IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION

Not Restricted

No. 7476 of 1997

IN THE MATTER of an application for leave to commence a proceeding pursuant to s.21 of the *Supreme Court Act 1986*

DAVID JAMES CLEMENS (FORMERLY LINDSEY) Applicant

- and -

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA Respondent

JUDGE:	HABERSBERGER J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	6 FEBRUARY 2009
DATE OF JUDGMENT:	20 MARCH 2009
CASE MAY BE CITED AS:	CLEMENS v ATTORNEY-GENERAL FOR VICTORIA
MEDIUM NEUTRAL CITATION:	[2009] VSC 28

PRACTICE AND PROCEDURE – Vexatious litigant – Application for leave to commence a proceeding – Whether an abuse of process – Allegations in proposed claim arguably similar to the tort of the intentional infliction of physical harm other than trespass to the person – Assumed that proposed claim would not be foredoomed to fail – Applicant previously given leave to commence a proceeding against same proposed defendant – That proceeding failed – Proposed claim could and should have been pleaded in earlier proceeding – Closely related subject matters – *Res judicata* in the wider sense – Application refused.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr Clemens (in person)	
For the Respondent	No appearance	

HIS HONOUR:

1 Mr David Clemens (formerly Lindsey) was declared to be a vexatious litigant, in July 1998, on the application of the Attorney-General for Victoria.[1] By the same order he was prohibited from commencing legal proceedings in this Court or in any other State court or tribunal without leave. This is an application by Mr Clemens for leave to commence a proceeding in the County Court of Victoria against Philip Morris Limited ("PML"). Section 21(4) of the *Supreme Court Act 1986* provides that the Court must not give a vexatious litigant leave to commence any legal proceeding "unless the Court … is satisfied that the proceedings are not or will not be an abuse of the process of the Court, inferior court or tribunal". It is well established that the onus rests on the applicant to establish that the condition as to the absence of an abuse of process has been satisfied.[2]

2 The High Court of Australia has recently reiterated three, often repeated, characteristics of an abuse of process.[3] In *PNJ v The Queen*, French CJ, Gummow, Hayne, Crennan and Kiefel JJ in a joint judgment stated:

> It is not possible to describe exhaustively what will constitute an abuse of process. It may be accepted, however, that many cases of abuse of process will exhibit at least one of three characteristics:
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> (a) the invoking of a court's processes for an illegitimate or collateral purpose;
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> (b) the use of the court's procedures would be unjustifiably oppressive to a party; or
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> (c) the use of the court's procedures would bring the administration of justice into disrepute.[4] [Footnotes omitted]

3 In *Rogers v The Queen,*[5] Mason CJ said:

> The circumstances in which abuse of process may arise are extremely varied and it would be unwise to limit those circumstances to fixed categories.

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1 *Attorney-General v Lindsey* (unreported, Kellam J, 16 July 1998).

2 *Phillip [sic] Morris Ltd v Attorney-General for the State of Victoria & Anor* (2006) 14 VR 538, [116] (Ormiston JA).

3 See, for example, *Rogers v The Queen* (1994) 181 CLR 251, 286 (McHugh J); *Batistatos v Roads and Traffic Authority of New South Wales* (2000) 226 CLR 256, 265-267, [9]-[15] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

4 [2009] HCA 6, [3].

5 (1994) 181 CLR 251, 255.

In holding that the concept of abuse of process was "not confined to cases in which the purpose of the moving party is to achieve some foreign or ulterior object",[6] his Honour emphasised two further aspects to abuse of process:

> … first, the aspect of vexation, oppression and unfairness to the other party to the litigation and, secondly, the fact that the matter complained of will bring the administration of justice into disrepute.[7]

4 No question arises here about Mr Clemens invoking the Court's procedures for an illegitimate or collateral purpose. But in order to properly consider whether or not his proposed action would be unjustifiably oppressive to PML or would bring the administration of justice into disrepute, it is necessary to set out some of the background to Mr Clemens' application.

