SUPREME COURT OF QUEENSLAND

CITATION:	*Vlies v Commonwealth of Australia* [2004] QSC 404
PARTIES:	**KARL McKENZIE VLIES** (plaintiff/applicant) v **COMMONWEALTH OF AUSTRALIA** (defendant/respondent)
FILE NO/S:	S 559 of 1986
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	30 September 2004
JUDGE:	McMurdo J
ORDER:	**The application for leave to proceed is dismissed**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – TIME – DELAY SINCE LAST PROCEEDING – where plaintiff suffered injury 18 years ago as he was attempting to repel from helicopter – where application for leave under r 389(2) – whether prejudice to defendant – whether leave to proceed should be granted *Uniform Civil Procedure Rules*, r 389(2) *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, cited *Cooper v Hopgood & Ganim* [1999] 2 Qd R 113, applied *Hoy v Honan* [1997] QCA 250, cited *Groves v The Commonwealth* (1981) 150 CLR 113, cited *Quinlan v Rothwell* [2002] 1 Qd R 647, applied *Tyler v Custom Credit Corporation Limited* [2000] QCA 178, applied
COUNSEL:	R J Douglas SC with A Luchich for the applicant D O J North SC for the respondent
SOLICITORS:	L A Ward Legal for the applicant Australian Government Solicitor for the respondent

[1] **McMURDO J:** This action was commenced by a writ which issued on 14 October 1986. It is a claim by the plaintiff, whose surname is now McKenzie, for damages for personal injuries from an accident which occurred in May of that year. The plaintiff was then a member of the Australian army, and he was injured when he fell from a helicopter in the course of a training exercise in North Queensland. Now, 18 years after the commencement of the proceedings, he seeks leave pursuant to r 389(2) to proceed with his claim, which he must do because no step has been taken for more than the past two years.

[2] This is not an especially complex case and it has at all times involved but two parties. There have been no substantial interlocutory disputes. There have been several lengthy periods in which nothing has been done on behalf of the plaintiff to move the case forward. On two occasions his solicitors have had to deliver a notice of intention to proceed under the previous rules of court. The defendant has contributed to the delay to some extent; it cannot claim that it has always sought to force the case on for trial. Some delay has been caused by its slowness to answer correspondence. Ultimately, however, it is the fault of the plaintiff or of those representing him that he finds himself in this position. On any view, there is no good reason why his case was not tried well more than ten years ago.

[3] In *Tyler v Custom Credit Corporation Limited* [2000] QCA 178, Atkinson J (with whom McMurdo P and McPherson JA agreed) set out a number of considerations relevant to r 389. Obviously, the relative importance of some of those matters will vary from case to case. But in any application under this rule, at least one of the more important considerations must be that of whether the delay between the events in question and the date of the trial is likely to affect the fairness of that trial.[1] In this matter, I conclude below that the plaintiff has not excluded prejudice to the defendant from the delay.

The accident

[4] The accident occurred when the plaintiff was attempting to rappel from a helicopter. He was one of five soldiers involved in that exercise, two from one side of the helicopter and three (including the plaintiff) from the other. That required the plaintiff to move outside the helicopter to a position where he was facing its side and standing on one of its skids, which were the two parallel rails which acted as the helicopter's feet. Each soldier had a rope down which he was to descend from that position. He was attached to the rope by equipment which he wore around the area of his hips.

[5] The plaintiff had rappelled from a helicopter on many occasions, but on this day the exercise was made more difficult for him by two things. The first was that he was wearing a very heavy kit as well as carrying a rifle. His backpack is thought to have weighed anything from 35 to 55 kilograms.[2] In addition he was wearing webbing containing water bottles and other items which together weighed a further 7.5

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1 *Hoy v Honan* [1997] QCA 250

