High Court of Australia

Williams v Spautz [1992] HCA 34; (1992) 174 CLR 509 (27 July 1992)

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WILLIAMS AND OTHERS v. SPAUTZ [1992] HCA 34; (1992) 174 CLR 509 F.C. 92/027

Criminal Law

High Court of Australia
Mason CJ(1), Brennan(2), Deane(3), Dawson(1), Toohey(1), Gaudron(4) and McHugh(1) JJ

CATCHWORDS

Criminal Law - Abuse of process - Stay of proceedings - Action for wrongful dismissal against university - Information for criminal defamation by plaintiff against officer of university - Predominant purpose of informant to secure reinstatement or favourable settlement of action - Whether abuse of process.

HEARING

Canberra, 1991, May 7; 1992, July 27. 27:7:1992

DECISION

MASON C.J., DAWSON, TOOHEY AND McHUGH JJ. This appeal is brought by the appellants against orders of the Court of Appeal of New South Wales made 12 December 1990. By those orders, the Court of Appeal set aside orders obtained by the appellants from Smart J. in the Supreme Court staying certain prosecutions instituted by the respondent Dr Spautz against the first two appellants and Mr L. Gibbs (now deceased) on the ground that the proceedings constituted an abuse of the process of the court. Some only of the issues that confronted Smart J. are before this Court. However, it is necessary to set out in some detail the complex facts which have given rise to the proceedings and the course of the proceedings.
The facts and the proceedings

2. From 1973 to 1980, Dr Spautz was a senior lecturer in the Department of Commerce at the University of Newcastle. In 1977, Professor Williams was appointed to the Chair of Commerce at the University. By the end of 1978 and throughout 1979, Dr Spautz was in serious conflict with Professor

Williams; he alleged plagiarism in the Professor's doctoral thesis, disputed the Professor's appointment to an administrative post within the Department and threatened litigation. Towards the end of 1979, the dispute reached the University Council and a committee, chaired by Professor Michael Carter, was appointed to report on and attempt to resolve the dispute. Upon the recommendation of the committee, the University Council directed Dr Spautz to stop his one-man campaign against Professor Williams; it also advised Dr Spautz that disobedience of the direction would be regarded as misconduct within the meaning of the relevant University by-law. Subsequently, a further committee, chaired by the Deputy Chancellor, Mr Justice Kirby, was appointed to investigate the conduct of Dr Spautz and, in particular, to report whether he had disobeyed the Council direction. Following the report of this committee, which made no recommendations but found in favour of Professor Williams on a number of issues, the Council resolved on 20 May 1980 to dismiss Dr Spautz, effective as from 23 May, unless he resigned prior to that time. Dr Spautz did not resign and thus his dismissal took effect.

3. In August 1980 Dr Spautz commenced proceedings in the Equity Division of the Supreme Court of New South Wales seeking a declaration that his dismissal was invalid. Those proceedings have not been concluded and, as they are not before this Court, it is unnecessary and inappropriate to say anything further about them.

4. Those proceedings were the first of many forays by Dr Spautz into the litigation process. From 11 August 1981 to the present date, Dr Spautz has commenced over thirty proceedings - the majority, criminal prosecutions - against persons who occupy positions of authority at the University or who played a role in the events leading to his dismissal. In the Court of Appeal, Priestley J.A. listed thirty-two proceedings instituted by Dr Spautz and observed that further actions not relevant to the matters in issue in this case had also been commenced. The criminal informations laid by Dr Spautz alleged a range of offences including criminal defamation, conspiracy seriously to injure, conspiracy falsely to accuse, attempting to pervert the course of justice and unlawful conspiracy. Invariably, one of the causes of action alleged in the civil actions was defamation.

5. In this appeal we are concerned only with particular informations laid against Professor Williams, Mr Morris and Mr Gibbs. On 13 July 1984, Dr Spautz laid an information against Professor Williams charging "several counts" of unspecified criminal defamation on and after 1 November 1978. On 26 September 1984, Dr Spautz laid an information against Mr Morris charging a conspiracy with Mr Justice Kirby and other members of the University seriously to injure the respondent without justification and by illegal means. On 18 March 1985, Dr Spautz laid an information against Mr Gibbs charging criminal defamation and a conspiracy with Mr Justice Kirby, Professor Dutton and Mr Oliver criminally to defame. Other criminal and civil actions were instituted by the respondent against the appellants but those actions are not of present relevance.

6. Each of the appellants commenced separate proceedings seeking, inter alia, declarations that the prosecutions were an abuse of the process of the court. Together with related actions, these proceedings came before Smart J. who, in final orders made 17 June 1988, granted the declarations sought and stayed the prosecutions permanently. Dr Spautz appealed against these orders. The Court of Appeal (Priestley and Meagher JJ.A.; Mahoney J.A. dissenting) allowed the appeal and set aside the declarations and orders made by Smart J. (1) Spautz v. Gibbs (1990) 21 NSWLR 230. The appellants now appeal to this Court against that decision. In addition, Dr Spautz has filed a lengthy Notice of Contention but Mr Cassidy Q.C. for Dr Spautz did not support the notice by argument in this Court.

7. For the sake of completeness, we should mention the outcome of other prosecutions instituted by Dr Spautz. On 14 October 1983, Hunt J. dismissed certain prosecutions initiated by Dr Spautz against

members of the University and made declarations that the prosecutions constituted an abuse of process and orders permanently staying those prosecutions (2) Spautz v. Williams (1983) 2 NSWLR 506. Approximately one month later, a claim for relief by members of the University came before Yeldham J. in relation to further prosecutions commenced by Dr Spautz. His Honour not only made orders in terms similar to those of Hunt J. in respect of the further prosecutions instituted by Dr Spautz but also made an order pursuant to s.84(2) of the Supreme Court Act 1970 (N.S.W.) declaring the respondent a vexatious litigant and restraining him from laying further informations or otherwise instituting criminal proceedings against those members of the University or their senior counsel without prior leave of that Court.

The trial judge's findings of fact and the conclusions reached by the Court of Appeal

8. After examining in detail the conduct of Dr Spautz during his self-proclaimed campaign for justice, Smart J. made this finding of fact:

"The predominant purpose of Dr Spautz in instituting and maintaining the criminal proceedings, the subject of the present applications, against Profs Gibbs and Williams and Mr Morris was to exert pressure upon the University of Newcastle to reinstate him and/or to agree to a favourable settlement of his wrongful dismissal case." (emphasis added)

before the trial judge from which he could draw that conclusion. In particular, there was a mass of documentation comprising newsletters, pamphlets and memoranda which the respondent had written and distributed to members of the University, media outlets, politicians and legal advisers to his opponents in the litigation. This material contained warnings about proposed legal proceedings, demands for reinstatement, discussions of Dr Spautz' purpose and motive and, what is more important, threats. In the opinion of the trial judge, the material plainly showed that, from the outset, Dr Spautz intended to exert pressure on the persons with power to decide the issues affecting him not to proceed in a manner unfavourable to him if they wished to avoid being sued. In this way he sought to bring pressure to bear so that the University would settle his wrongful dismissal action on terms, including reinstatement, favourable to himself. The trial judge found that, although the great bulk of this material was circulated prior to the institution of the proceedings now in question, material later circulated, while different in tone, hinted at the same theme.

9. On appeal, the Court of Appeal rejected a challenge to the central finding concerning Dr Spautz' predominant purpose.

10. The trial judge also found that Dr Spautz had other purposes in instituting the various criminal proceedings and that most of those purposes were improper. One such purpose was the collection of material for research which Dr Spautz claimed to be conducting into corrupt practices in Australian institutions. Another purpose was vindication of Dr Spautz' reputation. Although the trial judge referred in one passage in his judgment to vindication of reputation as not being a proper purpose for a person to have in instituting or maintaining proceedings for criminal defamation, later his Honour said that this purpose, though interwoven with the dominant purpose of securing reinstatement, did not detract from the finding that securing reinstatement was the dominant and improper purpose.

11. The trial judge expressed his understanding of the concept of abuse of process, which was based on the formulation by Hunt J. in Spautz v. Williams (3) ibid., at p 539., in these terms

> "The essence of an abuse of process action is that the proceedings complained of were instituted and/or maintained for a purpose other than that for which they

> were properly designed or exist, or to achieve for the person instituting them some collateral advantage beyond that which the law offers, or to exert pressure to effect an object not within the scope of the process. The focus in such a suit is on the purpose for which the proceedings exist, and on the dominant purpose of the person charged with abuse of process in instituting them."

His Honour then concluded that the fundamental purposes of a criminal defamation prosecution are to punish the defamer and to protect the community and that the dominant purpose of the prosecutor must be to bring the offender to justice. As the respondent's predominant purpose in bringing the prosecutions, namely, to secure his reinstatement, was improper and ulterior, the trial judge declared each of the relevant proceedings an abuse of process and ordered them stayed permanently.

12. In the Court of Appeal, Priestley J.A. concluded that the trial judge erred in his formulation of the principles governing abuse of process and in his view of the circumstances in which a stay of proceedings would be ordered. His Honour, though conceding that proceedings instituted for an improper purpose were in a sense an abuse of process, considered that no permanent stay should be granted in the absence of some improper act in the prosecution of the process. Moreover, after examining the judgments of this Court in Jago v. District Court (N.S.W.) (4) [1989] HCA 46; (1989) 168 CLR 23., Priestley J.A. considered that the governing principle was that supervising courts should restrict use of their power to control abuse of process to those cases in which exercise of the power is the only way of ensuring that an accused person is not deprived of a fair trial by reason of such abuse. His Honour concluded, on the materials, that the appellants would not have been deprived of a fair trial.

13. Mahoney J.A. dissented, applying the basic principle followed by the trial judge that to bring proceedings to achieve objects ulterior to the purpose of the cause of action as pleaded was an abuse of process for which a permanent stay should be granted.

The arguments of the parties

14. In essence, the case for the appellants is that the principles relating to abuse of process were correctly stated and applied by the trial judge. According to the appellants, the majority in the Court of Appeal was mistaken in asserting that relief for abuse of process should not be granted in the absence of an improper act. The appellants also contend that a permanent stay will be granted on the ground of abuse of process when the proceedings have been commenced and maintained for an improper purpose, even if the circumstances are such that the defendant may obtain a fair trial. The appellants submit that Jago, when properly understood, provides no support for the judgment of the Court of Appeal. On the other hand, the case for Dr Spautz is that Priestley J.A. correctly applied the principles governing abuse of process.

The jurisdiction to grant a permanent stay for abuse of process

15. It is well established that Australian superior courts have inherent jurisdiction to stay proceedings which are an abuse of process (5) Clyne v. N.S.W. Bar Association [1960] HCA 40; (1960) 104 CLR 186, at p 201; Barton v. The Queen [1980] HCA 48; (1980) 147 CLR 75, at pp 96, 107, 116; Jago. Although the term "inherent jurisdiction" has acquired common usage in the present context, the question is strictly one of the power of a court to stay proceedings. That power arises from the need for the court to be able to exercise effectively the jurisdiction which the court has to dispose of the proceedings. The existence of that jurisdiction has long been recognized by the House of Lords (6) Metropolitan Bank v. Pooley (1885) 10 App Cas 210; Connelly v. D.P.P. (1964) AC 1254; Reg. v. Humphrys (1977) AC 1. The jurisdiction extends to both civil and criminal proceedings. As Lord

Morris of Borth-y-Gest observed in Connelly v. D.P.P. (7) (1964) AC, at p 1301.

> "(A) court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such 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."