5 Between March 2003 and December 2004 Mr Clemens made eight unsuccessful applications in this Court for leave to bring an action against PML claiming damages for injuries allegedly suffered by him as a result of smoking cigarettes manufactured by it. On 12 January 2005, Gillard J granted Mr Clemens' ninth application for leave to bring such a proceeding in the County Court against PML. That company then applied to have the ex parte order set aside. After a rehearing, his Honour decided that he would not vacate his earlier order.[8] PML's appeal against that decision was dismissed.[9]

6 In May 2003 and February 2004 Mr Clemens had also commenced proceedings under the *Trade Practices Act 1974* (Cth) ("the TPA") against PML in the Federal Court of Australia, seeking damages for injuries allegedly suffered by him in consequence of smoking cigarettes manufactured by PML. In January 2004, Kenny J summarily dismissed the first of those applications.[10] In June 2004, Heerey J made a similar order in respect of the second application.[11]

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6 (1994) 181 CLR 251, 255.
7 (1994) 181 CLR 251, 256.
8 *Attorney-General v Lindsey* [2005] VSC 53, [25].
9 *Phillip [sic] Morris Ltd v Attorney-General for the State of Victoria and Anor* (2006) 14 VR 538.
10 *Lindsey v Philip Morris Limited* [2004] FCA 9.
11 *Lindsey v Philip Morris Limited* [2004] FCA 797.

7 Pursuant to the leave granted by Gillard J, Mr Clemens commenced a proceeding against PML in the County Court on 18 January 2005 ("the first PML proceeding"). There was a trial before a judge and jury in May 2007 and in accordance with the verdict of the jury that there had been no negligence on the part of PML causative of any injury sustained by Mr Clemens, judgment was entered for the defendant, PML. Mr Clemens unsuccessfully sought leave to appeal from that order.[12]

8 Following the dismissal of his County Court action and his unsuccessful application for leave to appeal, Mr Clemens' next step was to seek leave to commence a proceeding against Philip Morris (Australia) Limited ("PMAL") for damages for breach of a duty of care. On 13 May 2008 Hansen J gave such leave on the ex parte application of Mr Clemens. PMAL then sought leave to have that order set aside on the basis that the proceeding, which Mr Clemens had issued against it on 26 May 2008 ("the PMAL proceeding"), was bound to fail. Hansen J upheld that application[13] basically on the ground that the supporting material filed by PMAL revealed that PMAL had ceased to be the manufacturer, importer or marketer of cigarettes including Marlboro as from 1 July 1967 pursuant to a sale of business agreement dated 1 June 1967, whereby PMAL sold to PML all of the business assets of PMAL, including all of PMAL's stock in hand and in transit, as at the commencement of trading on 1 July 1967, and that the Marlboro cigarettes which Mr Clemens commenced to smoke in late 1971 or early 1972 were therefore not manufactured by PMAL.[14]

9 His Honour also refused a late application by Mr Clemens to add PML as a defendant to the PMAL proceeding based on the allegation that PML had failed to remove the toxic and carcinogenic chemicals and the nicotine from the cigarettes.[15] In dismissing Mr Clemens' application for leave, his Honour concluded by stating:

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12 *Clemens v Philip Morris Limited* [2008] VSCA 48.
13 *The Attorney-General for the State of Victoria v Clemens* [2008] VSC 370.
14 [2008] VSC 370, [14] and [21].
15 [2008] VSC 370, [31].

> If Mr Clemens desires to bring another application he should do so afresh on proper materials.[16]

10 Mr Clemens then sought leave to issue a new proceeding against PML. This application was dismissed by Harper J on the ground that it would be an abuse of process because an essential element of the proposed proceeding (that PML had breached its duty of care to him and was negligent) had already been determined against him in another proceeding to which PML was also a defendant (the first PML proceeding).[17]

11 Attempting to avoid this problem, Mr Clemens took a new approach in his next application for leave to issue another proceeding against PML. It was proposed that this proceeding be issued in the County Court in its criminal division. Byrne J noted, however, that the document had "the hallmarks of a civil claim".[18] The allegation in the claim was that:

> The bodily injury complained of by the plaintiff was caused by the defendant's recklessness effectively from the 1st July 1967, mixing "Toxic and Carcinogenic Chemicals" LETHAL IN NATURE AND CONTENT into its products, disregarding the possible consequence of its conduct.

