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"I don't know,

I just get told to come into court.

That's all I do"

Fitness in the Local Court

PART I

Legal Analysis

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INTRODUCTION

Representing clients with mental health issues or cognitive difficulties is a challenging aspect of a Local Court practice. The purpose of this paper and the presentation is to cast light upon a particularly vexed area; what are the ramifications of unfitness in the Local Court? Our focus is upon summary offences and indictable offences dealt with summarily.

The paper and presentation is divided into two parts. The first part is a legal analysis of the relevant principles. The second part highlights practical issues that commonly arise when representing clients that may be unfit.

It is important to note that delving into this area tends to reveal significant complexity and nuance. There are few simple answers and reasonable minds may differ on the legal and practical considerations. The authors therefore welcome any feedback about the contents of the paper and presentation.

FITNESS IN THE LOCAL COURT – AN ANALYSIS

A "Hiatus" in the Statutory Landscape

The *Mental Health (Forensic Provisions) Act 1990* governs the interaction between criminal proceedings and mental health. Part 2 of the Act outlines the process in the District and Supreme Courts of determining a person's "unfitness" and the ramifications if such a finding is made. However, Part 3, which applies to summary proceedings before a Magistrate, is completely silent on the issue of fitness.

The Local Court's statutory powers are limited to the diversionary provisions of ss 32/33. The Local Court can divert a defendant pursuant to s 32 if the defendant is unfit to plead and unfit to be tried.[1] However, if the court refuses to exercise its discretion under ss 32/33 or if the defendant does not fall within the jurisdictional ambit of those provisions, a defendant must answer the charges.[2] A dilemma arises if the defendant

[1] See *Mackie v Hunt & Anor* (1989) NSWLR 130; *Perry v Forbes & Anor,* Supreme Court of NSW, Unreported, 21 May 1993

[2] *Mantell v Molyneux*[2006] NSWSC 955 at [16]

is not fit to plead and not fit to be tried; that is, if the defendant is not capable of understanding and participating in the proceedings.[3] The absence of a statutory mechanism to address fitness in the Local Court constitutes a "hiatus" in the Act.[4]

It can be argued that the "hiatus" in the statute necessitates the intervention of the common law; that is, the common law principles regarding fitness should apply to the summary jurisdiction. There are two inter-related propositions in support of this argument.

First, fitness to plead and fitness to stand trial are concepts that derive from the common law.[5] It is described as a "cardinal principle" and as "clearly settled" that a person cannot be tried unless that person is mentally competent to mount a defence.[6] It is a long-standing concept. In *R v Mailes*[7]*,* Wood CJ at CL comprehensively extrapolated its development from the "medieval courts of law" in the United Kingdom to contemporary New South Wales.

Second, a statute is not to be construed as abrogating fundamental common law principles unless this intention is manifestly clear from its terms or it is a matter of necessary implication.[8] Therefore, neither the "hiatus" in the Act nor the diversionary provisions in ss 32/33 should be interpreted as evidencing an implicit legislative intention to abandon the fundamental common law principle that a defendant must be fit to plead and fit stand trial. Adams J in *Mantell v Molyneux*[9] unequivocally indicated that determining a defendant's "fitness" is not precluded because of a refusal to divert under s 32.

If the argument is accepted that the common law position applies to the Local Court, it becomes necessary to analyse the relevant principles.

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[3] *Police v AR* (unreported, 2009, Children's Court, Judge Marien) at [57]
[4] *Mantell v Molyneux* at [17]; Police v AR at [34]
[5] *Eastman v The Queen* [2000] HCA 29 at [59] per Gaudron J
[6] *Regina v Dashwood* [1943] 1 KB 1; *R v Presser* [1958] VicRp 9; *Eastman v The Queen* at [332]
[7] [2001] NSWCCA 155 at [112]-[181]
[8] *Eastman v The Queen* at [65]; *Coco v R* [1994] 179 CLR 427.
[9] *Mantell v Molyneux* at [49]

Fitness and the Common Law

The Test

"Fitness" is concerned with the capacity of the defendant to plead to the indictment and to comprehend the course of the proceedings of the trial in order to make a proper defence.[10] In *R v Presser*[11], Smith J indicated that the question is whether the accused fails to meet certain minimum standards which are necessary to ensure *"he can be tried without unfairness or injustice".* After considering the authorities, he extrapolated the following minimum standards:

> He needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any.

The *Presser* criteria are seminal having been approved in the High Court[12] and the NSW Court of Criminal Appeal.[13] It is important to highlight several principles that emerge in applying the *Presser* criteria.

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[10] *R v Pritchard* (1836) 7 C & P 303
[11] [1958] VicRp 9; [1958] VR 45
[12] *Ngatayi v R* [1980] HCA 18; (1980) 147 CLR 1 at [8]; *Kesavarajah v The Queen* (1994) 123 ALR 463 at pp 473-474
[13] *R v Mailes*[2001] NSWCCA 155 at [146]

First, the test must be applied "in a reasonable and common-sense fashion".[14] For instance, a defendant in a summary hearing is not confronted with a jury and therefore does not need to understand the right to challenge. Other relevant factors may be the length of the summary hearing,[15] the complexity or simplicity of the factual matrix, the number and nature of the charges, and the number of witnesses.

Second, the test is not reserved for persons who suffer from a mental illness/condition or intellectual disability.[16]In *R v Willie*[17]Cooper J found four Aboriginal defendants unfit to be tried because an interpreter could not be found. In *Pioch v Lauder*[18] a mute and deaf Aboriginal defendant, who did not suffer from a mental condition, was deemed not fit to plead to an assault charge.