2 According to the report procured for the plaintiff from Geoff McDonald & Associates Pty Ltd dated 17 January 1995

kilograms. His rifle weighed 4.75 kilograms. It is possible that all of this equipment weighed something of the order of 65 kilograms. He is 5 ft 7 ins in height and he is said to have then weighed 63.5 kilograms. Quite possibly then his body weight was effectively doubled by what he was carrying on his back. This meant that as he moved to the position of standing on the skid and leaning away from the helicopter whilst also supported by the rope around his hips or just below his waist, his centre of gravity was effectively raised and moved rearwards by the weight on his back. Secondly, as he moved sideways along the skid to make room for two more soldiers alongside him, he had to pass an obstacle, which was the machine gun mount. This required him to pass underneath that obstacle by leaning further back and away from the helicopter whilst keeping his feet edging along the skid. That was made more difficult by the heaviness of his kit and its effect on his centre of gravity. It appears that as the plaintiff attempted to move underneath the obstacle of the machine gun mounting by leaning further back and away from the helicopter, he fell backwards and turned upside-down. His case is that the weight on his back was so heavy that he was unable to maintain his position as he leant further backwards. Once he turned upside-down he lost effective control of the rope and its use as a brake, and he slid down to the ground and was injured.

The plaintiff's case

[6] He alleges that the Commonwealth of Australia owed to him a duty of care analogous to that owed by an employer to an employee. His case has been pleaded in varying terms since the original statement of claim was delivered on 17 September 1987, and in the course of the hearing of this application, his counsel abandoned some particulars of negligence. In essence, however, his case has been and remains that he should not have been told to attempt to pass underneath the machine gun mount with the kit he was carrying and with the rope attached as and where it was to a part of his body which was below the effective centre of gravity. He says that had the rope been attached by equipment by which the rope supported him at chest level, the undue risk of his falling backwards and becoming inverted could have been avoided. So the plaintiff's case is that there was a way of making this manoeuvre safe, which required the provision of different equipment attaching him to the rope. Alternatively, the plaintiff would say that if such equipment did not exist or was not reasonably available, he should not have been ordered to attempt the manoeuvre. A particular of his case is that a certain NCO had ordered his group not to wear some device to which the rope could have been attached around their chests. It has been, but is no longer, part of his case that the instructions and training he had been given in preparation for this particular manoeuvre was inadequate. Nor is it now part of his case that there was some defect in any of his equipment in the sense that it was in a damaged or deteriorated condition.

[7] In his original statement of claim, he alleged that his injuries involved a lacerated scalp, a fractured heel, a fracture in the thoracic spine and a bruised neck. In his Statement of Loss and Damage dated 30 June 1991, he also alleged that there were "numerous small fractures to various vertebrae" and that he suffered from headaches, disorientation, loss of memory, eye sight impairment, loss of sexual appetite, low backache, and cervical stiffness and soreness. In his amended

statement of claim delivered on 22 July 1996, he added to the originally pleaded injuries those of "head injury, including optic nerve damage and brain damage resulting in loss of intellect, impaired cognition, attention, concentration and memory, lethargy, loss of libido and personality change". In his amended Statement of Loss and Damage dated 27 July 1999, he complained of a personality change and also of depression. Then in 2001, various medical reports were obtained by his solicitors which foreshadowed complaints of a fracture of his cervical spine and an injury to his lumbar spine, as well as a case that he has suffered a post-traumatic stress disorder and an adjustment disorder. Those injuries are yet to be pleaded. The defendant submits that no notice of them was given until 2001, whilst the plaintiff points out that there was some notice by the 1991 Statement of Loss and Damage in its reference to "numerous small fractures to various vertebrae" and that a psychologist's report of 1989 as well as a psychiatrist's report of 1999, contain some discussion of the plaintiff's mind which is said to have anticipated a case of certain psychiatric disorders.

Contemporaneous records of the accident

[8] This accident was investigated by an Army officer, Capt Thompson, within weeks of its occurrence. His terms of reference were to investigate and report on "the circumstances surrounding injuries to (the plaintiff)" including "the cause of injury and the extent of all injuries sustained" and "whether any injury suffered by the (plaintiff) was caused or contributed to by any act or omission of another person (and) whether by his neglect, carelessness or misconduct the member contributed to his injuries". Capt Thompson's report is dated 13 August 1986. It describes the injuries sustained in terms which correspond precisely with what was pleaded in the plaintiff's original Statement of Claim in September 1987. Capt Thompson wrote:

> "It appears the machine gun and the machine gun mount on the right hand side of the Iriquois caused (the plaintiff) to lean back more than is normally necessary when on the skid preparing to rappel. … By his own admission (the plaintiff) had encountered a similar problem with the (machine gun) and (machine gun mount) on the right hand side of the helicopter on a previous airborne rappel. Although he knew the (machine gun) and (machine gun mount) would cause some awkwardness, he believed he was experienced enough to be able to cope with it while the two other members on his side moved on to the skid. However, he obviously misjudged the effect the extra weight of his kit and equipment would cause. During his fall out of control he attempted to stabilise by applying the emergency procedures but it appears that he could not effectively apply them due to his upside-down position and the bulkiness of his kit and equipment.
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> There is no evidence to suggest (the plaintiff) was negligent or applied incorrect rappelling procedures. I therefore conclude that (the plaintiff's) injuries were caused by an error in judgment."

> He recommended that "airborne rappellers be made aware of the possible awkwardness that can be caused by the machine gun and machine gun mount when rappelling from the … helicopter in full kit and equipment."

[9] The report also criticised the absence of a Safety Officer on board the helicopter but concluded that this was not a cause of the accident. Nor was it a cause on the plaintiff's case in these proceedings. It was further recommended that the plaintiff "be compensated for the injuries he received" but it is clear enough that this referred to something analogous to workers' compensation payments rather than to the Commonwealth's liability if any at common law.

[10] The investigation obtained statements not only from the plaintiff, but from a Cpl Capewell, another soldier involved in the descent from the helicopter, who said that he noticed that the plaintiff "on the right hand skid moving under the (machine gun) mount and leaning back more than normal (and then) upside-down and sliding down the rope". His statement attributed the accident to "the weight in his pack". It also obtained statements from Lt Turkington and Lt Porter, neither of whom was on board the helicopter. Their statements were relevant to the question of why there was no Safety Officer on board.

[11] Another document made in 1986 which is still available is headed "Report of an Injury or Illness". Three persons, one being the plaintiff, seem to have summarised the accident within this report. One of those was a Pte Penna. He also completed a document headed "Report by Witness" which he signed and dated 20 November 1986, in which he says that he was on the skid of the aircraft next to the plaintiff when he "saw he was having difficulty holding his brake and maintaining balance due to the machine gun mounting, he fell from the skid prior to the order to rappel as he could not maintain his balance or hold his brake". The third contributor was a Capt Appleton who wrote that "the injury was caused by weight of equipment, the location of the (machine gun) and contributed to by an error of judgment by (the plaintiff)".

[12] On 23 October 1986 the plaintiff submitted a claim for statutory compensation in which he identified as relevant witnesses Pte Penna, a Pte Connell and a Pte Snee, and to which he attached short statements by each of those witnesses. I have referred to Pte Penna's statement. Pte Snee's statement was to the same effect, and Pte Connell did not see the plaintiff lose his balance but saw only his subsequent fall.

[13] There are ample contemporaneous records then of the accident, including statements of eye witnesses, and there is no inconsistency between the records.

History of these proceedings

[14] The proceedings were very promptly commenced and the pleadings were apparently closed by the plaintiff's Reply dated 6 November 1987. There was then a request for further particulars served on the plaintiff on 25 January 1988. The plaintiff did

not respond to that request by providing particulars until more than two years later, on 10 May 1990. The explanation given at the time was that counsel who had been briefed had not attended to the matter, and new counsel had had to be retained. In June 1990, the defendant served a notice requiring discovery, which seems to have prompted a like notice from the plaintiff. It was not until May of 1991 that anything further happened, which was when the plaintiff filed his affidavit of documents and again sought discovery. In June 1991, he filed and served his Statement of Loss and Damage. He granted the defendant an extension of time in which to make discovery, and the defendant's affidavit of documents was dated 27 February 1992.[3] Later that year the defendant requested some further discovery from the plaintiff and it was provided.

[15] On 27 August 1993, the defendant delivered interrogatories of no considerable length. The plaintiff's solicitors immediately asked for an extension of time for their answer. They were eventually answered in February 1999. In the intervening years, there was some correspondence between the parties involving further particulars and inspection of documents. The plaintiff obtained the report of its expert engineer in January 1995 but it was not until July 1996 that he amended his statement of claim. Prior to doing that, he had had to give a notice of intention of proceed (on 20 June 1996), further to the similar notice he had given in February 1990. With his amended statement of claim he served a certificate of readiness for trial. But on 4 October 1996 he served a supplementary affidavit of documents, after which he took no step before serving yet another notice of intention to proceed, this time dated 24 June 1998. In August 1998 he demanded that the defendant sign the certificate of readiness and at the same time he served a Notice of Trial and filed his Entry of Cause for Trial, and the pleadings for the trial judge.