12 Byrne J rejected Mr Clemens' submission that the alleged reckless conduct of PML was a common law offence.[19] His Honour ruled that the nearest civil claim was one in negligence, which he noted, Mr Clemens disavowed.[20] His Honour therefore refused the application for leave on the basis that the case had no "prospect of success" and in substance was no different from the claim rejected by Harper J.[21]

13 Mr Clemens appeared before me in the Practice Court on 15 December 2008 seeking leave to issue an originating motion against PML under the *Crimes Act 1958*. The relief or remedy sought was damages. There were four grounds given as follows:

> 1. THIS proceeding is brought against the defendant by the plaintiff pursuant to and by the provisions of Section 5 of the *Crimes Act (Vic) 1958*, "ACTS CAUSING DANGER TO LIFE OR BODILY HARM".

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16 [2008] VSC 370, [31].
17 *Clemens v Attorney-General for Victoria* [2008] VSC 505, [22]-[24].
18 *Attorney-General v Clemens* [2008] VSC 564, [3].
19 [2008] VSC 564, [6].
20 [2008] VSC 564, [7].
21 [2008] VSC 564, [8].

2. ON the First Day of JULY, Nineteen Hundred and Sixty Seven, the defendant commenced to Manufacture, Import, Distribute and Market its products in the State of VICTORIA.

3. THAT it is alleged by the plaintiff, that effectively from the First Day of JULY, Nineteen Hundred and Sixty Seven, the defendant mixed "Toxic and Carcinogenic Chemicals" into its products making the products dangerous which would inflict bodily injury upon a person.

4. THAT on the Eleventh Day of OCTOBER, Two Thousand and Two, the plaintiff suffered "GRIEVOUS BODILY HARM".

In 1971/1972, Division 1(5) of Part 1 of the *Crimes Act 1958* dealt with "Acts Causing Danger to Life or Bodily Harm", including s.17 which dealt in part with the offence of unlawfully and maliciously causing any grievous bodily harm to any person. In 2002, Division 1(4) of Part 1 of the *Crimes Act 1958* dealt with "Offences against the person", including ss.16, 17 and 18, which contain the offences of without lawful excuse (respectively) intentionally causing serious injury to another person, recklessly causing serious injury to another person and intentionally or recklessly causing injury to another person. I pointed out to Mr Clemens a few of the obvious deficiencies in this pleading and, at his request, rather than dismissing the application, I adjourned it for hearing by me on 6 February 2009, to give Mr Clemens time to reconsider and, if he wished, to reformulate, his application.

14 Mr Clemens submitted an amended version of his proposed statement of claim prior to the adjourned date for the hearing of his application. He then handed up a further amended version of his proposed statement of claim at the hearing. I quote the final proposed statement of claim verbatim:

1. KNOWING that they were dangerous to use the Defendant on the First Day of JULY, Nineteen Hundred and Sixty-Seven, commenced to Manufacture, Import, Distribute and Market it's Tobacco Products in the State of VICTORIA.

2. FURTHER and on the alternative it is alleged by the Plaintiff, that effectively from the First Day of JULY, Nineteen Hundred and Sixty-Seven, the Defendant mixed "TOXIC AND CARCINOGENIC CHEMICALS" into it's tobacco product's causing danger to life which would inevitably inflict Bodily Injury and or Harm upon a person.

3. THAT the Plaintiff used the Defendants Tobacco Products, "MARLBORO" and "LONGBEACH MILD" for a long period of time and found it hard to stop using the Defendants Products.

4. FURTHER and on the alternative it is alleged by the Plaintiff that the Defendant effectively from the First Day of JULY, Nineteen Hundred and Sixty-Seven, KNEW that its Tobacco Products contained a poison, "NICOTINE", which would cause to a person, Addiction to and Dependence upon the Defendants Products.

5. THAT it is alleged by the Plaintiff that there are Many Thousands of "TOXIC AND CARCINOGENIC CHEMICALS" mixed into the Defendants Tobacco Products by the Defendant.

6. THAT on the Eleventh Day of OCTOBER, Two Thousand and Two, the Plaintiff suffered "GRIEVOUS BODILY HARM", ("G.B.H."), of a Serious Nature causing Permanent Injury to the Plaintiffs Health.

7. FURTHER and on the alternative it is alleged by the Plaintiff that such "G.B.H." was resultantly caused by the exposure to and inhalation of the "TOXIC AND CARCINOGENIC CHEMICALS" mixed into the Defendants Tobacco Products by the Defendant.

8. THAT it is further alleged by the Plaintiff that had the Defendant not mixed "TOXIC AND CARCINOGENIC CHEMICALS" into its Tobacco Products, the Plaintiff would not have suffered "G.B.H."