16. The jurisdiction to grant a stay of a criminal prosecution has a dual purpose, namely, "to prevent an abuse of process or the prosecution of a criminal proceeding ... which will result in a trial which is unfair" (8) Barton (1980) 147 CLR, at pp 95-96; Jago (1989) 168 CLR, at p 46; see also Reg. v. Derby Crown Court; Ex parte Brooks (1984) 80 Cr App R 164, at pp 168-169. This does not mean that the prosecution of proceedings in such a way as to make them an instrument of oppression which will result in an unfair trial stands outside the concept of abuse of process. That term has been applied on various occasions to describe the situation just mentioned as well as the more traditional case where the prosecution is brought for an improper purpose.

17. However, in the light of the particular object sought to be achieved by an exercise of the jurisdiction in each class of case, it is important to distinguish between them. 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 available means, such as directions to be given by the trial judge, of bringing about a fair trial. Jago was such a case. Consequently, the judgments in that case gave emphasis to the necessity that the court should satisfy itself upon this point before granting the relief sought (9) Jago (1989) 168 CLR, at pp 34, 48-49, 54, 56-58, 72-73, 75.

18. If, however, a stay is sought to stop a prosecution which has been instituted and maintained for an improper purpose, it by no means follows that it is necessary, before granting a stay, for the court to satisfy itself in such a case that an unfair trial will ensue unless the prosecution is stopped. There are some policy considerations which support the view that the court should so satisfy itself. It is of fundamental importance that, unless the interests of justice demand it, courts should exercise, rather than refrain from exercising, their jurisdiction, especially their jurisdiction to try persons charged with criminal offences, and that persons charged with such offences should not obtain an immunity from prosecution. It is equally important that freedom of access to the courts should be preserved and that litigation of the principal proceeding, whether it be criminal or civil, should not become a vehicle for abuse of process issues on an application for a stay, unless once again the interests of justice demand it. In the United States, great weight has been given to these factors (10) See Rosemont Enterprises Inc. v. Random House Inc. (1966) 261 F Supp 691, at pp 696-697.

19. These factors have considerable force. There is a risk that the exercise of the jurisdiction to grant a stay may encourage some defendants to seek a stay on flimsy grounds for tactical reasons. But that risk and the other policy considerations already mentioned are not so substantial as to outweigh countervailing policy considerations and deter the courts from exercising the jurisdiction in appropriate circumstances.

20. As Lord Scarman said in Reg. v. Sang (11) [1979] UKHL 3; (1980) AC 402, at p 455., every court is "in duty bound to protect itself" against an abuse of its process. In this respect there are two fundamental policy considerations which must be taken into account in dealing with abuse of process in the context of criminal proceedings. Richardson J. referred to them in Moevao v. Department of

Labour (12) (1980) 1 NZLR 464, at p 481 in a passage which Mason C.J. quoted in Jago (13) (1989) 168 CLR, at p 30. The first is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice. As Richardson J. observed (14) (1980) 1 NZLR, at p 482, the court grants a permanent stay

> "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 ... that the Court processes are being employed for ulterior purposes or in such a way ... as to cause improper vexation and oppression."

21. Other objections to the exercising of the jurisdiction arising from the availability of other remedies in the form of contempt, malicious prosecution and the tort of collateral abuse of process have not prevailed. Neither the action for malicious prosecution nor the action for collateral abuse offers the prospect of early termination of the subject proceedings. An action for malicious prosecution cannot be brought until those proceedings have terminated. Although an action for collateral abuse can be brought while the principal proceedings are pending, the action is at best an indirect means of putting a stop to an abuse of the court's process which the court should not permit to continue. Contempt stands in a rather different position because an injunction may be granted to restrain the continuation of a contempt (15) See Hammond v. The Commonwealth [1982] HCA 42; (1982) 152 CLR 188. But the possibility that a similar result might be achieved by an application of the law of contempt is not a reason for denying the existence of the inherent jurisdiction of a court to protect its own process from abuse, more particularly when conduct of the class under consideration has traditionally been dealt with under the rubric of abuse of process rather than as an instance of contempt. In the words of Lord Salmon in Reg. v. Humphrys (16) (1977) AC, at p 46.

> "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 its inherent power to prevent abuse of its process)".

On the score of costs alone, the exercise of the power will protect the accused person from expenditure on a trial on indictment which he or she cannot recoup.

22. It follows that the Court of Appeal was mistaken in treating the present case - which rested on abuse of process in the sense of proceedings instituted and maintained for an improper purpose - as if it were governed by the considerations which were influential, even decisive, in Jago. There, the complaint was that delay and prejudice, whether it be called abuse of process or not, precluded a fair trial. No element of improper purpose was involved. So it was relevant, indeed necessary, to determine whether a fair trial could be held. That is not the position here when, even if the trial be fair, the proceedings have been brought for an improper purpose and therefore amount to an abuse of process.
Is it essential to the exercise of the jurisdiction that the proceedings have been instituted not only for an improper purpose but also without reasonable grounds?

23. What the appellants assert here is that the court will with the statement of Lord Hodson in

Connelly (17) (1964) AC, at p 1337.

> "To exclude a litigant with a prima facie case,
> whether prosecutor or civil claimant, from the courts
> seems to be ... not justifiable unless an Act of
> Parliament so provides".

However, in that case, a majority of the House of Lords considered that a superior court has power to prevent an abuse of process, certainly when it amounts to oppression (18) ibid., per Lord Reid at p 1296; Lord Morris at pp 1301-1302; Lord Devlin at p 1355. The same view was taken by all three members of the English Court of Appeal in Goldsmith v. Sperrings Ltd. (19) (1977) 1 WLR 478. Lord Denning M.R., who dissented on the application of the relevant principles to the particular facts, stated that the court would prevent an abuse of process where, though the process might appear to be entirely proper and correct, it was used for an improper purpose (20) ibid., at p 489. Scarman L.J. was of a like opinion (21) ibid., at pp 498-499, as was Bridge L.J. (22) ibid., at p 503. Bridge L.J. identified one difficulty when he said (23) ibid.

> "What if a litigant with a genuine cause of action,
> which he would wish to pursue in any event, can be shown
> also to have an ulterior purpose in view as a desired
> byproduct of the litigation? Can he on that ground be
> debarred from proceeding? I very much doubt it."
> (emphasis added)

So would we. But his Lordship, by implication, evidently sees no difficulty with the case in which the plaintiff does not wish to pursue his or her cause of action to a conclusion because he or she intends to use the proceedings for a collateral and improper purpose.

24. In our view, the power must extend to the prevention of an abuse of process resulting in oppression, even if the moving party has a prima facie case or must be assumed to have a prima facie case. Take, for example, a situation in which the moving party commences criminal proceedings. He or she can establish a prima facie case against the defendant but has no intention of prosecuting the proceedings to a conclusion because he or she wishes to use them only as a means of extorting a pecuniary benefit from the defendant. It would be extraordinary if the court lacked power to prevent the abuse of process in these circumstances.

The relationship between the inherent jurisdiction and the tort of collateral abuse of process

25. In elucidating the principles governing the exercise of the inherent jurisdiction, the courts have had regard to the tort of collateral abuse of process. This cause of action has been recognized in England (24) Grainger v. Hill [1838] EngR 365; (1838) 4 Bing(NC) 212 (132 ER 769); Gilding v. Eyre [1861] EngR 793; (1861) 10 CB(NS) 592 (142 ER 584); and, more recently, Speed Seal Ltd. v. Paddington (1985) 1 WLR 1327, at pp 1334-1335 and Metall and Rohstoff v. Donaldson Inc. (1990) 1 QB 391, at p 469, the United States (25) Prough v. Entriken (1849) 11 Pa. 81 and Canada (26) Guildford Industries Ltd. v. Hankinson Services Ltd. (1973) 40 DLR (3d) 398. It was recognized by this Court in Varawa v. Howard Smith Co. Ltd. (27) [1911] HCA 46; (1911) 13 CLR 35. and Dowling v. Colonial Mutual Life Assurance Society Ltd. (28) [1915] HCA 56; (1915) 20 CLR 509.

26. The tort of collateral abuse of process differs from the older action for malicious prosecution in that the plaintiff who sues for abuse of process need not show: (a) that the initial proceeding has terminated in his or her favour; and (b) want of reasonable and probable cause for institution of the initial proceeding (29) Grainger v. Hill.

27. Central to the tort of abuse of process is the requirement that the party who has instituted proceedings has done so for a purpose or to effect an object beyond that which the legal process offers. The centrality of this element in the tort was recognized in the case which is generally recognized as having established the tort of abuse of process, Grainger v. Hill. In that case, the defendants lent money to Grainger in September 1836, secured by a mortgage on a ship. The money was to be repaid in September 1837. However, the defendants decided to seek possession of the ship's register before the loan was due to be repaid. When Grainger refused to repay the loan in response to the defendants' threat of arrest, they commenced an action in assumpsit in the King's Bench for recovery of the loan. A writ of capias was issued endorsed for bail pursuant to which the debtor was arrested. When the writ was issued on the instructions of the defendants, the sheriff's officers who served the process on Grainger told him that they had come for the register and that, if he did not deliver it or find bail, they would take him into custody. Grainger was imprisoned for twelve hours before he handed over the register. He then sued the defendants in a special action on the case. They sought a nonsuit, arguing that it had not been proved that the defendants' action had terminated and that Grainger had not alleged an absence of reasonable and probable cause. These arguments would have prevailed if Grainger's action had been for malicious prosecution or malicious arrest.

28. The Court rejected the notion that the action was in essence an action for malicious prosecution or malicious arrest and held that it was a distinct and independent action for abuse of process. Tindal C.J. said (30) (1838) 4 Bing(NC), at p 221 (132 ER, at p 773).

> "If the course pursued by the Defendants is such that there is no precedent of a similar transaction, the Plaintiff's remedy is by an action on the case, applicable to such new and special circumstances; and his complaint being that the process of the law has been abused, to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause." (emphasis added)

Bosanquet J. said (31) ibid., at p 224 (p 774 of ER).

> "This is not an action for a malicious arrest or prosecution, or for maliciously doing that which the law allows to be done: the process was enforced for an ulterior purpose; to obtain property by duress to which the Defendants had no right. The action is not for maliciously putting process in force, but for maliciously abusing the process of the Court."

29. In conformity with the approach adopted in Grainger v. Hill, this Court has regarded the purpose of the party instituting the proceedings as of crucial importance. In Varawa, the plaintiff alleged that the defendant company had instituted proceedings for breach of contract and procured the issue of a writ of capias ad respondendum pursuant to which the plaintiff was arrested with the intention of coercing him into paying the defendant moneys to which it was not entitled. The allegations were found unproved, but Griffith C.J., O'Connor and Isaacs JJ. recognized the existence of the tort of abuse of process (32) (1911) 13 CLR, at pp 55-56, 70, 91. Griffith C.J. referred to the abuse in Grainger v. Hill as being "a use of original process for purposes foreign to the scope of the process itself, that scope being merely to obtain security for enforcing the payment of an alleged debt" (33)

ibid., at p 55. O'Connor J. expressed himself in similar terms (34) ibid., at p 70. And Isaacs J. observed (35) ibid., at p 91.

> "In the sense requisite to sustain an action, the term 'abuse of process' connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse of process for this purpose".

30. In Dowling, the respondent Society bought up a debt owing by the appellant and instituted bankruptcy proceedings against the appellant in order, after a sequestration order had been made, to ascertain by examination the identity of the person behind the appellant's publication of defamatory material. The making of a sequestration order was opposed on the ground, amongst others, that the bankruptcy proceedings were an abuse of process. This Court (Isaacs and Powers JJ.; Griffith C.J. dissenting) held there was no abuse of process. Isaacs J. said (36) (1915) 20 CLR, at pp 521-522.

