on conciliators, although on different conditions: ss55A, 56. So far as relevant, s45 provides:

45. Medical questions

(1) Where the County Court exercises jurisdiction under this Part, the County Court—

(a) may refer a medical question; or

(b) if a party to the proceedings requests that a medical question or medical questions be so referred,

must, subject to subsections (1B) and (1C), refer that medical question or those medical questions—to a Medical Panel for an opinion under this Division.

(1A) … (1B) The County Court may refuse to refer a medical question to a Medical Panel on an application under subsection (1)(b) if the County Court is of the opinion that the referral would, in all the circumstances, constitute an abuse of process.

(1C) The County Court has on an application under subsection (1)(b) the discretion as to the form in which the medical question is to be referred to a Medical Panel.

(2) … The application came before Magistrate Garnett, who had been allocated as the trial Magistrate, on 16 October 2008. The VWA neither consented to it nor opposed it. The Magistrate heard the plaintiff's counsel and then retired to consider the matter. On resuming, he delivered a reasoned, oral decision rejecting the application. After referring to the procedural history, he said (as recorded in the transcript):

> "If the application is granted, the matter will have to be adjourned for a number of weeks to allow the parties to prepare the necessary documentation pursuant to s65 and submit the proposed medical questions to the court for its consideration. Once these matters are completed, the claim can then be referred to the panel by the court.
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> Once the panel receives the referral from the court, it will be a number of weeks before the panel examines the worker and then it must form its opinion within 60 days of the referral pursuant to s68(1). The panel then has seven days to provide the court with its opinion in writing pursuant to s68(3) and the court must relist the matter for the appropriate orders to be made which are consistent with the panel's opinion in accordance with s68(4). The anticipated delay from this date to the ultimate determination of the s98 entitlement, if any, is approximately three to four months. The court may then be required to hear evidence regarding the plaintiff's s98A entitlement.
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> I find that the plaintiff's delay in applying for a referral constitutes an abuse of process. In making this ruling, I have had regard to the decisions in *HIH v Greeves* in 1998; the Court of Appeal in *Greeves* in 2000, a decision of Judge Rendit on 4 May 1999 in a matter of *Stewart*; a decision of his Honour Judge Coish on 24 April 2003 in *Rose v Frankston City Council*; a decision of His Honour Judge Stott in *Bolton v Harrison Community Services* on 5 February 2004; *Zickley v Saville*, a decision in 2004; *Azzopardi*, a decision of Judge Punshon on 11 August 2004; a decision of Judge Coish on 4 November 2005 in *Beavis v St Vincent and Mercy Hospital* and previous decisions that I have made in the matter of *Salmon v Staline Catering* on 27 February 2008 and *Slocombe v AG Gippsland Pty Ltd* also on that date. I also rely on the High Court decision in *Walton v Gardiner* where a court considered the issue of fairness, misuse of the court's process and procedure and whether the application could be said to bring the administration of justice [into] disrepute. I also rely on the decision of Mr Justice Vickery in *Imaging Applications Pty Ltd v Vero Insurance*, a 2008 decision where he said 'The court has inherent jurisdiction to dismiss a proceeding before it on the ground that it is an abuse of process'.
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> In *Batistatos v Road Traffic Authority of New South Wales* in 2006 the High Court considered the scope of abuse of process of the court in the contemporary context. The court considered that what amounts to an abuse of process is [insusceptible] of a formulation comprising [closed] categories. Development continues. It was further said that abuse of process cannot be restricted to [defined and closed] categories because notions of justice and injustice, as well as other considerations that bear on the public confidence in the administration of justice must reflect contemporary values and as well take into account the circumstances of the case.
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> In an earlier decision in [*Rogers*] *v R*, McHugh J observed, 'Although the categories of abuse of procedure remain open, abuses of procedure usually fall into one of three main categories: firstly, the court's procedures are invoked [for] an illegitimate purpose' – which I don't find occurs in this case – 'secondly, the use of the court's procedures is unjustifiably oppressive to one of the parties; or thirdly, the use of the court's procedures would bring the administration of justice [into] disrepute'.
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> In the present case, I find the application is an abuse of process because the plaintiff has had prior opportunity to seek a referral, either at conciliation or to the court prior to 16 October. The matter was listed before the court on 8 August this year without a referral being sought. The plaintiff thereby failed to comply with practice direction 2 of 2004. The late notice of referral by the plaintiff to the defendant also contravenes rule 9.09 of the *Magistrates' Court Civil Procedure Rules*. A referral to the panel will result in a delay of three to four months before the s98 aspect of the claim is determined. A referral at this late stage will not only result in the parties to this proceeding, but others in the WorkCover jurisdiction to lack confidence in the administration of justice.
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> It is incumbent on practitioners experienced in this jurisdiction to make application to the medical

> panel at an early stage, not only to avoid the delay in the determination of the particular case at hand, but also to avoid causing delay in the listing and determination of other matters before the court. The frequency of late referrals is increasing, which in my opinion erodes confidence in the administration of justice by this court in the WorkCover jurisdiction.
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> In addition, I do not consider it is appropriate to grant the application because the medical panel opinion on its own cannot resolve the s98A aspect of the claim, which must be determined by the court if the plaintiff satisfies the threshold criteria in s98A. Therefore, it is in the interests of justice that the application be refused. Therefore, it is refused."