[16] In January 1999 the defendant's solicitor requested copies of documents and sought a further medical examination of the plaintiff. The documents were provided in the following month, coinciding with the plaintiff's answers to interrogatories of 1993. In July 1999 the plaintiff served his Amended Statement of Loss and Damage, after undergoing some medical examinations requested by the defendant. On 3 November 1999 there was a settlement conference, which was followed by an amendment to the defence on 19 November and a request that the plaintiff be further examined.

[17] On 10 March 2000 the plaintiff served a Request for Trial Date. On 28 March 2000 he filed his application seeking to have the matter set down which was unsuccessful and resulted in his being examined by Dr Askin as the defendant requested. He underwent that examination in August 2000. In October that year the defendant's solicitor wrote advising that a settlement conference could be held after the defendant had obtained counsel's advice. There was then a further period of inactivity until 27 July 2001 when the plaintiff served a further list of documents and obtained and served certain medical reports, which were those referring to injuries to the cervical and lumbar spine and psychiatric injuries. What followed was a sequence of letters between the solicitors, in which settlement conferences were scheduled and rescheduled and in which the defendant's solicitor continued to

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[3] Although according to plaintiff's chronology attached to his written submissions, the affidavit was not served until 6 May 1993

advise that he was awaiting advice from counsel. The plaintiff's solicitors continued to press for a settlement conference rather than attempting to have the case tried. There were letters from the defendant's solicitor which delayed settlement discussions, attributing the delay to suggested difficulties such as the closure of the Australian Government Solicitor's Townsville office or some difficulty in obtaining instructions from Canberra. Then in September 2002 the defendant's solicitor wrote suggesting that there had been no step in the proceeding for in excess of two years. She said:

> "We would appreciate your thoughts in this regard. We emphasise that we are not suggesting at this particular time that either of the parties must immediately file an application for leave to proceed; it may be that there has been action amounting to a step which is not immediately apparent to the writer. Alternatively, if leave is required, and subject to our client's instructions, a consent order within the terms of *UCPR* 666 may be appropriate."

[18] It was not clear why the plaintiff did not then either take a further step in the proceeding or apply for leave to do so. Instead, the plaintiff's side apparently did nothing until 10 April 2003 when his solicitors wrote enclosing a draft consent order for leave to proceed. On 22 April 2003 the defendant's solicitor advised that instructions were being sought as to this order. On 30 May 2003 the plaintiff's solicitors wrote a follow-up letter asking for a response to their draft order. It was, in fact, on 27 July 2003 that the period of two years relevant to this application from the last step expired. (The last step had been the supplementary list of documents served by the plaintiff.) Until then, each side was proceeding upon the misapprehension that the two years had already expired. The defendant's solicitor did not respond to the plaintiff's proposed draft order, but still the plaintiff's side did nothing until 9 July 2004 when a further follow up letter was sent. Yet another such letter was sent on 6 August 2004. Then finally on 13 August 2004, the defendant's solicitors advised that the defendant would not consent to there being leave to proceed.

[19] From that summary, it can be seen that the defendant was not without fault. There were periods in which the defendant seems to have taken an unduly long time to provide instructions to its solicitors. That having been said the history shows that the plaintiff's side was primarily responsible for the very extensive delay which has occurred. In several instances, an extraordinarily long time was taken for certain steps. An expert's report on liability was not obtained until 1995 but once it was obtained, it is difficult to see what else was holding up the plaintiff in pressing for a trial date. At times the plaintiff's side seems to have had a short period of enthusiasm for the prosecution of this case, but that would then be followed by a long period of inaction. After 18 years, there can be no satisfactory explanation for why this case has not been tried. Without saying anything at this point as to its merit, it is not a very complicated claim, or it has not been so at least since the expert's report was obtained. I make some allowance for the fact that the plaintiff's medical condition, at least according to some of the reports, would be a contributing factor in that it might make him less likely to initiate action by his lawyers. I also take into account the fact that he is obviously in a relatively poor financial position. But in this case, there were no complicating factors which in some cases can lead to

substantial delay, such as the addition of other parties, substantially interlocutory disputes and appeals, or the disappearance of critical documents or witnesses. Ultimately, the plaintiff's side is primarily responsible for this extraordinary delay and its consequential potential for prejudice.