Third, the defendant must be capable of making a proper defence. However, the defendant does not need to have sufficient capacity to make an able defence, or to act wisely or in his own best interest.[19]

Fourth, the defendant does not require sufficient capacity to understand the law that governs his case unless that incapacity renders the defendant unable to make a proper defence.[20] For instance, if the defendant is legally represented and able to instruct his lawyer on the facts of the case, the defendant will not fail the *Presser* criteria because he is incapable of understanding the law. The assistance of a lawyer will ensure that the defendant is able to make a proper defence.

Fifth, a defendant will not be unfit merely because the defendant cannot recall the commission of the offence. In *R v Drummond,* Gleeson CJ said:[21]

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[14] *R v Presser*; *Ngatayi v R* at [8]
[15] See *Kesavarajah v The Queen* at p475
[16] *Eastman v The Queen* at [59] per Gaudron J
[17] (1885) 7 QLJ (NC) 108
[18] (1976) 13 ALR 266
[19] *R v Presser; Ngatayi v R* at [8]
[20] *Ngatayi v R* at [9]
[21] [1994] NSWCCA 27 at p9

> As had been pointed out by Grove J, the decision in *R v Dennison* is supported by a line of English and Scottish authorities to the effect that amnesia does not constitute unfitness to plead to a criminal charge.
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> The common sense behind this conclusion is, I consider, fairly apparent. There may be any number of reasons why a person accused of a crime may be unable to recollect the events of the occasion on which the alleged crime occurred. Amnesia may be one such reason; age, other forms of infirmity, or simply distance in time between the alleged events and the trial, might explain the inability to recollect. The fact that an accused person cannot, for one reason or another, recollect the events of the occasion of the alleged crime does not mean that the accused is, within the words of *R v Presser*, incapable of letting Counsel know what his version of the facts is. The accused person who says to his counsel "I can't remember what happened on that day" is not thereby unfit to plead.

Sixth, the defendant must be able to meet all of the *Presser* criteria and he or she may become “unfit” during the course of the proceedings.[22] In *Kesavarajah v The Queen*, the High Court found that the trial judge had erred in failing to consider the fitness of the accused regardless of the late stage of the proceedings. Although some of the minimum standards were no longer relevant, others remained pertinent, including the accused’s capacity to understand the nature of the charges and to follow the course of the rest of the proceedings.[23]

Seven, a defendant is presumed fit at law unless there is material to suggest otherwise. If such material raises a question as to the defendant’s fitness, the presumption is displaced.[24] Material need not be admissible to trigger a consideration of the defendant’s fitness to plead and fitness to be tried. In *Eastman v The Queen*, Hayne J[25]and Callinan J[26] separately cited this passage in *R v Dashwood*:[27]

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[22] *Kesavarajah v The Queen* at pp 475-476
[23] Ibid
[24] *Eastman v The Queen* at [86] per Gaudron J
[25] Ibid at [296]
[26] Ibid at [403]
[27] [1943] KB 1 at 4 per Humphreys J

> It does not matter whether the information comes to the court from the defendant himself or his advisers or the prosecution or an independent person, such as, for instance the medical officer of the prison where the defendant has been confined.

The defence does not bear an "onus" in the traditional sense of proving that the defendant is unfit.[28] Furthermore, the prosecution or the trial judge may raise a question about the defendant's fitness to plead or to be tried.[29] This is because the fitness of the defendant is of fundamental importance to the adversarial system and the defendant's right to a fair trial.

Fitness: Fair Trial and the Adversarial System

The common law principle that a person must be fit to be tried is a corollary of a defendant's right to a fair trial. Deane J expressed the importance of the right to a fair trial in *Jago v District Court of NSW* as follows:[30]

> The central prescript of our criminal law is that no person shall be convicted of a crime otherwise than after a fair trial...As a matter of ordinary language, it is customary to refer in compendious terms to an accused's "right to a fair trial."...What is involved is more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial.

In *Eastman v The Queen,* the High Court considered whether the Full Federal Court of Appeal had erred in failing to address the appellant's fitness to plead in circumstances where fitness was not raised at the trial or on the appeal. During the course of separate judgments, Gaudron, Callinan and Hayne JJ articulated the fundamental importance of a defendant's fitness to the trial process. Although in the minority in *Eastman*, the observations were not challenged by the members of the majority. Indeed in *Mantell v Molyneux* and *R v Mailes,* the following passages in Gaudron's J judgment were quoted with approval:

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[28] *R v Presser*

[29] *Kesavarajah v The Queen* at p 473

[30] [1989] HCA 46 per Deane J at [4]

[62]The significance of the question of a person's fitness to plead is often expressed in terms indicating that, **unless a person is fit to plead, there can be no trial**. Certainly, that is the position where the issue of fitness to plead is raised before or during a trial. If a person stands trial notwithstanding that there is an unresolved issue as to his or her fitness to plead, or, if that issue is not determined in the manner which the law requires, **"no proper trial has taken place [and the] trial is a nullity."** To put the matter another way, there is a **fundamental failure in the trial process.**

[63] The question whether there was a fundamental failure in the trial process is different from the question whether there was a miscarriage of justice in the sense that the accused lost a chance of acquittal that was fairly open. If a proceeding is **fundamentally flawed because the accused was not fit to plead or if, to use the words in Begum, "the trial [is] a nullity",** the only course open to an appellate court is to set aside the verdict. **And that is so regardless of the strength of the case against the accused or of the likely outcome of a further trial according to law.** That is the basis upon which this Court proceeded in Kesavarajah v The Queen where the question of fitness to plead should have been but was not submitted to the jury for determination.