The plaintiff, apparently presuming that his application for a referral would be successful and that this would necessitate an adjournment of the trial, was not ready to proceed forthwith after the Magistrate delivered his ruling on 16 October 2008. To accommodate the plaintiff, the further hearing of the trial was then adjourned until 27 October 2008. When the matter came on again on that day before Magistrate Garnett the plaintiff sought and obtained another adjournment, on the ground of witness unavailability. It was adjourned until 3 November 2008 for mention. However the plaintiff then changed tack. On 5 November 2008 he made a fresh request to a different Magistrate, Magistrate Wright, for the referral of the proposed questions. Magistrate Wright declined to consider the application as the proceeding was marked as part heard before Magistrate Garnett. Further directions hearings were held on 5 November, 24 November and 10 December 2008 while the plaintiff (according to his affidavit in this Court) considered his options. On 10 December 2008 the proceeding was adjourned until 29 January 2009 before Magistrate Garnett.

On 14 January and 28 January 2009 the plaintiff advised the defendants that he would make another application to Magistrate Garnett for a referral on 29 January 2009. His counsel duly did so on that day. In terms, counsel asked the Magistrate to "reconsider" his decision of 16 October 2008. He did not distinctly submit that the previous decision was affected by jurisdictional error or error of law, although he did submit in general terms, on the authority of *Walton v Gardiner* [1992] HCA 12; (1993) 177 CLR 378, that the application for a referral on the previous occasion did not constitute an abuse of process. He did not suggest that any new circumstances had intervened, but nevertheless submitted that a referral should take place at that stage. He acknowledged that sending the questions to a medical panel at that stage would involve a delay of some three months. The Magistrate indicated that he could resume the trial sooner than that. The VWA again took a neutral position, although its counsel noted that the matter had by then come before the Court on 7 different occasions and he observed that "if it wasn't an abuse of process on 16 October, it surely is now" [transcript p6]. He also pointed out, without contradiction, that at the hearing on 10 December he had observed that if the plaintiff was dissatisfied with the ruling of 16 October 2008 his appropriate remedy was to approach the Supreme Court, and that Magistrate Garnett had then noted that time would run out for that purpose within a few days. Magistrate Garnett then announced the following ruling:

> "In relation to this matter, I have decided not to reconsider the decision I made on 16 October. I considered at that time that the application for a referral to be an abuse of process for the reasons I gave on that date. The plaintiff has elected not to review my decision by way of Supreme Court proceedings. Since 16 October the matter has been listed before this court for a further six occasions over a period of three and a half months. If the matter proceeded on the earliest date when the application was made and refused it would have obviously been finalised by now. The referral stage will result in the further delay of two to three months before a medical panel opinion is obtained and this delay is inexcusable. I therefore refuse the application for me to reconsider my earlier decision to refuse to refer the matter to a medical panel and I'll fix the matter for hearing ASAP."

The plaintiff commenced his proceeding in this Court on 10 March 2009. He sought orders quashing the decisions made by Magistrate Garnett on 16 October 2008 and 29 January 2009.

[2] [1996] VicRp 89; [1996] 2 VR 582.

[3] [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].

[4] [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.

[5] At 267 [15].

[6] *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.

[7] On 16 October 2008 the plaintiff's then counsel, Mr Smith, who said he had been "briefed very late in the piece", stated that a referral would be particularly suitable because there had been extensive medical

examinations of the plaintiff and a referral would considerably shorten the amount of court time required to deal with the matter, which he estimated at 4 days. No submission along those lines was made on 29 January 2009 by the plaintiff's then counsel, Mr Gray; nor did Mr Gray give any estimates as to hearing times or as to savings in hearing times. Indeed, after the ruling of 29 January 2009, counsel then appearing for the defendant, Mr O'Brien, gave an estimate of 2 days without being contradicted. The draft paperwork necessary for a referral to a Panel had still not been prepared as at 29 January 2009.
[8] In summary, those submissions and my responses were as follows.

(a) The plaintiff submitted that the Magistrate's approach was out of harmony with past and current County Court practice. On examination, the evidence relied on for this proposition, being certain rulings and practice notes of the County Court, did not bear it out. In any event, mere divergence from County Court practice, of itself, does not necessarily constitute legal error.