[20] It is submitted that the "pace" of the proceeding cannot be attributed to the conduct of the plaintiff himself, rather than to his lawyers. Reliance was placed upon what was said by Derrington J in *Cooper v Hopgood & Ganim* [1999] 2 Qd R 113 at 124 that "the position of a party innocent of any delay should not be viewed in the same light as that of a party who is responsible for persistent delay". I do not read that statement as providing particularly strong support for an argument that delay which puts at risk a fair trial is not so important where a cause of it is the lawyer's delay. I doubt that Derrington J was intending to say that a party whose lawyers were slow was not himself "responsible" for that delay. As his Honour went on to point out, the incompetence of the plaintiff's lawyers in that case did not provide a convincing answer, because the circumstances required that the plaintiff give the matter to lawyers who would prosecute the case. In a particular case, the relative responsibilities of a plaintiff and that plaintiff's lawyers might have a particular importance. For example, if a plaintiff had chosen to let an action go to sleep, that would be a discretionary consideration adverse to his being allowed to belatedly prosecute it. In the present case, the omissions of some of the plaintiff's lawyers have contributed to the delay. But so too has the plaintiff, who should have insisted that his case be prosecuted. The plaintiff admits that he was made aware of the various delays, and that he has "always been aware of any decision which may affect the action". The fault is not simply that of (some of) the plaintiff's lawyers, or former lawyers. But to the extent that they have caused the delay, it is difficult to see that their default should be to the disadvantage of the defendant through any risk to a fair trial from that delay.

Prejudice

[21] An affidavit by the plaintiff's solicitor exhibits recent statements by Mr Capewell, Mr Connell and Mr Snee. An affidavit by the defendant's solicitor says that of the persons who may be relevant witnesses on liability, her office has been unable to locate three of them. One is Lt Turkington, and the others are the two persons who, it seems, were the two persons flying the helicopter. A number of witnesses say that the crew rappelling from the helicopter consisted of the plaintiff, Capewell, Connell, Snee and Penna. It is not explained how the evidence of these two men, or that of Lt Turkington, who was not on board, might assist. Lt Turkington gave a statement for Capt Thompson's investigation. It seems clear then that the sequence of events was as the plaintiff has always claimed, as other witnesses have described and as Capt Thompson found in his report.

[22] The defendant submits that it is prejudiced also in having to meet allegations as to what alternative equipment should have been used in this exercise. It is submitted that the issues involved arose from the amendments to the statement of claim made in 1996. The original statement of claim alleged, amongst other things, that the defendant had failed to provide or maintain adequate or suitable plant and equipment to enable the plaintiff to carry out the rappel safely. But in particulars

provided in May 1990, the plaintiff alleged that his "webbing harness seat was not safe in all the circumstances in that it caused the centre of balance of the plaintiff to be above the point where the harness was attached to the rappelling rope". As I see the plaintiff's present case, it is that if he was to be directed to rappel from this helicopter after making his way under the machine gun mount and whilst wearing such a heavy kit, he should have been provided with equipment whereby the rappelling rope was attached to what he was wearing at a point which was closer to his "centre of balance" (or gravity). It seems to me therefore that his case in relation to inadequate equipment was raised as early as at least 1990. In the amended statement of claim delivered in July 1996, the point was pleaded and particularised with some more detail, and with the addition of a particular that the defendant "by its servant or agent (a more senior ranking person than the plaintiff) instruct (ed) the plaintiff not to use a chest strap as was previously done by the plaintiff to provide additional support countering the weight of the kit". As to this last particular, the recent statement of Mr Capewell, exhibited to the plaintiff's solicitor's affidavit in this application, identifies that the person who gave the instruction as a Warrant Officer Woods. It is submitted that there is prejudice in that Mr Woods may not be able to be found or to recall whether he gave that instruction.