> "If the object sought to be effected by the process is within the lawful scope of the process, it is a use of the process within the meaning of the law, though it may be malicious, or even fraudulent, and in the circumstances the fraud may be an answer; if, however, the object sought to be effected by means of the process is outside the lawful scope of the process, and is fraudulent, then - both circumstances concurring - it is a case of abuse of that process, and the Court will neither enforce nor allow it to afford any protection, and will interpose, if necessary, to prevent its process being made the instrument of abuse. Grainger v. Hill laid down the distinction."

The words "both circumstances concurring" suggest that both an improper object and fraud are needed before abuse of the court process is made out. His Honour was concerned to take account of the advice given by the Privy Council in King v. Henderson (37) (1898) AC 720, at p 731 where, in the context of the Bankruptcy Act 1887 (N.S.W.), it was held that an abuse of process does not exist unless "the remedy would be unsuitable, and would enable the person obtaining it fraudulently to defeat the rights of others". In expressing the matter in that way, the Privy Council was doing no more than saying that the existence of an unworthy or reprehensible motive for bringing the action was not enough and that it must appear that the purpose sought to be effected by the litigant in bringing the proceedings was not within its scope and was improper. There is no suggestion elsewhere that fraud is an additional and indispensable element in the doctrine of abuse of process, though it stands to reason that a purpose which stands outside the scope of the process will often be unlawful, fraudulent or otherwise reprehensible.

31. There is no suggestion in the majority judgments in Dowling - and certainly none in the dissenting judgment of Griffith C.J. - that a party cannot allege that a suit still pending is unjust or amounts to an abuse of process. That had been a rule of policy which the courts applied in cases of malicious arrest and malicious prosecution. In Gilding v. Eyre, Willes J. said (38) (1861) 10 CB(NS), at p 604 (142 ER, at p 589).

> "It is a rule of law, that no one shall be allowed to allege of a still depending suit that it is unjust. This can only be decided by a judicial determination, or other final event of the suit in the regular course of it. That is the reason given in the cases which established the doctrine, that, in actions for a malicious arrest or prosecution, or the like, it is requisite to state in the declaration the determination of the former suit in favour of the plaintiff, because the want of probable cause cannot otherwise be properly alleged".

32. Subsequently, in Parton v. Hill, Blackburn J. referred to the observations of Willes J. in Gilding v. Eyre with approval, but went on to point out (39) (1864) 10 LT(NS) 414, at p 415 that Parton v. Hill was not a case of malicious prosecution but one of abuse of process so that

> "the complaint must be that the process of the court has been abused to effect an object not within the scope of the process, in which case it is immaterial whether the suit has been determined or not".

33. No doubt the old rule of policy was based in part at least upon the view that it was for the court whose jurisdiction had initially been invoked to decide in the regular course of its proceedings whether the cause of action must inevitably fail. Nowadays the remedy by way of summary judgment is part of the regular course of proceedings. But that remedy is available only in cases in which the plaintiff is bound to fail in his or her action.

The boundaries of abuse of process

34. The observations of the Privy Council in King v. Henderson (40) (1898) AC, at p 731 and those of Isaacs J. in Dowling (41) (1915) 20 CLR, at pp 521-522, to which we referred earlier, represent an attempt to achieve a formulation which keeps the concept of abuse of process within reasonable bounds. To say that a purpose of a litigant in bringing proceedings which is not within the scope of the proceedings constitutes, without more, an abuse of process might unduly expand the concept. The purpose of a litigant may be to bring the proceedings to a successful conclusion so as to take advantage of an entitlement or benefit which the law gives the litigant in that event.

35. Thus, to take an example mentioned in argument, an alderman prosecutes another alderman who is a political opponent for failure to disclose a relevant pecuniary interest when voting to approve a contract, intending to secure the opponent's conviction so that he or she will then be disqualified from office as an alderman by reason of that conviction, pursuant to local government legislation regulating the holding of such offices. The ultimate purpose of bringing about disqualification is not within the scope of the criminal process instituted by the prosecutor. But the immediate purpose of the prosecutor is within that scope. And the existence of the ultimate purpose cannot constitute an abuse of process when that purpose is to bring about a result for which the law provides in the event that the proceedings terminate in the prosecutor's favour.

36. It is otherwise when the purpose of bringing the proceedings is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed (42) In re Majory (1955) Ch 600, at pp 623-624 or some collateral advantage beyond what the law offers (43) Goldsmith v. Sperrings Ltd. (1977) 1 WLR, at pp 498-499; see also Varawa (1911) 13 CLR, at p 91. So, in Dowling, Isaacs J. pointed out that (44) (1915) 20 CLR, at p 524.

> "if, for instance, it had been shown that the Society had simply threatened Dowling that unless he did what they had no right to demand from him, namely, give up certain names, they would proceed to sequestration, and they had proceeded accordingly, there would have been in law an abuse of the process".

However, because the Society wished to use the process for the very purpose for which it was designed, there was no abuse of process.
Is it essential to the exercise of the jurisdiction that there should be an improper act as well as an improper purpose?

37. Priestley J.A. drew heavily on the law relating to the tort of collateral abuse of process, particularly judicial decisions in the United States, to support the proposition that a permanent stay will not be granted in the absence of an improper act, improper purpose alone being insufficient to ground such a stay. His Honour drew a distinction between "the actual improper use of the process ... (and) the predominant purpose of the party for the misuse" (45) (1990) 21 NSWLR, at p 278, only the first satisfying the requirement that there be an act. A similar distinction seems to have been drawn by Clarke J.A. in Hanrahan v. Ainsworth (46) (1990) 22 NSWLR 73, at p 118 between the institution or maintenance of an action for an improper purpose and "an association of process and an overt act which, in combination, demonstrate the improper purpose".

38. Neither the authorities in Australia nor those in England insist on the need for an improper act as an essential ingredient in the concept of abuse of process. However, the authorities do speak of the "use" of process for a purpose which stamps it as an abuse (47) See, for example, Varawa (1911) 13 CLR, at p 55; Metall and Rohstoff v. Donaldson Inc. (1990) 1 QB, at p 469. That is not surprising because an improper act may, in appropriate circumstances, afford evidence of improper purpose and abuse of process. And in some, at least, of the cases there was a use of the process in the form of an improper act after the proceedings had been instituted. Thus, in Grainger v. Hill, the issue of the capias, though virtually contemporaneous with the commencement of the action in assumpsit, constituted an improper act within the framework of the principal proceedings that had been commenced immediately before. The statements that there must be a use of the proceedings are equivocal because the commencement of the proceedings may be described as a "use" of them, even if no attempt be made thereafter to take advantage of them for such a purpose as would constitute an abuse of process. Especially is this so when the party commencing the proceedings has previously threatened that, unless the other party complies with some improper demand the first party has made, such as payment of an alleged debt, criminal proceedings will be commenced and prosecuted to a conviction. In such a case, the very commencement of the proceedings amounts to use of them for an improper purpose.

39. In his dissenting judgment in Goldsmith v. Sperrings Ltd., Lord Denning M.R. was of the view that to issue a writ for an improper purpose constitutes without more an abuse of process (48)) (1977) 1 WLR, at pp 489-490. His Lordship appears to have regarded the cases on the tort of collateral abuse of process, including Grainger v. Hill, as supporting this proposition. In this respect, Lord Denning may well have been incorrect. However, his Lordship was right in treating the comments of Lord Evershed M.R., when he delivered the judgment of the Court of Appeal in In re Majory, as supporting the proposition. There, Lord Evershed referred (49) (1955) Ch, at pp 623-624 to a general rule

> "that court proceedings may not be used or threatened for the purpose of obtaining for the person

> so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused".

In our view, that is a correct statement of the principle.

40. In reaching a contrary conclusion, Priestley J.A. relied to a large extent on the cases dealing with the tort of collateral abuse of process. In that context, it is perhaps understandable that emphasis has been given to the need for an improper act which occasions damage to the plaintiff. At least in the United States, as the judgment in Rosemont Enterprises Inc. v. Random House Inc. pointed out (50) (1966) 261 F Supp, at p 695. See also Stromberg v. Costello (1978) 456 F Supp 848; Curiano v. Suozzi (1984) 469 NE 2d 1324, at pp 1326-1327.

> "(t)he gist of the action for abuse of process lies in the improper use of process after it is issued." (emphasis added)

But it by no means follows that a court needs to be satisfied of the commission of such an act when the court is called upon to protect its own process from abuse.

41. Priestley J.A. was also concerned to discount the notion that abuse of process calls for an inquiry into the moving party's motivation in instituting the proceedings. Much earlier, Isaacs J. was at pains to distinguish between motivation and abuse of process (51) Dowling (1915) 20 CLR, at pp 521-523. Inquiry into motivation alone might prove a fragile foundation on which to base an exercise of the power to grant a permanent stay. For that reason, apart from any other, it is more satisfactory to base an exercise of the jurisdiction in cases of improper purpose upon a use or threatened use of the proceedings for such a purpose. Then the conclusion which the court reaches is more likely to be founded upon objective evidence rather than subjective evidence of intention.

Predominant purpose

42. It has been suggested that the criterion for abuse of process is whether the improper purpose is the sole purpose of the moving party (52) See, for example, the use of the word "merely" by Isaacs J. in Varawa (1911) 13 CLR, at p 91. However, in more recent times it has been said, in our view correctly, that the predominant purpose is the criterion. That was the test applied by Lord Denning in Goldsmith v. Sperrings Ltd. (53) (1977) 1 WLR, at p 496 and by the English Court of Appeal in Metall and Rohstoff v. Donaldson Inc. In giving the judgment of the Court in the latter case, Slade L.J. observed (54) (1990) 1 QB, at p 469.

> "(A) person alleging such an abuse must show that the predominant purpose of the other party in using the legal process has been one other than that for which it was designed".

It is, of course, well established that the onus of satisfying the court that there is an abuse of process lies upon the party alleging it. The onus is "a heavy one", to use the words of Scarman L.J. in Goldsmith v. Sperrings Ltd. (55) (1977) 1 WLR, at p 498 and the power to grant a permanent stay is one to be exercised only in the most exceptional circumstances (56) Jago (1989) 168 CLR, at p 34;

see also Sang (1980) AC, at p 455.

The object of a criminal action for defamation

43. Although the primary purpose of the criminal action for defamation was to punish a defamer by peaceful process of law, thereby discouraging resort to violence and preventing disorder, it was recognized that the action served a purpose in vindicating the reputation of the injured party. Thus, Lord Edmund-Davies in Gleaves v. Deakin said (57) (1980) AC 477, at p 490.

> "Henry Brougham said 160 years ago that the 'allegation of a breach of the peace was merely a fiction of the law, merely a reason for giving the court jurisdiction' ... and 30 years later Lord Campbell said that criminal libel existed simply 'with a view of vindicating the character of the party injured, or of having revenge upon the libeller, and not in the remotest degree with any view to the protection of the public peace': House of Lords, Select Committee (1843), vol.20, p 177."

However, as Lord Diplock pointed out in Gleaves v. Deakin (58) ibid., at p 483.

> "(R)isk of provoking breaches of the peace has ceased to be an essential element in the criminal offence of defamatory libel; and the civil action for damages for libel and an injunction provides protection for the reputation of the private citizen without necessity for any interference by public authority with the alleged defamer's right to freedom of expression."