[64] Traditionally, an accused person has not been put on trial unless fit to plead because of "the humanity of the law of England falling into that which common humanity, without any written law would suggest, has prescribed, that no man shall be called upon to make his defence at a time when his mind is in that situation as not to appear capable of so doing". That statement may indicate a positive and independent right on the part of an accused not to be tried unless fit to plead. It is unnecessary to decide whether that is so. **It is sufficient to approach the present matter on the basis that the common law guarantees an accused person a fair trial according to law and that one aspect of that guarantee is that a criminal trial cannot proceed unless the accused is fit to plead.**

(Emphasis added and footnotes omitted)

Her Honour's analysis suggests that a fair trial is an essential ingredient of a criminal trial under the common law. A criminal trial cannot be fair if the accused person is

incapable of understanding the nature of the proceedings and participating in his or her defence.

Callinan J agreed that it was "clearly settled" at common law that no one may be tried for a crime unless that person is mentally competent to defend himself and is able to understand the proceedings and the nature of the evidence to be led.[31] His Honour emphasised the maxim of "procedural fairness" in a criminal trial as contravened should a trial proceed when an accused is not in a fit state to defend himself or herself.[32]

Hayne J said that there *"can be no trial unless the accused is fit both to plead and to stand trial".* The question of fitness is therefore fundamental; the trial judge (and arguably a Local Court Magistrate) must consider the question even if it is not raised by the parties. Hayne J said that the question of fitness falls outside of the adversarial system because *"the very question for consideration is whether there is a competent adversary."*[33]

His Honour did not rely upon the right to a fair trial as the gravamen of the fundamental common law principle that a defendant must be fit. Hayne J highlighted a number of circumstances that may trigger an unfair trial before concluding:

> The question that now arises is, however, of a different kind. It is one which goes, not to the fairness of the trial, but to whether there could be a trial at all. The miscarriage of justice said to have occurred is that there has been a trial where there should not have been.[34]

The important principle to extract from the minority judgment is that the fitness of the defendant is an essential pre-condition of a criminal trial under the common law. If a defendant is not fit to plead and stand trial, the trial is a "nullity."

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[31] *Eastman v The Queen* at [332] per Callinan J
[32] Ibid at [399]
[33] *Eastman v The Queen* at [294] per Hayne J
[34] *Ibid* at [317]

The term “nullity” was adopted from an English decision of *R v Begum.*[35]The appellant was charged with the murder of her husband. She was born in a rural district in Pakistan. She spoke no English, had some knowledge of Urdu and her native tongue was Punjabi. The interpreter had some knowledge of Urdu but did not speak Punjabi. It was readily apparent that the appellant’s counsel had difficulty communicating with her. The appellant pleaded guilty to the charge of murder. An appeal was subsequently lodged against the conviction on the basis that the plea of guilty was entered without the appellant understanding the nature of the offence and the possible defences available. The Court of Appeal concluded:[36]

> At all events, we are in so much doubt that she comprehended what was being said to her at crucial times that we cannot do other than come to the further conclusion that it would be impossible to feel sure that when she pleaded guilty to murder she understood all the implications of what she was doing. It has been said on a number of occasions here that unless a person fully comprehends the charge which that person faces, the full implications of it and the ways in which a defence may be raised to it, and further is able to give full instructions to solicitor and counsel so that the court can be sure that that person has pleaded with a free and understanding mind, a proper plea has not been tendered to the court. The effect of what has happened in such a situation as that is that no proper trial has taken place. The trial is a nullity.

A conviction for a conspiracy to import heroin was quashed in *Kesavarajah v The Queen* after the High Court concluded that the trial judge erred in not averring to the fitness of the accused to stand trial at the trial’s commencement and towards the trial’s conclusion.[37] It is important to note, however, that the High Court’s analysis was fundamentally a product of statutory interpretation although the outcome was consistent with the common law.

Distinction between Fitness to Plead and Fitness to be tried

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[35] [1991] 93 Cr. App. R 96

[36] Ibid at p 100

[37] *Kesavarajah v The Queen* at pp 475-476

The concepts of “fitness to plead” and “fitness to be tried” are often used interchangeably. This is readily apparent in the courtroom and the case law. However, in *Kesavarajah v The Queen*, the practice of merging the concepts was described as “not accurate”.[38]

The notes in *R v Southey* describe the common law’s approach to “insanity” at the time of arraignment (i.e. at the time of pleading) or after pleading.[39] The procedure included determining whether the accused was able to plead *“for if he be so insane as not to understand the nature of the proceedings, he cannot plead.”*[40] Subsequently, the jury would determine whether the accused was sane enough to be tried.

In *R v Pritchard*,[41] the accused was “deaf and dumb”. Relevantly, the jury was empanelled to determine if the accused was able to plead. Subsequently, the jury were sworn to try whether the accused was fit to be tried; that is, did the accused have sufficient intellect to comprehend the course of proceedings, so as to make a proper defence, to challenge any juror, and comprehend the evidence.