[23] However, in my view there is no relevant prejudice to the defendant on the question of what other equipment should have been worn by the plaintiff in this exercise. This is firstly because the defendant has been on notice since at least 1990 of the plaintiff's essential point, which is that his centre of gravity was well above where the harness was attached to the rappelling rope. Faced with that allegation within the 1990 particulars, the Commonwealth should have considered whether there was in fact alternative equipment available which could have been used on this flight or, if not, why it was not available. It seems likely that had consideration been given to the matter in 1990, any further relevant evidence could have been obtained. I would accept that after 18 years, there are difficulties in identifying what other alternative equipment was available, but I do not see why these inquiries were not made by at least 1990. If there was alternative equipment which could have been used, then I do not see that it will be critical to the outcome of this case to determine whether there was an express direction that the plaintiff and men on this occasion were instructed not to use it. There is no allegation pleaded against the plaintiff that he should have worn the chest harness which his witness would say that WO Woods vetoed. Clearly the plaintiff was ordered to engage in this exercise, wearing the equipment with which he was provided for it. That has always been his case. The relevance of the particular that a certain person had directed that the crew was not to wear the chest harness is in its suggestion that in fact there was available a piece of equipment which the plaintiff or his expert would say was more appropriate. But as I have said, the Commonwealth should have investigated the availability of other equipment by at least 1990. Further, insofar as the 1996 amendments to the Statement of Claim raised any allegation which was in substance a new one, there was no complaint of or opposition to the amendment. If there was then a new allegation in relation to the equipment worn by the plaintiff, then presumably the defendant considered it not only for the purpose of considering whether there was some matter which should be pleaded in answer to it, but also to consider whether all relevant documents had been disclosed. There was no complaint that the 1996 amendments had caused a difficulty in either respect.

[24] I am satisfied that there will be no significant prejudice to the defendant in relation to the trial of liability issues from the passage of time since 1986. One reason for this is that there could be no dispute as to the sequence of events which led to the plaintiff's fall, the presence of the machine gun and machine gun mount relative to his path along the skid or the equipment he was given. The proceedings were commenced promptly, and after an apparently thorough investigation by Capt Thompson. The factual issues are not ones for which fading memories should be a difficulty, because the primary facts have been recorded by statements made at the time.

[25] I turn then to the potential for prejudice in relation to quantum issues. As I have discussed, medical reports obtained in 2001 on behalf of the plaintiff identified components of the plaintiff's claim which had not been pleaded either originally or in the amended statement of claim delivered in 1996. Indeed, they still have not been pleaded.

[26] According to a report by Dr Pentis, orthopaedic surgeon, which is dated 4 June 2001, the plaintiff had suffered "a fracture of the spine of C 7 spinous process" and soft tissue injuries to his lumbar region. Until then, there was no suggestion of a disability from a lumbar injury or a cervical spine injury. Such a case was not sufficiently indicated by the 1999 Statement of Loss and Damage and its reference to "numerous small fractures to the various vertebrae". And according to reports by Dr James, psychiatrist, and Dr Boyce, neurologist, also obtained in 2001 the plaintiff has a post traumatic stress disorder. Dr James also said that he has an adjustment disorder.

[27] In 2000, the plaintiff applied to have the case set down for trial, but then agreed that his application should be dismissed because the defendant should have an opportunity to have him examined by Dr Askin, orthopaedic surgeon. It is clear from Dr Askin's report, which is dated 11 September 2000, that he examined the plaintiff only by reference to the injuries which had been pleaded. He did not consider whether there was an injury to the cervical spine or a lumbar injury. The defendant had not anticipated any case to the effect that there were such injuries, and nor in my view should it have done so. The plaintiff's counsel ultimately submitted that "a claim in respect of a neck injury attributable to the accident is seen by the court to be an impediment to the plaintiff obtaining leave to proceed, then that is also abandoned or not sought to be the subject of a claim". The same was not said in relation to a claim for a lumbar injury, a post traumatic stress disorder or an adjustment disorder.

[28] The case for which leave to proceed is sought is, strictly speaking, that defined by the present pleadings. However, the plaintiff's submissions make it clear that leave is sought to proceed with a case which includes claims for a lumbar injury and for those psychiatric disorders. He has not sought, in the alternative, leave to proceed upon the case as presently pleaded. And to allow the plaintiff leave to proceed on only the pleaded case could prove to be unrealistic, where witnesses such as Dr Pentis will still be called.