9. FURTHER and on the alternative the Plaintiff alleges that the Defendants conduct engaged in effectively from the First Day of JULY, Nineteen Hundred and Sixty-Seven, by mixing "TOXIC AND CARCINOGENIC CHEMICALS" into its Tobacco Products was an act done recklessly and wantonly, without morals, disregarding the foreseeable harm caused to persons.

10. BY reason of the matters aforesaid the Defendant has committed a COMMON LAW OFFENCE, that of causing "G.B.H." to the Plaintiff.

11. FURTHER and on the alternative the Plaintiff asserts that he is not statute barred from bringing on this proceeding against the Defendant.

AND THE PLAINTIFF CLAIMS

1. DAMAGES (To be assessed by the Court).

2. OTHER such further ORDER as the Court deems fit.

15 Doing the best I could to make some sense of this claim, it seemed to me that Mr Clemens' new cause of action, which was based on the alleged common law offence of causing grievous bodily harm (or serious injury) to Mr Clemens by mixing toxic and carcinogenic chemicals into its tobacco products knowing that they were dangerous, was arguably similar to the tort of the intentional infliction of physical harm other than trespass to the person.

16 The few early decisions establishing this tort were all nervous shock cases. In *Wilkinson v Downton*,[22] the defendant, as a practical joke, falsely told the plaintiff that her husband had been seriously injured in an accident. The plaintiff suffered nervous shock resulting in serious physical illness. Wright J held that the defendant had wilfully done an act calculated to cause harm to the plaintiff. Her legal right to personal safety had been infringed, and she had been occasioned physical harm without justification. *Wilkinson* was followed by the English Court of Appeal in *Janvier v Sweeney*,[23] another case of deliberate false statements causing nervous shock and physical illness.

17 The High Court of Australia, in *Bunyan v Jordan*,[24] upheld the decisions in both of these cases. In that case, the plaintiff observed her drunken employer handling a loaded revolver and later overheard him in his office inform one of her fellow employees that he was going to shoot himself or someone. The defendant left his office and the plaintiff heard a shot fired. She claimed to have suffered nervous shock and physical injury. One of the reasons given by Latham CJ for the plaintiff failing in her appeal was that the threat to shoot was only overheard by the plaintiff and had not been addressed to her or uttered in her presence.[25] Nevertheless, the learned Chief Justice stated that *Wilkinson* stood for the proposition that:

> If a person deliberately does an act of a kind calculated to cause physical injury for which there is no lawful justification or excuse and in fact causes physical injury to that other person, he is liable in damages.[26]

18 Two recent English cases seem, however, to have proceeded on the basis that the tort includes physical harm even though both were concerned with plaintiffs suffering mental distress. In *Wong v Parkside Health NHS Trust*,[27] the relevant facts were that the

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22 [1897] 2 QB 57; 66 LJQB 493.
23 [1919] 2 KB 316.
24 (1937) 57 CLR 1.
25 (1937) 57 CLR 1, 11.
26 (1937) 57 CLR 1, 10.
27 [2003] 3 All ER 932 (Brooke, Hale LJJ and David Steel J).

appellant was subjected to "a catalogue of rudeness and unfriendliness"[28] by her work colleagues. The Court of Appeal held that:

> For the tort to be committed, as with any other action on the case, there has to be actual damage. The damage is physical harm or recognised psychiatric illness. The defendant must have intended to violate the claimant's interest in his freedom from such harm. The conduct complained of has to be such that that degree of harm is sufficiently likely to result that the defendant cannot be heard to say that he did not 'mean' it to do so. He is taken to have meant it to do so by the combination of the likelihood of such harm being suffered as the result of his behaviour and his deliberately engaging in that behaviour.[29]

19 In *Wainwright v Home Office*,[30] the relevant facts were that the claimants were humiliated and distressed by being wrongfully strip-searched for drugs when visiting a prison. The House of Lords held that insofar as there might be a tort of intention to cause harm, under which damages for distress which did not amount to recognised psychiatric injury might be recoverable, the necessary intention was not established on the facts of the case. Nevertheless, Lord Hoffman, with whom all of the other Law Lords agreed, stated that:

> If someone actually intends to cause harm by a wrongful act and does so, there is ordinarily no reason why he should not have to pay compensation.[31] …
>
> The defendant must actually have acted in a way which he knew to be unjustifiable and either intended to cause harm or at least acted without caring whether he caused harm or not.[32]