Arguably, the development and adoption of the *Presser* criteria, has diminished the practical difference between the concepts. The *Presser* criteria were developed in the context of an accused’s fitness to stand trial. Smith’s J minimum standards include the ability of the accused to understand what he is being charged with and an ability to plead to the charge. Therefore, the concept of fitness to plead has arguably been “subsumed” in “fitness to stand trial”.[42] Magistrate Heilpern commented in *R v KF:*[43]

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[38] Ibid at p 465 & Note 2

[39] *R v Southey* (1865) 4 F and F 864 [176 ER 825]

[40] Ibid p 831

[41] *R v Pritchard* (1836) 7 C & P 303

[42] *Crime and Mental Health Law in New South Wales: A Practical Guide for Lawyers and Health Care Professionals,* 2nd edition, Dan Howard SC,2010 Reed International Books Australia Pty Ltd at p 172; Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: Consultation Paper*, June 2013 at [4.53]

[43] [2011] NSWLC 14

> During the application, the term "fitness to plead" was used synonymously with "fitness to be tried" by defence counsel. In my view, the latter term is the correct nomenclature for such an application. Fitness to plead, that is to enter a plea of guilty or not guilty, may be an element of fitness to be tried, however it is not the only element as discussed below.[44]

A practical application of *Presser* in a summary matter may prove illustrative. A defendant is required to plead to a criminal charge under s 192(2) of the *Criminal Procedure Act 1986*. However, assume the defendant is not fit to plead. It would be pointless for the court to proceed on the basis of a plea of not guilty under s 194(1) because the defendant will, by necessity, not be fit to be tried. This is because, under *Presser,* it is an essential pre-condition of fitness to stand trial that the defendant is fit to plead.

Conversely, there may be circumstances where a defendant in a summary matter is fit to plead yet not fit to be tried. That is, the defendant may understand the nature of the charge and be able to plead to the charge. However, he or she may fail to meet the remaining minimum standards outlined in *R v Presser*. Arguably, a plea of guilty in such circumstances could legitimately be entered. Conversely a plea of not guilty may trigger consideration of the defendant's fitness to be tried.

Application of Common Law Principles in the Local Court

Pioch v Lauder[45]

The defendant was an Aboriginal man. He was totally deaf and unable to use speech to communicate. He was brought up in an Aboriginal community. He had not absorbed the cultural or moral values of Aboriginal or European society. There was no evidence of a mental incapacity.[46]

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[44] Ibid at [7]
[45] (1976) 13 ALR 266
[46] Ibid at 267

The defendant was charged with assault in a circumstance of aggravation. He was unable to enter a plea to the charge. The Magistrates Court stated the following question to the Supreme Court of the Northern Territory: would proceeding in these circumstances be (a) contrary to law; (b) in excess of jurisdiction; (c) a denial of natural justice; or (d) improper in the circumstances?[47]

Foster J concluded that the offence was a "simple offence" under the relevant legislation. That is, it must be tried summarily.[48] His Honour accepted that the defendant was not "fit to plead" yet the statutory regime was silent on an appropriate remedy. His Honour concluded that it would not be proper to proceed with his summary trial.[49] The Magistrate, upon finding the defendant unfit, "should simply go no further and desist from hearing the charge against him because of his unfitness" because to proceed would be contrary to law.[50]

Foster J also suggested that, if the offence were a "minor indictable" offence, the court could commit the defendant to trial because the defendant need not enter a plea at the committal stage. However, this aspect of *Pioch v Lauder* was expressly disavowed in *Ebatarinja v Deland.*[51]

Ebatarinja v Deland

The appellant was charged with murder. He could not understand the committal proceedings or comprehend the charges. The Magistrate stated a case to the Supreme Court of the Northern Territory. Mildren J found that committing the appellant for trial would not be unfair or unjust nor would it deny the appellant natural justice. The Court of Appeal agreed with the primary court's conclusion.[52]

[47] Ibid at 266
[48] Ibid at 270
[49] Ibid at 271
[50] Ibid at 272
[51] [1998] HCA 62
[52] Ibid at [6]-[8]

The High Court, however, concluded that committing the appellant for trial would fail to comply with the *Justices Act (NT).*[53] This is because it was a condition-precedent that the committal hearings occurred in "the presence or hearing of the defendant" and this concept required the appellant to understand and comprehend the committal proceedings.[54] Committing the appellant to trial would fail to comply with statute and would be rendered a nullity.[55] Although the Magistrate was therefore prohibited from further hearing of the committal proceedings, the Crown could proceed by an *ex officio* indictment.[56]

Ebatarinja v Deland was concerned with statutory construction as opposed to fitness.[57] Importantly, the High Court did not challenge Foster's J observations on the approach to fitness in a summary matter.[58]

Mantell v Molyneux[59]

This may be the only Supreme Court authority on fitness in the Local Court in NSW. The defendant was unfit to plead to a charge of assault that involved the wielding of a knife. She had significant mental health problems compounded by an intellectual disability, long-term alcohol abuse, and sexual abuse. She was subject to a Guardianship order.

On the first hearing of the matter in the Local Court, a s 32 application was made and refused.[60] On the second occasion, Mr Haesler SC (as he then was) appeared for the defendant and argued that the only option was to stay the proceedings. Psychiatric evidence adduced in support of the proposition that the defendant was unfit was compelling. The prosecution did not challenge it. The learned magistrate refused to

[53] Ibid at [11]
[54] Ibid at [25]& [28]
[55] Ibid at [29]
[56] Ibid at [34]-[35]
[57] Ibid at [31]
[58] Ibid at [31]
[59] [2006] NSWSC 955 at [16]
[60] Adams's J dissertation of s 32 and the capacity of the Local Court to make interlocutory orders is particularly useful.

stay the proceedings having embarked upon a balancing exercise purportedly mandated in *Jago v The District Court of NSW &Ors.*[61]

When the matter was appealed to the Supreme Court, Adams J extrapolated the common law principles and cited the leading authorities.[62] His Honour concluded that the Local Court had erred in considering that a balancing process was involved in determining whether it would be fair to conduct a trial in the circumstances.[63] The following passages are particularly pertinent:

> [33]...**If a defendant is not fit to stand trial in the Presser sense, the trial is by virtue of that very fact necessarily unfair and the public interest in the trial of the person charged with the criminal offence must give way...**
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> [34]As the Crown Advocate pointed out during submissions in this Court, the learned Magistrate **did not make any finding that the appellant was unfit for trial**. His Honour approached the question facing him as being whether he could, by making some adjustments in the way in which the proceedings were undertaken, ensure that the trial was fair.
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> [35] In my view, the **question of fitness for trial is fundamental**. In some cases, adjustments can be made to overcome the defendant's unfitness, as by providing a deaf person with a signing interpreter. But this is not to make the trial of a person who is unfit for trial a fair one: it is to remove the unfairness.
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> [36] In my respectful opinion, **there were no orders that the Court could have made that were capable of overcoming the appellant's unfitness. Where a defendant does not understand the nature of a plea, the elements of the charge and the essential nature of the proceedings, it does not make such a trial fair even though he or she is able to give a version of events**...Sympathetic allowance for the appellant's problems in this regard does not overcome the fundamental unfairness which her unfitness in respect of these matters demonstrates. This is not less so because it appears, as it happens, that the

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[61] [1989] HCA 46
[62] *Mantell v Molyneux* at [28]-[31]
[63] Ibid at [33]

appellant has a good defence to the charge which might well result in her acquittal.

[37] It is not, of course, appropriate for me simply to substitute my view of the facts for that of the learned magistrate. However, I am satisfied that his Honour erred in law in his consideration of the question of whether the appellant was unfit to stand trial.

(Emphasis added)

Significantly, Adams J suggested that a defendant in the Local Court who is not fit to be tried must be discharged.[64] This proposition is examined below.

Police v AR[65]

Mantell v Molyneux was considered and applied in *Police v AR.* Judge Marien, sitting as the President of the Children's Court, helpfully recites the relevant authorities and illuminates the interaction of fitness to be tried, s 32, and committal proceedings.

The defendant faced several charges of varying seriousness. Medical evidence and an affidavit from the defendant's legal representative were tendered in the proceedings. The material established that the defendant was not fit to be tried under the *Presser* criteria. The prosecution did not object to the tender of the medical and affidavit evidence.

Judge Marien discharged the defendant under s 32 for an offence of goods in custody, yet refused the s 32 application in relation to the remaining offences.[66] His Honour noted his statutory power to commit the defendant to the District Court for the remaining offences under s 31 of the *Children (Criminal Proceedings) Act 1987.* However, the court concluded that the defendant could not be committed for trial because the principles in *Ebatarinja v Deland* were apposite to the governing legislation.[67] The matter could not proceed to a summary hearing because the

[64] Ibid at [28]
[65] (unreported, Children's Court of NSW, 18/11/09)
[66] Ibid at [50]
[67] Ibid at [58]-[59]

defendant was not fit to plead and stand trial; he was therefore discharged.[68] Judge Marien noted that the Crown could nonetheless lay an ex officio indictment regarding the remaining offences.[69]

R v AAM; ex parte A-G (Qld)[70]

The Queensland Court of Appeal decision in *R v AAM* is a classic illustration of fitness to plead. The appellant's criminal antecedents contained numerous entries of summary criminal offences that were committed between 2001 and 2003. The appellant's guardians petitioned the Governor of Queensland for a pardon in respect of her entire criminal record. The Attorney General referred the matter to the Court of Appeal.

The appellant had a significant intellectual impairment. There was unequivocal evidence that she was not fit to plead when she pleaded guilty to the offences between 2001 and 2003.[71] The Court of Appeal noted that the criminal justice system did not make provision for dealing with fitness for trial issues in the Magistrates Court. It also criticised "this hiatus in the existing criminal justice system" and recommended legislative intervention.[72]

The Court of Appeal found that the pleas of guilty were not entered in the exercise of a free choice.[73] This is because the defendant was not fit to plead to those charges. The Court of Appeal also highlighted the comments of Brennan, Toohey and McHugh JJ in *Meissner v The Queen:*[74]

[68] Ibid at [60]
[69] Ibid at [62]
[70] [201] QCA 305
[71] Ibid at [5]
[72] Ibid at [9]
[73] Ibid at [12]
[74] (1995) 184 CLR 132 at 141; Ibid at [11]

> A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea.

The Court concluded that it would constitute a miscarriage of justice to allow the findings of guilt to stand citing the observations of Gaudron J and Hayne J in *Eastman v The Queen.*[75]

R v KF[76]

Magistrate Heilpern accepted the proposition that a summary hearing could not proceed unless the defendant was fit to be tried.[77] However, his Honour found that the defence material did not support the conclusion that the defendant failed to meet the *Presser* criteria. [78]

The decision is useful for several reasons. First, Magistrate Heilpern concluded that the Local Court possessed the power to stay proceedings that related to indictable offences tried summarily.[79] Second, the decision emphasises the traditional distinction between fitness to plead and fitness to be tried.[80] Third, it discusses the possible remedies available to the Local Court if a defendant is unfit.[81] Fourth, it highlights the "common sense" application of the *Presser* criteria.[82] Finally, it stresses the importance of tendering compelling material including affidavits from legal representatives in support of the application.[83]

CL (a minor) v Lee[84]

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[75] Ibid at [12]
[76] [2011] NSWLC 14
[77] Ibid at [14]
[78] Ibid at [42]
[79] Ibid at [9]-[11]
[80] Ibid at [7]
[81] Ibid at [12] – [14]
[82] Ibid at [44]
[83] Ibid at [41]
[84] (2010) 29 VR 750.