[29] Accordingly, if leave is given to proceed as sought, the defendant will have to meet a case parts of which are yet to be pleaded, and of which it had no notice until some 15 years after the accident and the commencement of these proceedings. Not only were doctors engaged by the defendant to examine the plaintiff not asked to consider these particular injuries, but there is the further difficulty from the fading recollections of medical witnesses and, in some cases, from the loss of their notes.

[30] In not every case will a delay, even as great as that here, result in prejudice trial of issues concerning the nature and effect of a plaintiff's injuries. In many cases, for example, the nature and extent of the injuries are not particularly controversial. But in this case there was always a substantial controversy as to those matters, even before the further components of the plaintiff's case were foreshadowed by the 2001 reports. Ultimately I am not satisfied that there is an absence of significant prejudice to the defendant, from the impact of this very extensive delay upon the fair trial of questions concerning the nature and effect of the plaintiff's injuries.

Merits of the claim

[31] Another relevant consideration is said to be the plaintiff's prospects of success. The defendant submitted that there is a particular difficulty for the plaintiff, in that very arguably the Commonwealth did not owe him a duty of care. In *Groves v The Commonwealth* (1981) 150 CLR 113, the court left open the question of whether a duty would be owed to servicemen in the context of activities involving training in simulated combat conditions: see 119 (Gibbs CJ), 134 (Stephen, Mason, Aickin and Wilson JJ) and 136 (Murphy J). But ultimately the defendant agreed that for the purposes of this application, there was an arguable case to the effect that a duty of care was owed and that it was breached. As the matter presently appears, the likely outcome is not so clear as to make the plaintiff's prospects of success, or a lack thereof, a decisive consideration for this application.

Unreadiness for trial

[32] It is also relevant to consider how far the litigation has progressed. If leave was given, then the plaintiff would have to amend his statement of claim and his statement of loss and damage. The defendant would want the plaintiff to be further examined in the light of those reports of 2001. It is likely that the matter would not be tried until some time towards the middle of 2005. The fact that the case is still not ready for trial could only add to the potential prejudice from the plaintiff's delay.

Conclusion

[33] Having regard to these various considerations, I have concluded that the plaintiff has not demonstrated that he should be given leave to proceed. The most important considerations are that I am not satisfied that there is no material prejudice for a fair trial insofar as questions of the nature and extent of the plaintiff's injuries are concerned and that the prejudice is the result of what is in total an extraordinary

delay for which the plaintiff's side is primarily responsible. Several recent decisions demonstrate that courts are now more conscious of the likelihood of prejudice from substantial delay and are accordingly less tolerant of it: see *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; *Cooper v Hopgood & Ganim* [1999] 2 Qd R 113 and *Quinlan v Rothwell* [2002] 1 Qd R 647. In *Quinlan*, Thomas JA (with whom de Jersey CJ and Mackenzie J agreed) said at 658:

> "Subject to what is said below, the wide-ranging factors that have been identified as potentially relevant to such applications, such as those mentioned in *Cooper v Hopgood & Ganim*, will continue to guide courts in exercising the power. In addition, r 5 gives express recognition to the importance of expeditious resolution of issues in proceedings. In my view the nature of the power of this court has not been altered, but the rules are a clear indication of the change in attitude that has independently taken place in courts throughout Australia. They suggest that courts will now be less tolerant of delay and that the expedition of proceedings should be encouraged to a greater extent than was formerly the case."

In the same case, the Chief Justice said at 652:

> "I at once observe that the discretion to dismiss for want of prosecution may these days confidently be exercised, in appropriate cases, with more robustness than would previously have been considered appropriate. *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 551-2 jurisprudentially signalled that shift, and it is legislatively suggested through the Uniform Civil Procedure Rules. The focus of rule 5 rests strongly on 'the just and expeditious resolution of the real issues ... at a minimum of expense', and avoiding undue delay, expense and technicality. The rule has gone to the length of expressly confirming that breach of a party's 'implied undertaking' 'to proceed in an expeditious way' may attract sanctions including, as per the proffered example, dismissal of the proceeding."

[34] I conclude that the application for leave to proceed must be dismissed. I shall hear the parties as to any consequent orders and as to costs.