(b) The plaintiff complained about the Magistrate's statements that the plaintiff had had prior opportunity, either at conciliation (in 2003) or at the directions hearing on 8 August 2008, to seek a referral and that the plaintiff had not complied with Magistrates' Court Practice Direction No 2 of 2004 or with r9.09 of the *Magistrates' Court Rules*. However, the Magistrate was perfectly correct in his statements of fact about those matters. Nor were they irrelevant to an assessment of whether a very late application for a referral might involve an abuse of process. Practice Direction No 2 of 2004 (issued by the Chief Magistrate) dealt with proceedings under the Act. It provided for a directions hearing to be held 3 months after the filing of a defence. The directions hearing was to be attended by legal practitioners fully conversant with the proceeding. They would be able to claim costs accordingly. All interlocutory issues were expected to be resolved prior to the directions hearing. Paragraph 3 stated: "It is expected that if a party wishes to refer medical questions to a Medical panel for an opinion then the application to do so will be made prior to the date of the directions hearing". The plaintiff advanced absolutely no explanation to the Magistrate for failing to comply with this Practice Direction. Neither was any explanation put forward on his behalf to this Court. Rule 9.09 provides that a request for a referral is to be in a certain form and that a copy must be served on all other parties not less than two days before the request is to be considered by the Court. Mr Hurley submitted that paragraph 3 of Practice Direction No 2 was inconsistent with this Rule and therefore ineffective. He also submitted that where a party serves a copy of their request 2 clear days before the scheduled trial date (as the plaintiff almost did), r9.09 precludes any finding of abuse of process. Both submissions are incorrect. There is no inconsistency. The rule deals only with the time for giving notice to the other parties of the proposed request. It does not deal with the question of when the request itself should be made to the Court. In any event, mere compliance with all applicable statutes and rules of court does not necessarily preclude a finding of abuse of process: *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27; (2006) 226 CLR 256 at 264 [6], 277-278 [54], 279-281 [62]-[69], esp at [62]; (2006) 227 ALR 425; (2006) 80 ALJR 1100; [2006] Aust Torts Reports 81-849; (2006) 45 MVR 288.

(c) The plaintiff submitted that Magistrate Garnett should not have taken into account the fact that the Panel's opinion on the proposed medical questions would not have dealt with the medical issues as to pain and suffering arising in respect of the s98A claim, as distinct from the related issues arising in the s98 claim. But this circumstance was not irrelevant. There would have remained a potential need for medical witnesses to attend and be cross-examined at a later trial of the s98A claim. Very likely, the remaining medical issues would have overlapped with those dealt with in the Panel's opinion. Without a referral, all medical issues in both claims could have been dealt with together, with savings accordingly. This was a relevant countervailing factor in relation to any suggestion that a referral would have been cheaper, quicker or more efficient overall. It is true that this situation will always arise in cases involving s98 and s98A claims but not all proceedings under the Act in which referrals might be sought will involve such claims. In any event, the Magistrate, quite properly, did not treat this factor as determinative, but only as a relevant matter.

(d) The plaintiff suggested, somewhat faintly, that Magistrate Garnett had adopted a "policy" of refusing requests for referral which were raised after the directions hearing and less than 2 clear days before the question fell to be considered by the Court. Counsel referred to the two earlier cases, which had been cited by Magistrate Garnett himself, in which he had refused late requests for referral. However, in each of the three cases (including the present case) Magistrate Garnett carefully examined the procedural history and the nature of the issues in the proceeding and applied the authorities as to abuse of process to the facts as found. There is no proper foundation for any suggestion that he had adopted a fixed, unalterable rule or that he was unprepared to listen to argument.

(e) Mr Hurley objected to Magistrate Garnett's reference to the fact that the plaintiff had been legally represented, but this was obviously a relevant circumstance.

(f) Mr Hurley complained about the Magistrate's mention of the increased frequency of late requests. However, in a busy Magistrates' Court endeavouring to advance the efficient administration of justice for the benefit of all potential litigants, this was a relevant matter: see *Aon v Risk Services Australia Limited v Australian National University* [2009] HCA 27; (2009) 239 CLR 175; (2009) 258 ALR 14; (2009) 83 ALJR 951.
[9] [1996] VicRp 89; [1996] 2 VR 582.

[10] [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].
[11] [2009] HCA 27 at [35]; (2009) 239 CLR 175; (2009) 258 ALR 14; (2009) 83 ALJR 951.

APPEARANCES: For the plaintiff Skordos: Mr T Hurley, counsel. Nowicki Carbone Lawyers. For the secondnamed and thirdnamed defendants: Mr M Fleming, counsel. Herbert Geer Lawyers.