20 I agree with the learned authors of a leading Australian textbook on torts that there seems to be "no inherent reason" why the tort should be limited to nervous shock cases:

> Is this tort limited to nervous shock cases? Despite its application in *Wilkinson* and *Janvier*, there seems no inherent reason why it should be. The tort might usefully provide a remedy in many situations where there might otherwise be no cause of action. For example, acts such as putting poison in someone's tea or passing on an infectious disease like AIDS, which only indirectly cause harm, cannot be trespasses but should properly be regarded as intentional physical harm within the principle of *Wilkinson v Downton*. The old cases declaring it to be tortious deliberately to set spring guns or other mechanical devices with the intention of injuring trespassers seem also to belong to this

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28 [2003] 3 All ER 932, [17].
29 [2003] 3 All ER 932, [12].
30 [2004] 2 AC 406.
31 [2004] 2 AC 406, [44].
32 [2004] 2 AC 406, [45].

> category. It is, moreover, inappropriate to regard these acts as negligence when the harm has been deliberately inflicted, and the old cases refrain from dealing with the problem on that basis. [Footnotes omitted][33]

21 I consider, however, that it is unnecessary to pursue this issue further or to grapple with the pleading and evidentiary difficulties confronting Mr Clemens in his proposed action against PML. I will assume that, if properly pleaded and particularised, Mr Clemens' latest claim would not be "foredoomed to fail".[34] Nevertheless, I am satisfied that, even if he has such a cause of action, it would be an abuse of process to give him leave to bring a further proceeding against PML, when this cause of action could and should have been pleaded in the PML proceeding.

22 In his judgment, Hansen J set out the allegations contained in the final form of the frequently amended statement of claim in the first PML proceeding:

> (a) at all relevant times PML was an "importer, manufacturer and distributor of tobacco products".
>
> (b) in late 1971 or early 1972 Mr Clemens commenced to smoke and use Marlboro cigarettes, a tobacco product of PML. He was then about 13 to 13½ years, having been born on 4 March 1958, and did not know that smoking PML's tobacco product caused disease or nicotine addiction.
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> (c) believing it was safe to do so, and not being warned otherwise, Mr Clemens began to smoke Marlboro cigarettes on a daily basis and did so until 1987.
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> (d) as a result, on 11 October 2002 Mr Clemens suffered damage or injury being emphysema, pulmonary disease, smokers bronchitis and symptoms of nicotine dependence.
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> (e) as manufacturer, PML owed Mr Clemens a duty to warn of the product's inherent dangers associated with use; his damage and injury was caused by a breach of that duty. The breach was particularised as:
>
> (i) A failure to warn that Marlboro cigarettes were a dangerous product.
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> (ii) A failure to warn that Marlboro cigarettes contained or produced by way of smoke carcinogens or toxic chemicals which through inhalation of tobacco smoke to the user's lungs would cause long term injury, disease, disorder and diminished expectancy of life.

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33 Balkin and Davis: *Law of Torts*, 2004, Third Edition, p.51, para 3.23. See also Clerk & Lindsell on Torts, 2006, Nineteenth Edition, p.886, para 15-14.

34 *Phillip [sic] Morris Ltd v Attorney-General for the State of Victoria & Anor* (2006) 14 VR 538, [85] (Maxwell P), [121] (Ormiston JA), [152] Eames JA.

(iii) A failure as manufacturer to warn that Marlboro cigarettes contained nicotine, a poison, an addictive substance which would cause in a user a dependency upon it.[35]

23 It is immediately apparent, in my view, that Mr Clemens' proposed statement of claim ("proposed claim") is based on the same set of alleged facts as formed the basis of the statement of claim in the first PML proceeding ("first claim"). There are the following virtually similar allegations:

(a) PML was the manufacturer, importer and distributor of tobacco products, since 1 July 1967 (according to the proposed claim) or "at all relevant times" (according to the first claim);

(b) Mr Clemens used PML's tobacco products, including Marlboro cigarettes, "for a long period of time" (proposed claim) or from "late 1971 or early 1972" (first claim);

(c) PML's tobacco products (proposed claim) or Marlboro cigarettes (first claim) were dangerous and contained "toxic and carcinogenic chemicals" (proposed claim) or "carcinogens or toxic chemicals" (first claim);

(d) PML's tobacco products (proposed claim) or Marlboro cigarettes (first claim) contained a poison, nicotine, which would cause in a user addiction and dependency; and

(e) as a result, on 11 October 2002, Mr Clemens suffered "grievous bodily harm of a serious nature causing permanent injury to the plaintiff's health" (proposed claim) or "damage or injury being emphysema, pulmonary disease, smokers bronchitis and symptoms of nicotine dependence" (first claim).