44. On the other hand, Law Commissions have acknowledged that criminal defamation may serve some purpose in vindicating the reputation of the injured party in cases where the defamer is impecunious (59) Law Commission (England), Working Paper No.84, Criminal Libel, (1982), par.7.14(4); Australian Law Reform Commission, Report No.11, Unfair Publication: Defamation and Privacy, (1979), p 105.

45. Nevertheless, the fundamental purpose of criminal action for defamation, as with other criminal proceedings, is to decide whether the accused has engaged in conduct which amounts to an offence and is deserving of punishment (60) Jago (1989) 168 CLR, at p 47. Consequently, we do not regard the primary judge's finding that vindication of his reputation was a subsidiary motive of Dr Spautz as detracting from the overall finding that his predominant purpose was improper in that he sought to use the threat of proceedings and the maintenance of them as a means of securing his reinstatement.

Conclusion

46. Although the primary judge did not express his findings in terms that the use of the proceedings was for an improper purpose, the findings are so expressed as to make it clear that Dr Spautz threatened to use the proceedings for an improper purpose and that his commencement and maintenance of the proceedings were, in pursuance of that purpose, undertaken predominantly to that end. There was therefore a relevant use of the proceedings for an improper purpose.

47. For the foregoing reasons we would allow the appeal.

BRENNAN J. The jurisdiction of a court to prevent an abuse of its process and the power of a court to mould its procedures to ensure a fair trial are distinct aspects of curial authority (61) Barton v. The Queen [1980] HCA 48; (1980) 147 CLR 75, at pp 95-96; Jago v. District Court (N.S.W.) [1989] HCA 46; (1989) 168 CLR 23. In Jago v. District Court (N.S.W.), this Court considered the power of a court to eliminate or diminish the prejudice created by an unjustifiable delay in bringing an accused person to trial and the manner in which that power should be exercised. That case was concerned with the court's procedures to ensure a fair trial. In this case, the other aspect of curial authority falls for consideration.

2. As I said in Jago (62) (1989) 168 CLR, at pp 47-48.

> "An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. ... Although it is not possible to state exhaustively all the categories of abuse of process, it will generally be found in the use of criminal process inconsistently with some aspect of its true purpose, whether relating to the hearing and determination, its finality, the reason for examining the accused's conduct or the exoneration of the accused from liability to punishment for the conduct alleged against him. When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose."

In this case, the defendants in certain criminal proceedings seek protection against the continuance of the proceedings on the ground that the proceedings have been commenced and maintained by Dr Spautz for a purpose alien to the purpose which such proceedings are intended to serve. Dr Spautz commenced and is maintaining criminal proceedings against Professor Williams and Mr Morris, two of the appellants, and he commenced and was maintaining criminal proceedings against Mr Gibbs, now deceased, whose personal representatives are appellants. Those proceedings were commenced in the Local Court (previously the Court of Petty Sessions) at Newcastle by the laying of three informations by Dr Spautz on which summonses were issued. On 13 July 1984, a summons was issued against Professor Williams requiring him to answer charges of criminal defamation; on 18 March 1985 a summons was issued against Mr Gibbs requiring him to answer charges of criminal defamation and conspiracy to criminally defame; and on 26 September 1984 a summons was issued against Mr Morris requiring him to answer a charge of conspiracy to seriously injure.

3. Although the proceedings in the Local Court would terminate, if successfully prosecuted, on the making of an order of committal for trial, committal proceedings are part of, and an important part of, an entire criminal process which includes the proceedings on trial to which an order of committal naturally, albeit not inevitably, leads (63) Grassby v. The Queen [1989] HCA 45; (1989) 168 CLR 1, at p 15. To establish that the proceedings in the Local Court are an abuse of process which the Supreme Court of New South Wales ought to stay (64) In exercise of its supervisory jurisdiction: see s.23 of the Supreme Court Act 1970 (N.S.W.) and Herron v. McGregor (1986) 6 NSWLR 246, at p 251, it is necessary to show that the purpose of those respective proceedings - seen as part of an entire criminal process - is not a purpose which they are designed to serve, that is, not a legitimate purpose. But what is meant by purpose when used in reference to a "proceeding"?

4. Purpose, when used in reference to a transaction, has two elements: the first, a result which the transaction is capable of producing; the second, the result which the person or persons who engage in or control the transaction intend it to produce. Or, to express the concept in different terms, the purpose of a transaction is the result which it is capable of producing and is intended to produce (65) See the reference to intention in Federal Commissioner of Taxation v. Whitfords Beach Pty. Ltd. [1982] HCA 8; (1982) 150 CLR 355, at pp 370, 381. When the transaction is the commencement or maintenance of a legal proceeding, its purpose is to be ascertained by reference to the intention of the party who commences or maintains it (hereafter "the plaintiff"). The intention of the plaintiff can be proved by what the plaintiff said and did, and from any inference that might be drawn from what was said or done (including the commencing and maintaining of the proceeding) in the circumstances of the case. The testimony of the plaintiff, though admissible to prove intention, is not conclusive.

5. The purposes which legal proceedings are designed to serve are the protection or vindication of particular legal rights or immunities, the maintenance or affection of particular legal relationships, and the imposition or enforcement of particular legal penalties, liabilities and obligations. The means by which these purposes are achieved in a proceeding consist in the verdict which might be returned or the order which might be made in the proceeding, in the consequences that flow naturally from a verdict that might be returned or from an order that might be made (for example, the vindication of a plaintiff's reputation flowing from a verdict in a civil action for defamation) and in compromise of the claims made in the proceeding. The achievement of any of the purposes mentioned by any of the means mentioned is within the scope of the remedy for which a proceeding is designed. But a proceeding may be intended to produce and may be capable of producing results that are not within the scope of the remedy.

6. The possibility of producing results that are not within the scope of the remedy arises from the variety of situations and interests that can be affected by the commencement or maintenance of a proceeding and, in particular, by the burdens, the delay and the publicity of litigation. Where a plaintiff commences or maintains a proceeding with the intention of obtaining a result falling outside the scope of the remedy, a question can arise as to whether the purpose of the proceeding is legitimate or not.

7. In the early formulation of the test of an abuse of process, emphasis was placed on the scope of the process to determine the legitimacy of the purpose of a proceeding. Grainger v. Hill (66) [1838] EngR 365; (1838) 4 Bing (NC) 212 (132 ER 769), the case which is the source of the tort of abuse of process, is a good example. There, a writ of capias was issued indorsed to levy a sum claimed under a mortgage of a ship but not yet payable by the defendant. The plaintiff's intention was not to have the defendant arrested but to compel him, under threat of arrest, to hand over the ship's register to which the plaintiff had no colour of title. Tindal C.J. (67) ibid., at p 221 (p 773) said "that the process of the law has been abused, to effect an object not within the scope of the process". The criterion adopted by the Court was the character of the result which the plaintiff intended to achieve ("to effect an object") and that character was to be ascertained by comparison of the "object" with the "scope of the process". Isaacs J. broadened the "scope of the process" to the "nature of the process" in Dowling v. Colonial Mutual Life Assurance Society Ltd. (68) [1915] HCA 56; (1915) 20 CLR 509, at p 522 where he said that the issuing of the writ of capias in Grainger v. Hill "was held to be an abuse of process, because the law did not provide it for that purpose. The purpose is foreign to the nature of the process". It was held that there was no abuse of process in Dowling. There, a creditor petitioned for the sequestration of the debtor's estate in order to ascertain on an examination of the debtor after sequestration the identity of persons who had instigated the debtor to publish matter defamatory of the creditor. Isaacs J. pointed out (69) ibid., at p 524 that the creditor "wishes to use the process - that is, to attain by its means the very object for which it is designed by law, namely, sequestration, and this, notwithstanding there is a desire to use the sequestration afterwards for a certain purpose".

Similarly, in King v. Henderson (70) (1898) AC 720, a creditor petitioned for a sequestration in order to effect thereby the dissolution of a partnership, but that did not stamp the proceeding as an abuse of process: the creditor intended to obtain the remedy which the proceeding was designed to give. In Dowling, the creditor sought the right to subject the debtor to an examination; in King v. Henderson, the creditor sought the application of the provisions of a partnership agreement to a partner whose estate had been sequestrated. In both instances, sequestration was the primary object intended. In both cases, the creditor had an ulterior motive for pursuing his legal rights, but the ulterior motive did not affect the character of the result which the plaintiff intended the proceedings to achieve. The pursuit of a legitimate remedy is not converted to an abuse of process by an unworthy and ulterior motive.

8. These cases show that a plaintiff's intention to achieve a result must be distinguished from his motive for commencing or maintaining a proceeding, though the distinction may be elusive. In Bayne v. Baillieu (71) [1908] HCA 39; (1908) 6 CLR 382, at p 403, O'Connor J. cited with approval a statement by Holroyd J. in a Victorian case (72) In re Morrissey [1899] VicLawRp 145; (1899) 24 VLR 776, at p 778.

> "'I think that if the object of an act is legal, and there is no wrongful intention in it, but the intention is to do something also legal, founded upon that act - it is perfectly immaterial what the ulterior motive of the party may be - what it may be that prompts him to do the legal act.'"

That principle was held to be applicable to an act done in exercise of a legal right arising under a contract or other instrument in Chapman v. Honig (73) (1963) 2 QB 502, at p 520 in which Pearson L.J. said

> "I cannot think of any case in which such an act might be invalidated by proof that it was prompted by some vindictive or other wrong motive. Motive is disregarded as irrelevant."

In a given case, a distinction may have to be drawn between the purpose of the proceeding and the motive of the plaintiff in commencing or maintaining it (74) XCO Pty. Ltd. v. Federal Commissioner of Taxation [1971] HCA 37; (1971) 124 CLR 343, at pp 350-351. That distinction depends on a disparity between the plaintiff's intention and the plaintiff's motives. Intention relates to the result which the plaintiff desires to obtain by commencing or maintaining the proceeding; motive relates to all the considerations which move that party to commence or maintain the proceeding. The desired result is no doubt an element of the moving considerations, but it does not exhaust those considerations.

9. In a case where a plaintiff intends to obtain relief within the scope of the remedy available in a proceeding, there is no abuse of process whatever the plaintiff's motives may be. Isaacs J. said in Dowling (75) (1915) 20 CLR, at pp 521-522.

> "If the object sought to be effected by the process is within the lawful scope of the process, it is a use of the process within the meaning of the law, though it may be malicious, or even fraudulent, and in the circumstances the fraud may be an answer; if, however, the object sought to be effected by means of the process

> is outside the lawful scope of the process, and is fraudulent, then - both circumstances concurring - it is a case of abuse of that process, and the Court will neither enforce nor allow it to afford any protection, and will interpose, if necessary, to prevent its process being made the instrument of abuse."

For the reasons given by the majority judgment in this case, his Honour's reference to fraud should be understood as importing a purpose outside the scope of the remedy and improper.

10. There is no impropriety of purpose (whatever may be said of motive) when a plaintiff commences or maintains a proceeding desiring to obtain a result within the scope of the remedy, even though the plaintiff has an ulterior purpose - or motive - which will be fulfilled in consequence of obtaining the legal remedy which the proceeding is intended to produce. To amount to an abuse of process, the commencement or maintenance of the proceeding must be for a purpose which does not include - at least to any substantial extent - the obtaining of relief within the scope of the remedy. As Isaacs J. said in Varawa v. Howard Smith Co. Ltd. (76) [1911] HCA 46; (1911) 13 CLR 35, at p 91.

> "the term 'abuse of process' connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse of process for this purpose".