The NSW authorities appear in direct conflict with the Victorian position. In *CL (a minor) v Lee,* Lasry J rejected the plaintiff's submissions that the Children's Court (and in obiter dicta, the Magistrate's Court) retained authority under either statute or the common law to deal with an issue of fitness to plead.[85] Importantly, the Court appeared to reject the proposition that the Children's Court could permanently stay proceedings because of an abuse of process caused by a defendant's unfitness.[86] Interestingly, Lasry J also appeared to accept the submission that an essential characteristic of fitness at common law is that a jury determine the question. Therefore, the common law concept of fitness could not find its expression in the Magistrates court.[87] The judgment was endorsed on appeal in *CL (a minor by his Litigation Guardian) v DPP &Ors.*[88]

It is beyond the scope of this paper to address the ratio in *CL (a minor) v Lee*. In the unlikely event that a Magistrate or prosecutor were to rely upon it, the following issues may be worth considering in limiting its persuasiveness in a NSW context. Lasry J was considering a specific issue; the statutory power of a Children's Court Magistrate to commit a defendant to the County Court on the basis that the defendant may be unfit. The Victorian legislative provisions require careful analysis before the principles articulated in *CL (a minor) v Lee* could be imported to NSW. For example, Lasry J appeared to accept the proposition that statute had codified and abrogated the common law in Victoria on the issue of fitness.[89] Furthermore, the Court did not consider the NSW authorities to the contrary and the analysis of *Pioch v Lauder* appeared to deemphasise Foster's J conclusion that a summary hearing could not proceed if a defendant was not fit to plead and stand trial.[90] Even if not distinguishable on these grounds, the Victorian position should not be followed because it does not reflect the current law in NSW.

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[85] Ibid at [69]
[86] See the discussion at [54]-[69]
[87] Ibid at [53]-[54]
[88] [2011] VSCA 227
[89] *CL (a minor) v Lee* at [61] & [67]
[90] Ibid at [57]-[60]

Unfitness and Remedies

When a question of fitness arises, the Local Court cannot conduct a fitness hearing in the traditional sense. However, at least in NSW, it could be argued that the court must determine the issue if it is raised and must make a finding. If the defendant is not fit to plead and stand trial, the question becomes; what is the appropriate remedy?

Section 32/33

If a defendant is not fit to plead and or to be tried in the Local Court on a matter dealt with summarily the only statutory remedy available is discharge under ss 32/33.[91] The purpose of the paper is not to traverse the s 32 principles.[92]

However, a defendant may not fall within the ambit of s 32. For example, the defendant may not suffer from a mental illness/condition or developmental disability. Alternatively the court may conclude that s 32 disposition is inappropriate; for instance, the offence may be too serious or there is an absence of a treatment plan.

If this scenario eventuates, the Local Court does not possess the power to commit the defendant to the District Court of its own accord under the *Criminal Procedure Act 1986*. Therefore, the only remedies that exist are a discharge of the defendant or a stay of proceedings. However, it is important to remember that a prosecutor could elect to commit the matter to the District Court if the offence is a table 1 or 2 offence, if the defence indicates an intention to rely upon such remedies.

Discharge

<u>The Authorities</u>

[91] See *Mackie v Hunt & Anor* (1989) NSWLR 130; *Perry v Forbes & Anor,* Supreme Court of NSW, Unreported, 21 May 1993

[92] See for example "*Section 32 - Summary of Principles",* Lester Fernandez - June 2007; *"What To Do When A Section 32 Application Is Refused"* Karen Weeks - March 2012

It could be argued that the primary course that the court should adopt if the defendant is unfit, is a discharge of the defendant. This is apparent from *Mantell v Molyneux*. There is also some support for this remedy at common law.

The Queensland Law Journal reports a case of *R v Willie*[93] where four Aboriginal men were discharged because an interpreter could not be found competent to communicate the charge of murder to them. However, the reporting of the case consists of four lines in the Journal and the statutory or common law basis upon which Cooper J adopted this course is ambiguous.[94]

In *Mantell v Molyneux,* the appellant applied in the Local Court for a permanent stay of the proceedings.[95] Adams J, however, suggested the appropriate remedy was that the defendant should be discharged:

> [28] It is convenient first to deal with the problem arising from the appellant's unfitness for trial. Even though, in the case of a charge being heard in the Local Court, there is no statutory enactment either dealing with determination of the question of fitness to be tried or as to what should occur if a person is found unfit to be tried, **it seems to me that, where a defendant is found not fit to be tried, he or she must be discharged**. So much is the effect of the judgment in *Ngatai v The Queen* [1980] HCA 18; (1980) 147 CLR 1 at 7-8, per Gibbs, Mason and Wilson JJ–
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> "...If the incapacity is due to unsoundness of mind the accused will of course be dealt with in accordance with the provisions of the legislation in force on the subject of mental health, but in a case where there is no mental or physical disability, there may be no statutory enactment under which the accused can continue to be detained. In such a case no doubt he should be discharged."
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> [29] In this case there is no relevant mental disability that would bring the appellant within the provisions of the *Mental Health Act* and **the consequence must be that, if**

[93] (1885) 7 QLJ (NC) 108
[94] See also *Ngatayi v R* at [7]
[95] *Mantell v Molyneux* at [17]-[18]

> **unfit to be tried, she must be discharged**; see also *Pioch v Lauder* (1976) 13 ALR 266.
>
> (Emphasis added)

In *Police v AR,* Judge Marien accepted the defendant's submissions that an unfit defendant in the Children' Court should be discharged in accordance with the principles in *Mantell v Molyneux*. Magistrate Heilpern indicated that if he found the defendant unfit to be tried, he would discharge him on the basis of these authorities.[96]

A Local Court magistrate is arguably bound by *Mantell v Molyneux* to discharge the defendant if the defendant is unfit. At the very least, it constitutes highly persuasive authority that a "discharge" is the appropriate remedy.[97]

Comment – Problems with Discharge as a Remedy

After considering the authorities that advocated the discharge of a defendant unfit to plead and unfit to stand trial, Magistrate Heilpern in *R v KF* said:[98]

> This is curious, as I would have thought that discharge is only available as a result of a successful s 32 application, and not for a permanent stay. Thus, the result of an application for a permanent stay would be an order permanently staying the proceedings, not discharging the defendant.