24 The difference between the two claims is that whereas the cause of action in the first claim was PML's negligent failure to warn users, including Mr Clemens, of the inherent dangers associated with the use of its tobacco products, in the proposed claim the cause of action is based on the alleged common law offence of causing

35 *The Attorney-General for the State of Victoria v Clemens* [2008] VSC 370, [6].

grievous bodily harm to Mr Clemens by mixing toxic and carcinogenic chemicals into its tobacco products knowing that they were dangerous.

25 What is important for present purposes is that, in my opinion, the cause of action sought to be pleaded in the proposed claim, however it be described and framed, could have been pleaded, in the alternative, in the first claim. In *Henderson v Henderson*,[36] Wigram VC said:

> where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

26 In *Kok Hoong v Leong Cheong Kweng Mines Ltd*,[37] the Privy Council said that the rule laid down by Wigram VC in *Henderson* had been "frequently cited with approval". In *Brisbane City Council v Attorney-General for Queensland*,[38] the Privy Council again referred to Wigram VC's statement, as follows:

> The second defence is one of "res judicata". There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. It was, in the judgment of the Board, there described in these words:
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> > ".... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings". (p590)

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36 (1843) 3 Hare 100, 115.
37 [1964] AC 993, 1010-11.
38 [1979] AC 411, 425.

> This reference to "abuse of process" had previously been made in *Greenhalgh v Mallard* [1947] 2 All ER 255 per Somervell LJ and their Lordships endorse it. This is the true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.

27 In *Port of Melbourne Authority v Anshun Pty Ltd*,[39] Gibbs CJ, Mason and Aickin JJ set out the passage from *Henderson* quoted above and continued:

> The existence of the principle has been affirmed by the Judicial Committee on four occasions[40] … In two of these cases the principle was applied so as to shut out litigation of an issue which could and should have been litigated in the earlier proceedings.

28 However, their Honours went on to cast doubt on the width and utility of the principle in *Henderson*:

> However in *Yat Tung* (1975) AC 581 the adoption of the principle in *Henderson v Henderson* [1843] EngR 917; (1843) 3 Hare 100 (67 ER 313) was taken too far. Lord Kilbrandon spoke of it becoming "an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings" (1975) AC at p590. As we have seen, this statement is not supported by authority. And if we are to discard the traditional statement of principle because it was linked to the rules of common law pleading, there is no reason for rejecting the powerful arguments based on considerations of convenience and justice which were associated with it.
>
> Lord Kilbrandon's remarks go further than the statement of Somervell LJ in *Greenhalgh v Mallard* (1947) 2 All ER 255 at p257 which was recently approved by Lord Wilberforce in *Brisbane City Council* (1979) AC at p425. Somervell LJ had said: "res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but … it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them". Yet, *Greenhalgh v Mallard and Brisbane City Council*, unlike *Yat Tung*, were not cases in which the alleged estoppel arose from a defendant's failure to plead a defence. They were cases in which it was argued that a plaintiff was estopped from bringing a new proceeding by reason of dismissal of an earlier action.
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> In these cases in applying the *Henderson v Henderson* principle to a plaintiff said to be estopped from bringing a new action by reason of the dismissal of an earlier action, Somervell LJ and Lord Wilberforce insisted that the issue in question was so clearly part of the subject matter of the initial litigation and so clearly could have been raised that it would be an abuse of process to allow a new proceeding. Even then the abuse of process test is not one of great utility. …[41]

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39 (1981) 147 CLR 589, 598.

40 Referring to the four decisions referred to above.

41 (1981) 147 CLR 589, 601-2.