11. Putting to one side, then, the cases where the plaintiff intends to obtain relief within the scope of the remedy, the problematic cases arise when the plaintiff's purpose is to obtain some benefit, to impose some obligation or to affect some relationship otherwise than by verdict, by order or by compromise of the particular claims made in the proceeding. These are cases where the plaintiff's objective lies outside the relief which, if the proceeding were prosecuted to completion, might be obtained by verdict or by order. The general principle applicable when a plaintiff intends to obtain a result outside the scope of the remedy was stated by Lord Evershed in In re Majory (77) (1955) Ch 600, at pp 623-624.

> "court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused."

Expounding the distinction made by Lord Evershed between the purpose of gaining a "collateral advantage" and the purpose for which proceedings "are properly designed and exist", Bridge L.J. said in Goldsmith v. Sperrings Ltd. (78) (1977) 1 WLR 478, at p 503.

> " For the purpose of Lord Evershed's general rule, what is meant by a 'collateral advantage'? The phrase

> manifestly cannot embrace every advantage sought or obtained by a litigant which it is beyond the court's power to grant him. Actions are settled quite properly every day on terms which a court could not itself impose upon an unwilling defendant. An apology in libel, an agreement to adhere to a contract of which the court could not order specific performance, an agreement after obstruction of an existing right of way to grant an alternative right of way over the defendant's land - these are a few obvious examples of such proper settlements. In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. On the other hand, if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process. These two cases are plain; but there is, I think, a difficult area in between. What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired byproduct of the litigation? Can he on that ground be debarred from proceeding? I very much doubt it."

His Lordship's doubts reflect the decisions in, and are confirmed by, King v. Henderson and Dowling. I respectfully adopt the phrase "reasonable relationship" to formulate a test similar to (though it may not be identical with) the test propounded by Bridge L.J. in this passage. I would formulate the test in this way: if there be a reasonable relationship between the result intended by the plaintiff and the scope of the remedy available in the proceeding, there is no abuse of process. If there be mixed purposes - some legitimate, some collateral - I would restate his Lordship's test that "but for his ulterior purpose, (the plaintiff) would not have commenced proceedings at all". So expressed, the test casts on the other party an onus of proving what the plaintiff would not have done if he had not formed the intention of obtaining a collateral advantage. That onus may be impossible to discharge. If that onus were discharged, the other party would establish that the plaintiff had not commenced or maintained the proceeding for any substantial legitimate purpose. The gravamen of the test, I apprehend, is that the plaintiff did not commence or maintain the proceeding for any substantial legitimate purpose. I would state the test in that way. Substantiality is a matter of degree, ascertained by reference to the intention attributed to the plaintiff in all the circumstances of the case. At the end of the day, the court must determine, by reference to the intention attributed to the plaintiff, not merely whether the collateral purpose of the proceeding outweighs any legitimate purpose but whether the plaintiff entertained any substantial intention that the proceeding should achieve a legitimate purpose.

12. For these reasons, I would hold that an abuse of process occurs when the only substantial intention of a plaintiff is to obtain an advantage or other benefit, to impose a burden or to create a situation that is not reasonably related to a verdict that might be returned or an order that might be made in the proceeding.

13. It is necessary, then, to ascertain the intention with which Dr Spautz commenced and maintained the proceedings against Professor Williams, Mr Gibbs and Mr Morris. Smart J. found that Dr Spautz instituted and maintained the proceedings in the Local Court with the "predominant purpose ... (of exerting) pressure upon the University of Newcastle to reinstate him and/or agree to a favourable settlement of his wrongful dismissal case". Smart J. also found that Dr Spautz had other purposes

> "Dr Spautz had other purposes in instituting the various criminal proceedings being considered, most of which were also improper, not being consistent with the purposes for which criminal proceedings exist, such as to vindicate his reputation (as civil proceedings he regarded as too expensive), and to collect material for his research into corrupt practices in Australian institution. The purpose of vindication of reputation was interwoven with the purpose of exerting pressure upon the University for reinstatement."

If the proceedings instituted by Dr Spautz were successfully prosecuted, only one of these purposes - vindication of reputation - could have been achieved by verdict or order, and only as a consequence of a conviction of the particular defendant (Professor Williams or Mr Gibbs) for criminal defamation. The other purposes - including pressure to compel a favourable settlement of other litigation - are wholly unrelated to the scope of the remedy available on prosecution of any of the charges pending in the Local Court.

14. Vindication of reputation apart, Dr Spautz' purposes were entirely outside the scope of and unrelated to the remedy available in the proceedings commenced in the Local Court. Vindication of reputation apart, the case falls squarely within the passage earlier cited from the judgment of Isaacs J. in Varawa v. Howard Smith Co. Ltd. (79) (1911) 13 CLR, at p 91.

15. If the proceedings would be held to be a clear abuse of process but for Dr Spautz' intention to use them - or two of the three of them - to vindicate his reputation, does the existence of this purpose preclude their being so characterized? If the vindication of his reputation was within the scope of the remedy available in a private prosecution for criminal defamation, there was no abuse of process in commencing proceedings against Professor Williams and Mr Gibbs. There is no doubt about a private citizen's capacity to launch a prosecution for a crime, for "(a)ll citizens have sufficient interest in the enforcement of the law to entitle them to take this step" (80) per Lord Wilberforce in Gouriet v. U.P.W. [1977] UKHL 5; (1978) AC 435, at p 482. But, taking the proceedings in the Local Court to be part of a prosecution for the criminal offences alleged, the question is whether the vindication of a private prosecutor's reputation is within the scope of the criminal remedy.

16. In Jago (81) (1989) 168 CLR, at p 47 I pointed to the public purpose to be served by criminal proceedings

> "The purpose of criminal proceedings, 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."

That is, punishment at the hands of the State. This approach was taken with reference to criminal defamation by Lord Denning in Goldsmith v. Sperrings Ltd. (82) (1977) 1 WLR, at p 485; see also Gleaves v. Deakin (1980) AC 477, per Lord Edmund-Davies at p 491; and (1824) 1 Hawk PC, c.28, p

543, s.3.

> "A criminal libel is so serious that the offender should be punished for it by the state itself. He should either be sent to prison or made to pay a fine to the state itself. Whereas a civil libel does not come up to that degree of enormity. The wrongdoer has to pay full compensation in money to the person who is libelled and pay his costs; and he can be ordered not to do it again. But he is not to be sent to prison for it or pay a fine to the state. When a man is charged with criminal libel, it is for the jury to say on which side of the line it falls. That is to say, whether or not it is so serious as to be a crime."

The vindication of reputation damaged by defamation arising out of a private controversy did not warrant the grant of leave for the issue of a criminal information charging criminal defamation (83) Ex parte Narme (1928) 45 WN (N.S.W.) 78, at p 79; see also (1824) Hawk PC, c.28, p 543, s.3. And, in Uren v. John Fairfax and Sons Pty. Ltd. (84) [1966] HCA 40; (1966) 117 CLR 118, at p 150 Windeyer J. observed

> " Defamation is a criminal offence and also a civil wrong. We heard in the course of the argument some complaint of a victim of a criminal act having an option to pursue his civil remedy and in this to seek punitive damages instead of seeking to set the criminal law in motion. But the law allows this, and not only for defamation; and perhaps wisely so. One lesson of eighteenth century events may be that libels, especially those arising out of private feuds and partisan political controversy, ought not, except in very gross cases, to be made the subject of criminal prosecutions."

I would not admit the vindication of a private citizen's reputation to be within the scope of the remedy available in proceedings charging criminal defamation, at least in the absence of evidence of conduct which would attract the punitive power of the State. It would be an extraordinary case in which defamation of a private person would amount to a crime against the State deserving of punishment. Once the vindication of reputation is rejected as a legitimate purpose of the proceedings against Professor Williams and Mr Gibbs, none of the proceedings in the Local Court can be seen as having been commenced or maintained for a legitimate purpose. Though regular in form, each of them is an abuse of process and should be stayed.

17. It is not necessary to consider the elements of the tort of abuse of process, but I would add my general concurrence with the observations on that subject in the judgment of the majority.

18. The appeal should be allowed. The declaration made by Smart J. that the prosecutions commenced by the respondent against the appellants were abuses of process and his Honour's orders that those prosecutions be stayed permanently should be restored. To that extent the orders made by the Court of Appeal of New South Wales should be set aside.

DEANE J. The respondent, Dr Michael Spautz, was a senior lecturer in the Department of Commerce

within the University of Newcastle ("the University"). He was purportedly dismissed from that post by the University Council as from 23 May 1980. He has, since then, maintained that his dismissal was wrongful and has instituted proceedings against the University in relation to it. He has also instituted an extraordinary number of proceedings against persons who played a part in the events which culminated in his dismissal. Among those proceedings are the three sets of committal proceedings with which the present appeal is concerned. These were each initiated by summons issued by the Local Court of New South Wales based on an information laid by Dr Spautz. In one of them, the defendant is the first appellant, Professor Williams, who held at relevant times the Chair of Commerce within the University. The charges against Professor Williams are of criminal defamation. In another, the defendant is the second appellant, Mr Morris, who was a member of the University Council. The charge against him is of criminal conspiracy to injure Dr Spautz. The defendant in the third proceedings was Mr Gibbs. He was a member of the University Council and has since died. The third and fourth appellants are his executors. The charges against Mr Gibbs were of criminal defamation and of criminal conspiracy to criminally defame. Dr Spautz apparently maintains that all of the alleged criminal defamations and conspiracies were directed against him and were among the causes of his dismissal.

2. Professor Williams, Mr Morris and Mr Gibbs each instituted proceedings against Dr Spautz in the Supreme Court of New South Wales in relation to the committal proceedings in the Local Court. In each case, the learned primary judge (Smart J.) made, among other orders with which this Court is not directly concerned, a declaration that the prosecution of the relevant accused was an abuse of the process of the Local Court and an order that the prosecution be stayed permanently. Dr Spautz appealed to the New South Wales Court of Appeal which, by majority (Priestley and Meagher JJ.A.; Mahoney J.A. dissenting), allowed the appeal and set aside the orders made by the primary judge (85) Spautz v. Gibbs (1990) 21 NSWLR 230. The present appeal is from the judgment and orders of the Court of Appeal.

3. At the outset, it is essential to stress that the attack upon the committal proceedings in the Local Court has at no time been based on a submission that the proceedings are without foundation or enjoy no prospect of success. The basis of the appellants' attack is that the committal proceedings were an abuse of process unless Dr Spautz's predominant subjective purpose in initiating and maintaining them was either to punish the particular defendant or to protect the community. The learned primary judge upheld that submission. He found that Dr Spautz's predominant purpose was to obtain his reinstatement in his University post and/or compensation for the allegedly wrongful dismissal (86) Gibbs v. Spautz, unreported, Supreme Court of New South Wales, Smart J., 2 October 1987, at pp 22, 34, 38 and held that both those subjective purposes were improper. His Honour also found that Dr Spautz had other subsidiary purposes for instituting the proceedings "most of which were also improper" (87) ibid., at p 37 (emphasis added). The most important of the subsidiary purposes which his Honour held to be improper was that of "vindication of reputation". With reference to that purpose, his Honour said (88) ibid., at p 40.

> "From the newsletters written by Dr Spautz pre-1984, and from the transcripts of evidence (in earlier proceedings) before Hunt and Yeldham JJ., it is possible to discern that vindication of his reputation was an important purpose of Dr Spautz in instituting proceedings. This was not found by their Honours to be his dominant purpose, but it was, in my opinion, interwoven with his dominant purpose. Certain of the newsletters and statements in the transcripts contain express declarations of Dr Spautz of the purpose of

> vindication of reputation. Its importance in motivating Dr Spautz to institute the various criminal actions is also implicit in his dominant purpose - reinstatement would carry with it a certain degree of vindication of reputation. Vindication of his reputation may lead to reinstatement."