It appears that Adams J in *Mantell v Molyneux* was not suggesting that discharging the defendant was the product of a successful permanent stay application; discharging a defendant was a separate and distinct remedy. In *Police v AR,* the remedy sought was a discharge of the defendant not a stay of proceedings.

However, Magistrate Heilpern's remarks do raise several difficulties with the proposed remedy of discharging a defendant on the basis of unfitness.

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[96] Ibid at [14]
[97] *R v KF* at [14]
[98] Ibid

First, the comment by Adams' J that an unfit defendant must be discharged is arguably *obiter.* Although it is unclear from the judgment, it would appear that the issue confronting the Supreme Court was whether the Local Court Magistrate's discretion to stay the proceedings miscarried.

Second, the proposition that a defendant should be discharged originates from the High Court decision of *Ngatayi v The Queen.* It could be argued, however, that the reliance on this authority as a basis for discharge is misplaced. The High Court was considering s 631 of the *Criminal Code (W.A)* which stated the procedure for a jury to determine an accused's fitness to plead. Relevantly it provided:[99]

> If the jury find that he is not so capable, the finding is to be recorded, and the Court may order the accused person to be **discharged**, or may order him to be kept in custody in such place and in such manner as the Court thinks fit, until he can be dealt with according to law.
> A person so found to be incapable of understanding the proceedings at the trial may be again indicted and tried for the offence."
>
> (Emphasis added)

The passage cited in *Mantell v Molyneux* omits the immediately preceding sentence. The entire paragraph in *Ngatayi v The Queen* reads:

> Under s. 631 if the jury find that the accused is not capable of understanding the proceedings, the court may order him to be discharged or to be kept in custody until he can be dealt with according to law. If the incapacity is due to unsoundness of mind the accused will of course be dealt with in accordance with the provisions of the legislation in force on the subject of mental health, but in a case where there is no mental or physical disability, there may be no statutory enactment under which the accused can continue to be detained. In such case no doubt he should be discharged.[100]

[99] *Ngatayi v The Queen* at [5]
[100] Ibid at [7]

Therefore, it could be argued that the assertion in *Ngatayi v The Queen* that an unfit defendant must be discharged was made in the context of a statutory power conferred under s 631. It was not intended to constitute a general proposition.

Third, neither *Pioch v Lauder* nor *Ebatarinja v Deland* are authority for the proposition that an unfit defendant must be discharged. In the former, Foster J concluded that the Magistrate must desist from hearing the charge because of the defendant's unfitness.[101] In *Ebatarinja v Deland,* the High Court concluded that the Magistrate had no authority to continue the proceedings.[102]

Finally, the discharge of a defendant is ordinarily an exercise of a statutorily conferred power. For example, a court may dismiss a charge and discharge a defendant suffering from a mental illness/condition or developmental disability under s 32(3)[103]; the capacity of a magistrate to discharge an accused person at committal is conferred by s 66 of the *Criminal Procedure Act 1986,* and; an order discharging an offender without conviction is pursuant to s 10 of the *Crimes (Sentencing Procedure) Act 1999*. As discussed, there is no statutory power to discharge a defendant in the Local Court because the defendant is unfit. Therefore, an order discharging a defendant can only be validly exercised if it has its origins in the common law; is a product of the court's inherent jurisdiction, or; is a power implied from a statutory provision. There is limited authority in support of the contention that such a remedy exists independently of statute. Even if *Ngatayi v The Queen* was stipulating a general proposition, the only authority cited in support was *R v Willie*. As the High Court highlighted, it is unclear on what basis the order to discharge the defendant in that case occurred.[104]

The Power to Stay Criminal Proceedings

The alternative remedy is to stay the proceedings. The authorities that canvass applications to stay proceedings are complex and voluminous. It is not our intention

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[101] *Pioch v Lauder* at p 272
[102] *Ebatarinja v Deland* at [33]
[103] *Mental Health (Forensic Provisions) Act 1990*
[104] *Ngatayi v The Queen* at [7]

to comprehensively catalogue the case law. It is highly recommended that a defence solicitor arguing that proceedings should be stayed consider the relevant case law and Stephen Lawrence's paper.[105]

The leading decision on applications to permanently stay proceedings is *Jago v District Court of NSW.*[106] The complexity of the decision is exacerbated because there were five separate judgments. The court was considering the circumstances in which delay would justify the granting of a permanent stay. All Judges rejected the proposition that an accused person has a "right to a speedy trial." Importantly all Judges, with the apparent exception of Brennan J, accepted that a permanent stay is available to ensure a fair trial.

What is a Stay of Proceedings?

The court addressed the practical effect of a permanent stay of proceedings. Brennan J described it as "tantamount to the refusal of jurisdiction to hear and determine the matter arising on the presentation of an indictment."[107] Gaudron J said "(t)he power is, in essence, a power to refuse to exercise jurisdiction."[108] Therefore, a court that grants a permanent stay of proceedings is refusing to put the defendant to trial.