29 Brennan J concluded his examination of the principle as follows:

> Although *Henderson v Henderson* [1843] EngR 917; (1843) 3 Hare 100 (67 ER 313) does not appear to assert the existence of a power to bar an action where the rule of res judicata has no operation, there have been observations of high authority which draw upon it as authority for the existence of a power to shut out a party from raising in subsequent proceedings an issue which was not actually decided in earlier proceedings but which the party could, and should, have raised in those proceedings: see *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* (1975) AC 581 at p590 and *Brisbane City Council v Attorney-General (Q)* (1979) AC 411 at p425. If the operation of the rule of res judicata were confined to rights which had been litigated in earlier proceedings, it would be necessary to invoke a power to stay proceedings brought to enforce a right outside the operation of the rule though belonging to the subject of the earlier litigation; and accordingly *Henderson v Henderson* was construed as applying the rule "in a wider sense", reserving to the court a discretion to relieve from its wider operation when "there is a danger of a party being shut out from bringing forward a genuine subject of litigation" (*Brisbane City Council v Attorney-General (Q)* (1979) AC 411 at p425). Whatever effect be attributed to *Henderson v Henderson* in estopping a party from litigating a particular issue, I do not think that *Henderson v Henderson* has hitherto been understood in this Court as applying to shut out a party from litigating a cause of action which has not merged in a judgment.[42]

30 In *Rogers v The Queen*, Deane and Gaudron JJ said:

> Considerations bearing on estoppel resulting from the failure to raise some issue which could reasonably have been raised in earlier proceedings have sometimes been conflated with considerations relevant to the various principles aimed at ensuring the final, binding and conclusive nature of judicial determinations.[43]

Their Honours then referred to "the so-called 'extended principle'" in *Henderson*, and stated that:

> It is clear that that principle, if it be one, is to be treated with caution.

31 Whatever be the current status of the rule in *Henderson*, it seems to me that Mr Clemens faces an insurmountable obstacle in seeking to persuade me that his proposed claim is not an abuse of process. In my opinion, it is clear that the subject matters of the two claims are closely related and that the proposed claim could and should have been included as part of the first claim. Moreover, there is nothing

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42 (1981) 147 CLR 589, 614.

43 (1994) 181 CLR 251, 275.

"special" about the circumstances of this case to warrant the Court exercising its discretion to allow this further proceeding to be brought against PML.

32 Mr Clemens' only arguments were that he was not a lawyer and should, therefore, be treated leniently when it came to considering whether the proposed claim could and should have been included in the first claim, and that there was no *res judicata* in the strict sense because the two causes of action were quite different. So much may be accepted. I also bear in mind the approach set out by Kirby J in *Re Attorney-General (Cth); Ex parte Skyring*:

> First, it is always important for every Judge to keep an open mind in case a person who has been rejected by courts in the past may have, hidden amongst the verbiage of his or her arguments, a point which has not been previously seen and which may have merit. Vigilance, and not impatience, are specially required where that person is not legally represented;
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> Secondly, it is regarded as a serious thing in this country to keep a person out of the courts. The rule of law requires that, ordinarily, a person should have access to the courts in order to invoke their jurisdiction.[44]

33 Nevertheless, the very purpose of requiring a person who has been declared a vexatious litigant to obtain leave before commencing a new proceeding is to stop the proposed defendant or defendants from being unfairly vexed or oppressed by continually being forced to spend the time and to incur the costs of defending unjustified proceedings being brought against them. Here, PML has defended a proceeding all the way to verdict and won. Given that the statement of claim in that proceeding was Mr Clemens' ninth attempt to obtain leave, it could hardly be said that, despite his lack of legal training, he had not thought long and hard about how he might plead his complaint against PML. He was apparently quite content to proceed to trial on the basis of his first claim. But when he lost, he scrambled around and came up with yet another way of attempting to recover damages from PML. It should not be forgotten that apart from unsuccessfully suing PML in negligence, Mr Clemens had also tried unsuccessfully to bring proceedings under the TPA against PML in the Federal Court.

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44 (1996) 70 ALJR 321, 323.

34 In my opinion, in all the circumstances, it is not only oppressive for PML to have to defend a new claim which could have been litigated in earlier proceedings, it also brings the administration of justice into disrepute. When the scarce resources of the courts are so stretched and the demands on their time so heavy, it is quite unfair to other litigants to allow one party, even a litigant in person, the luxury of bringing one cause of action at a time against the same defendant arising out of the same set of facts, when all of the causes of action could have been heard at the same time in the one proceeding.

35 I have, therefore, concluded that it would be an abuse of process if Mr Clemens were to bring this new proceeding. Accordingly, I refuse leave to commence the proposed proceeding.