Smart J. found that another improper subsidiary purpose was that of obtaining material for research in relation to corrupt practices in Australian institutions (89) ibid., at p 37. His Honour did not identify any subsidiary purpose which was not, in his view, improper. Presumably, the statement that "most" of the subsidiary purposes were improper was intended at least to leave open the possible existence, as a subsidiary purpose, of one (or both) of what his Honour saw as permissible purposes, namely, punishing the defendants and protecting the community.

4. As I followed the argument, it is not submitted that there is anything in the evidence which would warrant the conclusion that, in the absence of either an overall settlement with the University or what he saw as an appropriate apology by a particular defendant, Dr Spautz did not intend to prosecute the committal proceedings to finality and to seek an order committing the relevant defendant for trial. Certainly, there is no finding to that effect by the primary judge. To the contrary, his Honour's finding that vindication of reputation was an important subsidiary purpose of Dr Spautz supports an inference that, in the absence of settlement or apology, Dr Spautz intended to prosecute the committal proceedings all the way to a committal order.

5. Inevitably, the number and nature of the related legal proceedings which Dr Spautz has initiated and the earlier fate of some of those proceedings (90) See Spautz v. Williams (1983) 2 NSWLR 506; and note that a number of earlier related committal proceedings (including proceedings against Professor Williams) were withdrawn by reason of duplicity and that a number of other related proceedings were declared by the Supreme Court of New South Wales to be an abuse of process (Callaghan v. Spautz, unreported, Yeldham J., 18 November 1983) combine to create a strong impression that Dr Spautz is acting quite irresponsibly in his campaign of litigation. Nonetheless, as the learned primary judge appreciated, the applications for a stay of the three sets of committal proceedings fell to be dealt with solely on the basis of the issues raised by those applications and the evidence led and submissions made in relation to them. That being so, and in the context of the heavy onus which rests upon a defendant who seeks to have proceedings stayed on the grounds of abuse of process (91) See, e.g., Packer v. Meagher (1984) 3 NSWLR 486, at p 500; Spautz v. Williams (1983) 2 NSWLR, at p 540; Hanrahan v. Ainsworth (1990) 22 NSWLR 73, at p 95, those applications fell to be determined on the basis of a number of assumptions favourable to Dr Spautz. The most important of those assumptions is that the charges made in the informations may be well founded. Another is that Dr Spautz may be genuine in the allegation, repeatedly made by him, that his dismissal by the University was wrongful and has caused him substantial loss and damage. Another is that the criminal defamations and criminal conspiracies charged against the defendants in the committal proceedings may have been among the causes of that wrongful dismissal. It is in the context of those assumptions that this Court must approach the question whether, as the majority of the Court of Appeal held, the primary judge was mistaken in holding that the proceedings in the Local Court should be stayed for the reason that the "predominant purpose" of Dr Spautz in initiating and maintaining the committal proceedings was an improper one.

6. The subjective purposes which might lead a plaintiff, claimant or informant legitimately to institute civil or criminal proceedings are manifold. Indeed, they are almost unlimited. It has never been the policy of the common law that a plaintiff's predominant subjective purpose in instituting civil proceedings must be that of obtaining the orders sought in them or that committal proceedings can be

instituted by a private informant only for a predominant purpose of obtaining the punishment of the defendant and/or the protection of the community. Most civil proceedings are instituted in the hope that the defendant will settle before the action ever comes to trial or formal orders are made. Frequently, they are instituted for the predominant subjective purpose of obtaining an object which it would be beyond the power of the particular court to award in the particular proceedings. For example, the predominant subjective purpose of a plaintiff in a common law action for damages for wrongful dismissal may well be to obtain a settlement involving reinstatement in his or her former position under a contract for personal services of a type which a court would not enforce by specific performance or injunction. A plaintiff's predominant subjective purpose in suing at common law for damages for trespass to land may be to obtain a settlement in the form of undertakings about future conduct. A plaintiff's predominant subjective purpose in bringing proceedings for an injunction restraining infringement of copyright or breach of patent may be to obtain a settlement incorporating a licence agreement providing for the payment of future royalties. In all those cases, the institution and maintenance of proceedings and the use of them to pursue a form of redress which the particular court could not have granted if the proceedings had run their course are legitimate unless the proceedings themselves are not founded on a genuine grievance but are used as a "stalking-horse" for extortion (92) See Varawa v. Howard Smith Co. Ltd. [1911] HCA 46; (1911) 13 CLR 35, at p 91 or merely as an instrument for vexation and oppression. As Bridge L.J. commented in Goldsmith v. Sperrings Ltd. (93) (1977) 1 WLR 478, at p 503.

> "Actions are settled quite properly every day on terms which a court could not itself impose upon an unwilling defendant. An apology in libel, an agreement to adhere to a contract of which the court could not order specific performance, an agreement after obstruction of an existing right of way to grant an alternative right of way over the defendant's land - these are a few obvious examples of such proper settlements. In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance."

And that is true even of proceedings in which the interests involved transcend those of the immediate parties to the litigation, such as bankruptcy proceedings. The "predominant" subjective "purpose" of a creditor who institutes proceedings in bankruptcy is ordinarily not to obtain the sequestration order for which he or she petitions. Indeed, that is commonly the last thing that a petitioning creditor wants. His or her predominant subjective purpose is ordinarily to obtain prompt payment of his or her debt whereas a sequestration order almost invariably precludes immediate payment and sometimes presages ultimate discharge of the debt with no payment at all. Again, the position will be different if the bankruptcy proceedings are used as an instrument of extortion of something to which the petitioning creditor has no legitimate claim (94) See, generally, Dowling v. Colonial Mutual Life Assurance Society Ltd. [1915] HCA 56; (1915) 20 CLR 509, at pp 522-524.

7. The position is even clearer as regards committal proceedings such as those involved in the present case. As noted earlier, it has never been the policy of the common law that a private individual's purpose in laying an information or prosecuting committal proceedings must be the vindictive one of punishment of the defendant and/or the altruistic one of protection of the community. To the contrary, both the common law and legislatures have long adopted the approach of compelling or enticing

private individuals to initiate committal proceedings for a dominant subjective purpose other than the punishment of the particular defendant or the protection of the community. Thus, the felonious tort rule precluded a plaintiff against whom a felony had been committed by the defendant from obtaining compensation in his action "unless the defendant (had) been prosecuted or a reasonable excuse (had) been shewn for his not having been prosecuted" (95) Smith v. Selwyn (1914) 3 KB 98, at p 106; and see, generally, Holdsworth, A History of English Law, vol.3, 5th ed. (1942), pp 331-332; Pannam, "Felonious Tort Rule", (1965) 39 Australian Law Journal 164; Fleming, The Law of Torts, 7th ed. (1987), p 33. The reason for the rule was said to be that a person injured by felony should be required "to prosecute before he can sue" on the basis that public policy required assistance in the enforcement of the criminal law (96) See Pannam, op cit., at p 168 and cases there cited. I have, on occasion in this judgment, used the past tense to refer to the felonious tort rule for the reason that there is a strong tendency, in modern times, to dismiss "the rule" as archaic (see, e.g., per Lord Wright, Rose v. Ford (1937) AC 826, at p 847) or to confine its requirement to the reporting of the commission of the felony to the police or other authorities (but cf. per Pape J. in Wonder Heat Pty. Ltd. v. Bishop [1960] VicRp 77; (1960) VR 489, at pp 493-494). In some Australian jurisdictions, the rule has either been specifically abolished by statute (see, e.g., Supreme Court Act 1986 (Vict.), s.41 and Criminal Code Act 1924 (Tas.), s.9(3)) or held to have been deprived of content by the disappearance of the distinction between felonies and other criminal offences (see Black and White Cab Co. Pty. Ltd. v. Kelk (1984) 2 Qd R 484). In New South Wales, the distinction between felony and misdemeanour persists and there has been no specific statutory abolition of the rule. Examples of statutory enticement to initiate criminal proceedings range from provisions entitling an informer to seek and keep a pecuniary penalty (97) See Holdsworth, A History of English Law, vol.4, 3rd ed. (1945), p 356, nn.2-4 to provisions enabling a criminal court or other tribunal to award compensation to the victim of a crime (98) Victims Compensation Act 1987 (N.S.W.), ss.19(2), 53, 61.

8. The unacceptability of any general proposition to the effect that committal proceedings initiated in the New South Wales Local Court by a private information should be stayed as an abuse of process whenever the predominant subjective purpose of the informant in laying the information and initiating the proceedings is not to punish the defendant and/or protect the community can, in my view, be demonstrated by reference to the function and purpose of such proceedings and by hypothetical example. Committal proceedings are not judicial in nature. Their function and purpose are not to punish. Their function is that of an executive or ministerial inquiry (99) See Grassby v. The Queen [1989] HCA 45; (1989) 168 CLR 1, at p 11. Their purpose is to determine whether an order should be made that a person charged with a crime should be committed for trial or discharged. In New South Wales, an order for committal for trial or discharge at the end of committal proceedings does not even finally determine whether the person committed for trial or discharged will or will not be indicted. The Attorney-General or Director of Public Prosecutions may determine that no bill be found(100) ibid., at p 13; and see Director of Public Prosecutions Act 1986 (N.S.W.), s.7(2)(a), with the result that a person committed for trial will be discharged, or present an ex officio indictment against a person notwithstanding that he or she was discharged at the end of the committal proceedings(101) See Kolalich v. Director of Public Prosecutions (N.S.W.) [1991] HCA 47; (1991) 66 ALJR 25, at pp 27, 28; [1991] HCA 47; 103 ALR 630, at pp 634, 635-636; see, also, Criminal Procedure Act 1986 (N.S.W.), s.4(2).

9. Quite apart from their nature as a ministerial or executive inquiry, committal proceedings differ from conventional judicial proceedings in that they are not, at least in so far as the informant is concerned, proceedings inter partes. Strictly speaking, "(t)he Crown, not the prosecutor, is the party to a criminal inquest"(102) per Rich, Dixon, Evatt and McTiernan JJ., Commonwealth Life Assurance Society Ltd. v. Smith [1938] HCA 2; (1938) 59 CLR 527, at p 538. Even when initiated by a summons based on a private information and prosecuted by the private informant, their conduct and their continuance do not lie fully within the control of the informant. In New South Wales, their

conduct can be taken over, at any time and against the wishes of the private informant, by the Director of Public Prosecutions(103) See Director of Public Prosecutions Act 1986 (N.S.W.), ss.9, 10. See, also, Reg. v. Lang (1859) 2 Legge 1133. They do not automatically lapse if a private informant dies(104) See, e.g., Reg. v. Truelove (1880) 5 QBD 336. If that happens, it would seem that the Director of Public Prosecutions or, in his or her absence, any other person may take up the prosecution, at least where the offence is of a public nature(105) ibid., at p 340. See, also, Reg. v. Egan (1850) 1 Legge 588; Hill v. Pinnock (1879) 1 QLJ (Supp.) 45, at pp 48, 51; McGrath v. Dobie [1890] VicLawRp 133; (1890) 16 VLR 646, at p 649. If, at the end of the committal proceedings, the private informant changes his or her mind and seeks an order that the defendant be discharged, the magistrate must nonetheless commit the defendant for trial if, after considering all the evidence, he or she is not of the opinion that a jury would not be likely to convict the defendant of an indictable offence(106) See the mandatory language used in s.41(6) of the Justices Act 1902 (N.S.W.); Grassby v. The Queen (1989) 168 CLR, esp. at pp 17-18; Hill v. Pinnock (1879) 1 QLJ (Supp.), at p 50 (recently approved in Turner v. Randall; Ex parte Randall (1988) 1 Qd R 726, at p 728); Reg. v. Truelove (1880) 5 QBD, at pp 339-340; Ex parte Dowsett; Re Macauley (1943) 60 WN (NSW) 40, at p 42; Connor v. Sankey (1976) 2 NSWLR 570, at p 628. In New South Wales, "notwithstanding that the accused has been charged (by the informant) with a specific offence, the proceedings extend beyond 'the information then under enquiry' to embrace any indictable offence" which the evidence may sustain(107) Kolalich v. Director of Public Prosecutions (N.S.W.) (1991) 66 ALJR, at pp 26-27; 103 ALR, at p 633.

10. Once it is appreciated that committal proceedings in the Local Court are an executive or ministerial inquiry to determine whether the defendant should be committed for trial and that a private informant lacks real control over the inquiry and is, strictly speaking, not even a party to the proceedings, it is apparent that the subjective purpose or motive which leads such an informant to initiate the proceedings is unlikely to be determinative of the question whether they should or should not be permitted to run their course. If the proceedings obviously lack any proper foundation in the sense that there is no evidence capable of sustaining a committal, they will obviously be vexatious and oppressive. In such a case, the proceedings themselves are an abuse of the process of the Local Court and will inevitably result in the discharge of the defendant. Notwithstanding the fact that it is ordinarily inappropriate for a supervisory court to stay proceedings in an inferior court on the ground that they will ultimately fail, I am inclined to think that, if it is clear that the proceedings are brought to serve some collateral purpose of the informant and that the charges against the defendant lack any foundation, the Supreme Court would be justified in intervening to halt the proceedings in limine in order to prevent the defendant from being subjected to unfair vexation and oppression. If, however, there is evidence which is capable of sustaining a conclusion by the magistrate that a jury would be likely to convict the defendant of an indictable offence, the mere fact that the predominant subjective purpose or motive of a private informant in initiating the proceedings was not directed towards the punishment of the defendant or the protection of the public neither suffices to make the committal proceedings oppressive or vexatious of the defendant nor has the effect that any subsequent trial, if a committal order is made and an indictment is presented by the Attorney-General or the Director of Public Prosecutions, will be necessarily unfair. Nor does it lead to the result either that the proceedings are of themselves an abuse of process which should be stayed, or that the magistrate in the Local Court is entitled to refuse to make an order that the defendant be committed for trial notwithstanding that he or she considers that a jury would be likely to convict the defendant of an indictable offence. To the contrary, it is the statutory duty of the magistrate in those circumstances to make a committal order as a preliminary to the executive decisions as to whether a bill should be found and whether an indictment should be presented. A fortiori, the subjective purpose or motive of the informant in such a case cannot of itself justify the intervention of the Supreme Court effectively to exclude the informant from the courts by an order that the proceedings be permanently stayed(108) See, generally, per Lord Hodson, Connelly v. Director of Public Prosecutions (1964) AC 1254, at pp

1336-1337. In that regard, there are strong and obvious reasons of policy why an informant in the Local Court should not be subjected to a collateral Supreme Court investigation of his or her subjective purposes in making charges of criminal conduct which are not shown to be without foundation. For one thing, as has been seen, it has long been the policy of the common law and legislation to facilitate the private disclosure and prosecution of criminal activity by encouraging collateral purposes and motives rather than to prohibit or reject such disclosure or prosecution on the ground that the purpose of the disclosure or prosecution is not to punish the offender or protect the community. For another, quite apart from the undesirability of judicial proceedings based on allegations of improper subjective thought processes, it is generally undesirable that a court whose ultimate function may be to determine an accused's guilt or innocence in criminal proceedings at the suit of the Crown should become closely involved in the executive procedures leading up to the commencement of a prosecution(109) See Barton v. The Queen [1980] HCA 48; (1980) 147 CLR 75, at pp 94-95. I turn to illustrate what has been said above by hypothetical example.

11. Let it be assumed that B, who is a member of a well-organized and violent gang, robs and wounds A in New South Wales, stealing a valuable painting in the process and that A, who knew and recognized B, lays an information in the Local Court charging B with robbery with wounding(110) Crimes Act 1900 (N.S.W.), s.96, which is a felony(111) See s.9: under s.96, robbery with wounding is punishable by "penal servitude" for twenty-five years. Let it also be assumed that, under cross-examination in the committal proceedings, A frankly agrees that he is apprehensive about being involved in criminal proceedings against a member of a violent gang, that his predominant subjective purpose in laying the information was to influence B to return the stolen painting and that, if the painting were to be returned to him, he would seek to withdraw from the committal proceedings. Finally, let it also be assumed that, as in the present case, it is not suggested that A does not intend to prosecute the proceedings to a committal order if his subjective purpose of obtaining the redress of his alleged grievances is not achieved. In my view, neither principle nor the due administration of criminal justice requires or justifies the approach that, in those circumstances and notwithstanding B's obvious guilt of the crime with which he is charged, the committal proceedings should be stayed by an order of the Supreme Court on the ground that A's subjective purpose in initiating the committal proceedings was not to punish B and/or protect the community but to influence B to return A's painting. Such an order would hold the administration of justice up to public ridicule and would ignore the function and frustrate the purpose of committal proceedings as a ministerial or executive inquiry into the available evidence to determine whether a defendant should be committed for trial. In that regard, it is relevant to note that in initiating the committal proceedings against B, in circumstances where his only subjective purpose in pursuing B was to recover his stolen property, A would have acted in accordance with the policy and requirement of the old felonious tort rule(112) And see, also, Crimes Act 1900 (N.S.W.), s.316(3) providing that it is not an offence against s.316(2) (soliciting, accepting or agreeing to accept a benefit in consideration for concealing a serious offence) "merely to solicit, accept or agree to accept the making good of loss or injury caused by an offence or the making of reasonable compensation for that loss or injury". Assuming that A communicated the information which he possessed to "a member of the Police Force or other appropriate authority" (113) s.316(1), any legitimate criticism which could be levelled against him would not be that the committal proceedings which he had instituted and maintained against an obviously guilty felon were, of themselves, an abuse of process which should be stayed. It would be that his intention to seek to withdraw from the proceedings if he got his property back was not the approach of the model citizen. Indeed, on the assumption that A communicated the relevant information to an appropriate authority and that B is guilty, it would be the duty of the prosecuting authorities to ensure that the committal proceedings, far from being stayed by reason of A's collateral purpose, were prosecuted to a committal order.

12. Even on the assumptions which must be made in Dr Spautz's favour in the present case, his

purpose in initiating the committal proceedings was not merely to influence the defendants to make redress personally for the injuries caused by their conduct. He sought to influence them in the performance of their functions as officers of the University and to influence the University itself to reinstate him and/or pay compensation for his allegedly wrongful dismissal. The judgment of Smart J. contains no specific finding on the question whether, apart from initiating and maintaining the proceedings, Dr Spautz did any act in furtherance of those aspects of his predominant subjective purpose. It is not, however, necessary to pursue that question for the purposes of the present case. Even where a private informant acts unlawfully in relation to committal proceedings(114) See text below for some examples, the proceedings themselves do not constitute an abuse of process of the Local Court if the case against the defendant is well founded and the circumstances are not such as to preclude a fair trial of the defendant if a committal order is made. Again, a hypothetical example should serve to demonstrate that that is so. Let it be assumed that X, having witnessed the murder of Y by Z, lays an information before a magistrate of the Local Court alleging that Z murdered Y. Let it also be assumed that the evidence against Z establishes a very strong prima facie case of murder. The effect of such an information, as has been seen, would be to initiate a ministerial or executive inquiry to determine whether Z should or should not be committed for trial on a charge of murder. In those circumstances, neither principle nor the interests of the administration of criminal justice support the conclusion that the committal inquiry should be stayed as an abuse of process if it emerges that X had some improper subjective purpose in initiating, or participating as informant in, the inquiry. If it emerges that X had some improper collateral purpose or motive, that fact may well tend to discredit X's evidence. If it emerges that X has done some act in furtherance of that collateral purpose, such as suborning evidence against Z or using the proceedings as a means of extorting property from Z, X's conduct may constitute one or more of a variety of criminal or quasi-criminal offences: attempting to pervert the course of justice(115) Crimes Act 1900 (N.S.W.), s.319, subornation of perjury(116) s.333, corrupting, intimidating or obstructing a witness(117) ss.321, 322, 323, 325, accusing or threatening to accuse a person of felony to extort or gain property(118) s.102 and contempt of court. X may also be guilty of, and liable in damages for, the tort of collateral abuse of process. The committal proceedings (i.e. the ministerial or executive inquiry being conducted by a magistrate to determine whether Z should be committed for trial) will not, however, be transformed into an abuse of process merely by reason of X's collateral purposes or actions. The proceedings themselves, if otherwise regularly conducted, will constitute an abuse of process only if the circumstances (including X's collateral purposes and actions) are either such that the proceedings are vexatious and oppressive for the reason that they lack any proper foundation or such that any subsequent trial will be necessarily and unavoidably unfair(119) See, generally, Jago v. District Court (N.S.W.) [1989] HCA 46; (1989) 168 CLR 23; Grassby v. The Queen (1989) 168 CLR, at p 6. Such circumstances plainly have not been shown to exist in the present case where there is no suggestion that, if committal orders were made, any trial would be unfair and where it is not argued that Dr Spautz's charges lack foundation.

13. It follows that, in a context where it was necessary to assume that the charges against Professor Williams, Mr Morris and Mr Gibbs were all well founded, the learned primary judge was mistaken in his conclusion that the prosecution should be stayed merely because Dr Spautz had initiated the committal proceedings for the predominant subjective purpose of seeking the redress of his perceived personal grievances. There are two further matters which should be mentioned. The first is that I respectfully disagree with the learned primary judge that a subjective purpose of remedying the damage done to one's reputation by a criminal defamation is an improper purpose, whether predominant or subsidiary, for laying an information charging the offender with criminal defamation. There is, of course, room for differences of opinion about whether the offence of criminal defamation should be more narrowly confined or, indeed, completely abolished. While it exists, however, a person whose reputation has been damaged by criminal defamation is, in my view, acting with complete propriety if he or she institutes criminal proceedings against the offender for the subjective

purpose of vindicating his or her reputation(120) See, e.g., Gleaves v. Deakin (1980) AC 477, at p 490 (Lord Edmund-Davies quoting Lord Campbell); and, generally, at pp 483-484 (Lord Diplock) and pp 486-487 (Viscount Dilhorne, with whom Lord Keith of Kinkel and Lord Scarman agreed). If I had not been of the view that the appeal should be dismissed for the reason that an improper predominant subjective purpose on the part of an informant does not of itself transform well-founded committal proceedings into an abuse of process, it would have been necessary to consider the significance of the absence of any finding by the primary judge about whether Dr Spautz would have initiated and pursued the committal proceedings even if he had not had a predominant purpose of seeking a settlement of his overall dispute with the University. If he would have done so, the case would fall within the category of case referred to by Bridge L.J. in Goldsmith v. Sperrings Ltd. (121) (1977) 1 WLR, at p 503.

> "What if a litigant with a genuine cause of action,
> which he would wish to pursue in any event, can be shown
> also to have an ulterior purpose in view as a desired
> byproduct of the litigation? Can he on that ground be
> debarred from proceeding? I very much doubt it."

It is, however, unnecessary to pursue that question.

14. The second further matter is that there was some discussion in the course of argument about the elements of the tort of collateral abuse of process. I have found it unnecessary to examine that question in this judgment. I would, however, indicate my agreement with the conclusion expressed by Priestley J.A. in the Court of Appeal that the tort necessarily involves some collateral overt or extraneous act(122) See Spautz v. Gibbs (1990) 21 NSWLR, at pp 244, 270, 278-280; and see, also, Hanrahan v. Ainsworth (1990) 22 NSWLR, per Clarke J.A. at pp 107-122 esp. at p 118; United Telecasters Sydney v. Hardy (1991) 23 NSWLR 323, at pp 343-344; Hauser v. Bartow (1937) 7 NE 2d 268, at pp 269-270 (affirmed in Curiano v. Suozzi (1984) 469 NE 2d 1324, at pp 1326-1327); R. Cholkan and Co. v. Brinker (1990) 71 O.R. (2d) 381; Teledata Communications Inc. v. Westburne Industrial Enterprises Ltd. (1990) 65 DLR (4th) 636 as distinct from the mere institution of proceedings, however well-founded, for some "improper" subjective purpose. It is that collateral overt or extraneous act, and not the initiation of the proceedings themselves, which constitutes the "collateral abuse" for the purposes of the tort. As Samuels AP commented in United Telecasters Sydney v. Hardy(123) (1991) 23 NSWLR, at p 343 (emphasis in text); Meagher and Clarke JJ.A. agreeing (at p 348), the "gravamen of the action is the use of a process; not simply an improper subjective purpose". The collateral overt or extraneous act may, in my view, be committed before the initiation of the relevant proceedings provided its effect persists at the time when the proceedings commence.

15. The appeal should be dismissed.

GAUDRON J. The facts have been set out in other judgments. The question that arises by reference to those facts is whether committal proceedings for conspiracy and criminal defamation should be stayed as an abuse of process because they were commenced by Dr Spautz for the predominant purpose of obtaining settlement of a claim that he was wrongfully dismissed by the University of Newcastle. That purpose was characterized as improper by Smart J. who, at first instance, held in favour of a stay.

2. It is convenient to adopt the expression "improper purpose" to describe the kind of purpose that must be established before proceedings or some step in proceedings can be characterized, by reason of the purpose involved, as an abuse of process. And, on that basis, I can at once state my agreement

with Mason C.J., Dawson, Toohey and McHugh JJ. that an improper purpose is sufficient, without an improper act, to justify a stay. That, of course, says nothing as to the tort of collateral abuse of process which, I am inclined to think, requires some act amounting to a misuse or attempted or threatened misuse of the process involved. And I agree with their Honours that a stay may be granted on the basis of improper purpose even though there are reasonable grounds for the proceedings or for the taking of the particular step concerned. However, I differ from their Honours in that, in my view, something over and above what is involved in this case is necessary before a purpose can be identified as improper.

3. The kind of purpose that will indicate that proceedings should be stayed as an abuse of process is the same kind that marks out the tort of collateral abuse of process, they being different remedies deriving from the same law and based on those principles which protect the courts and their processes(124) In re Majory (1955) 1 Ch 600, at pp 623-624. The tort was recognized by this Court in Varawa v. Howard Smith Co. Ltd. (125) [1911] HCA 46; (1911) 13 CLR 35. For earlier discussion see Bayne v. Ballieu [1908] HCA 39; (1908) 6 CLR 382, at p 401; Bayne v. Blake [1909] HCA 55; (1909) 9 CLR 347, at pp 358-359 and in Dowling v. Colonial Mutual Life Assurance Society Ltd. (126) [1915] HCA 56; (1915) 20 CLR 509. However, in neither of those cases was the tort established. The tort was made out in QIW Retailers Limited v. Felview(127) (1989) 2 Qd R. 245. And in Hanrahan v. Ainsworth(128) (1990) 22 NSWLR 73 it was held that there was sufficient evidence to be left to a jury. These appear to be the only reported cases in this country in which a plaintiff has succeeded on the tort or on some aspect of it. The same pattern can be observed in other jurisdictions, there being few successful claims since Grainger v. Hill(129) [1838] EngR 365; (1838) 4 Bing(NC) 212 (132 ER 769), the case in which the tort was established. Successful claims were made in Gilding v. Eyre(130) [1861] EngR 793; (1861) 10 CB(NS) 592 (142 ER 584) in the United Kingdom, in Guilford Industries Ltd. v. Hankinson Management Services Ltd.(131) (1973) 40 DLR (3d) 398 in Canada and in Dishaw v. Wadleigh(132) (1897) 44 NYS 207 in the United States of America. The list is not exhaustive.

4. The cases in this area speak in terms that are not entirely explicit. The terms used include "(a purpose) foreign to the scope of the process"(133) Varawa v. Howard Smith Co. Ltd. (1911) 13 CLR, per Griffith C.J., at p 55. See also per O'Connor J. at p 70, "an object not within the scope of the process"(134) Parton v. Hill (1864) 10 LT(NS) 414, at p 415, "some collateral advantage ... (other than) the purpose for which such proceedings are ... designed"(135) In re Majory (1955) 1 Ch, at pp 623-624, or a "collateral advantage beyond what the law offers"(136) Goldsmith v. Sperrings Ltd. (1977) 1 WLR 478, at pp 498-499. These expressions can be traced to Grainger v. Hill where the expressions used included "an object not within the scope of the process"(137) (1838) 4 Bing(NC), per Tindal C.J. at p 221 (132 ER, at p 773) and "an ulterior purpose"(138) ibid., at p 224, per Bosanquet J. (p 774 of ER). See also Varawa v. Howard Smith Co. Ltd. (1911) 13 CLR, per Isaacs J. at p 91. The terms leave it to be discovered from the facts of the cases in which abuse has been established (or potentially established) what it is that makes a purpose "foreign" or "ulterior".

5. I have already stated my agreement with the conclusion of Mason C.J., Dawson, Toohey and McHugh JJ. that an improper act is not essential. However, it should be noted that many, if not all, of the cases in this area and in which it has been held that there was an abuse of process have involved some positive act. That is not surprising: many cases are cases in tort where damage is essential, and it is difficult to conceive of damage occurring in this area without some act or threat; and, at least ordinarily, improper purpose is discoverable only because of some act done in furtherance of the purpose. Notwithstanding my view that improper purpose is sufficient to justify a stay, it is necessary to have regard to the cases involving an improper act for, otherwise, very little useful guidance is to be had.

6. The cases in which abuse of process has been established have usually involved an act described in terms such as "extortion"(139) Gilding v. Eyre (1861) 10 CB(NS), at p 605 (142 ER, at p 590). See also Guilford Industries (1974) 40 DLR (3d), at p 405, where the act was described as obtaining "a settlement by means of legal 'blackmail'", "coercion"(140) Dishaw v. Wadleigh (1897) 44 NYS, at p 210 or "bring(ing) pressure to bear ... to force (a result)"(141) QIW Retailers Limited v. Felview (1989) 2 Qd R, at p 258. These terms signify a claim or demand made without right and without claim of right. And without going to the detail of the cases in which those expressions were used, it is fair to say that, save in the case of Gilding v. Eyre, what was demanded was unrelated to the right, interest or wrong asserted in the proceedings which were held to constitute an abuse of process or, in the case of ancilliary proceedings, the right, interest or wrong asserted by the particular process involved.

7. In Gilding v. Eyre a judgment creditor endorsed a writ of execution for a sum in excess of that which remained outstanding. The judgment debtor was arrested. It was said by Willes J.(142) (1861) 10 C.B.(NS), at p 604 (142 ER, at p 589) that the judgment creditor thereby "extorted money which he knew had been already paid and was no longer due on the judgment". In Grainger v. Hill creditors also issued mesne process pursuant to which the debtor was arrested. Their purpose was to obtain possession of the register of the debtor's vessel, the "Nimble", they having no right or entitlement in that regard. The creditors held a mortgage over the vessel and wished to improve their security by holding the register without which, apparently, the vessel could not put to sea. Dishaw v. Wadleigh also involved a debt. In that case a subpoena to give evidence was issued and served on the defendant who lived some considerable distance from the place where proceedings were brought. The purpose was not to obtain the defendant's evidence, but to force payment of the debt claimed in the principal proceedings without need in the case of the creditor, and without right on the part of the debtor, to resort to the usual procedures for adjudication and execution of judgment.

8. The cases are not confined to proceedings involving debt. It is sufficient to mention the recent cases of QIW Retailers and Hanrahan v. Ainsworth decided in Queensland and New South Wales respectively. In QIW Retailers, winding up proceedings were brought against a company on the ground that the directors were not acting for the benefit of the company as a whole. The proceedings were brought for the purpose of forcing the directors to negotiate for the transfer of control of the company to the petitioner. Hanrahan v. Ainsworth concerned civil proceedings for defamation brought against a police officer. The question whether they had been instituted for an improper purpose was identified in the light of the facts concerned by Kirby P. as being whether they were instituted as "a mere step in a concerted and sustained campaign to get (him) to back off the criminal proceedings and to neglect his duties as a police officer(143) Hanrahan v. Ainsworth (1990) 22 NSWLR, at p 96".

9. The purpose suggested by Kirby P in Hanrahan v. Ainsworth is one which, prima facie, is wrongful in itself. Obviously and as recognized by Lord Denning M.R. in Goldsmith v. Sperrings Ltd.(144) (1977) 1 WLR, at p 490, a purpose which is wrongful in itself is an improper purpose justifying a stay. But leaving that aside and without going to other cases in the area in which there has been held to be an abuse(145) See, for example, In re a Debtor (1928) Ch 199; In re a Judgment Summons; Ex parte Henleys Ltd. (1953) Ch 195, on my reading of the relevant cases there is no basis for characterising a purpose as improper unless it involves a demand made without right or claim of right, or unless it entails some consequence which is unrelated to or is not proportionate with the right, interest or wrong asserted in the proceedings or by the process which is said to have been abused. And, in my view, one or other of those features must be present or the purpose must itself be wrongful if a purpose is to be held an improper purpose justifying a stay.

10. Dr Spautz claims that the acts which form the basis of the charges of conspiracy and criminal

defamation resulted in or materially contributed to his dismissal. There is nothing to suggest that that claim is not genuinely made. And there is nothing to suggest that Dr Spautz does not believe that he has some right or entitlement arising as a result of his dismissal. His claim in that regard is closely connected with and directly related to (indeed, on his view, arises out of) the wrongs asserted in the committal proceedings. And the purpose of securing a settlement of his claim of wrongful dismissal is not one that can be said to be out of proportion with those wrongs. Finally, the purpose is not itself wrongful or improper. Accordingly, it is not an improper purpose and the proceedings cannot, on account of that purpose, be viewed as an abuse of process.

11. The appeal should be dismissed.

ORDER

Appeal allowed with costs.

Set aside so much of paragraph 3(a), (b) and (c) of the order of the Court of Appeal, of New South Wales as set aside the following declarations and orders made by the Supreme Court of New South Wales (Smart J.):

> (a) the declarations that the prosecutions commenced by the respondent against the appellants were abuses of process; and
> (b) the orders that the said prosecutions be stayed permanently.

Set aside so much of paragraph 1 of the order of the Court of Appeal as applies to the said declarations and orders and in lieu thereof order that the respondent's appeals to the Court of Appeal against the said declarations and orders be dismissed.

Set aside paragraph 2 of the order of the Court of Appeal together with the orders of the Court of Appeal that the proceedings in the Supreme Court commenced by the appellants against the respondent for the said declarations and orders be dismissed with costs. Order that the matter of costs of the Supreme Court proceedings and of the appeals to the Court of Appeal be remitted to the Court of Appeal for its determination in light of this judgment.