Power to Stay Proceedings to Prevent an Unfair Trial

It is clear that the power to grant a permanent stay of proceedings exists as an inherent or implied power of courts to prevent abuses of their process.[109] It is also settled that an accused person has a right to a fair trial, or as Deane J suggested,

[105] *The Power of a Court to Stay a Prosecution as an Abuse of Process: Judicial Enforcement of Fundamental Values & Principles*, presented at the Reasonable Cause Criminal CLE Conference on 16 September 2012
[106] [1989] HCA 46 (1989); 168 CLR 23
[107] [1989] HCA 46 per Brennan J at [13]
[108] Ibid per Gaudron J at [14]
[109] Ibid per Mason CJ at [2]

the right not to be tried unfairly. The interrelationship between “abuse of process” and “the right to a fair trial” was considered in *Jago v The District Court.*

Brennan J described an “abuse of process” as occurring 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. [110]

Brennan J adopted a “narrow” approach to the concept of abuse of process. His Honour suggested that an “abuse of process” and “the right to a fair trial” were separate and distinct concepts. The former may justify extreme remedies (such as a permanent stay of proceedings) whereas the latter would not. As an aside, Brennan J repeated those comments in *Dietrich v The Queen*.[111] In both *Jago* and *Dietrich*, his Honour’s comments were not supported by the majority of the bench.

Conversely, Gaudron J in *Jago v The District Court (NSW)* appeared to suggest that the power of a court to stay proceedings to ensure a fair trial was incidental to the power of a court to control its own processes.[112] Her Honour indicated that the court’s power “to control its own process and proceedings is such that its exercise is not restricted to defined and closed categories but may be exercised as and when the administration of justice demands.”[113]

Toohey J highlighted the overlap between abuse of process and the right to a fair trial.[114] In some cases, the unfairness may be so substantial that a permanent stay of proceedings is the only available remedy.

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[110] Ibid per Brennan J at [24]
[111] (1992) 109 ALR 385 per Brennan J at p 400-408
[112] [1989] HCA 46 per Gaudron J at [15]
[113] Ibid per Gaudron J at [7]
[114] Ibid per Toohey J at [29]

Deane J suggested that a court's power to stay proceedings to prevent an unfair trial falls within implied or inherent jurisdiction to prevent an abuse of its processes.[115]

Ultimately, the important principle to extract from *Jago v The District Court* is that a court possesses jurisdiction to stay proceedings to prevent an unfair trial. It is arguably unimportant whether this power falls within the ambit of "abuse of process" or is incidental to an alternative inherent or implied power. As Mason CJ said:

> [13]...The continuation of processes which will culminate in an unfair trial can be seen as a "misuse of the Court process" which will constitute an abuse of process because the public interest in holding a trial does not warrant the holding of an unfair trial.
>
> [14] Ultimately, it does not matter whether the problem is resolved in this way, by invoking a wide interpretation of the concept of abuse of process, or by saying that courts possess an inherent power to prevent their processes being used in a manner which gives rise to injustice. In either event the power is discretionary, to be exercised in a principled way, and the same considerations will govern its exercise. And in each case the power will be used only in most exceptional circumstances to order that a criminal prosecution be stayed. I have already noted that a similar result was reached by taking a broad view of the concept of abuse of process in Reg. v. Derby Crown Court; Ex parte Brooks. If the distinction matters, I would prefer to regard the power as an incident of the general power of a court of justice to ensure fairness.

<u>The Test</u>

A permanent stay of proceedings is a discretionary power[116] and the onus rests upon the defendant to persuade the court that the power should be exercised.[117] It was described as an "extreme" remedy in *Jago v The District Court (NSW).*[118]

In the context of whether delay in prosecution would warrant a stay of proceedings, Mason CJ indicated that the touchstone in every case is fairness. His Honour suggested that a balancing process is involved in determining the test of fairness.[119]

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[115] Ibid per Deane J at [6]

[116] Ibid per Mason CJ at [14] & [19]; Gaudron J at [13]

[117] *R v Basha* (1989) 39 A Crim R 337 per Hunt J said at p 338; BC8902533 per Hunt J at 2

[118] *Jago v District Court (NSW)* Mason CJ at [20]

[119] Ibid per Mason CJ at [20]

This “balancing process” was adopted by the Local Court Magistrate in *Mantell v Molyneux.* The subsequent paragraph, however, is crucial. Mason CJ said:[120]

> To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial "of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences": Barton, at p 111, per Wilson J.

Gaudron J also advanced the proposition that a permanent stay of proceedings is warranted where a fundamental defect in the trial results in irreconcilable unfairness to the accused because the accused person is denied a fair trial.[121] Toohey J[122] and Deane J[123] formulated different conceptions of the test.

The fundamental principle, therefore, is that a permanent stay of a prosecution of a criminal offence can only to be granted where the apprehended defect causing unfairness to the accused is of such a nature that it goes to the root of the proceedings, and there is nothing a trial judge can do in the conduct of the trial to relieve its unfair consequences.[124]

Application to Fitness in the Local Court

It could be argued that the comments of the minority in *Eastman v The Queen* are apposite when considering the application of the principle in *Jago v The District Court (NSW).* This is because the unfairness that arises when a defendant is unfit to be tried constitutes a fundamental defect in the trial process which cannot be remedied.

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[120] Ibid at [21]
[121] Ibid per Gaudron J at [11]
[122] Ibid per Toohey J at [29]
[123] Ibid per Deane J at [6]
[124] *RM v R* [2012] NSWCCA 35 per Whealy JA; *Jago v District Court of New South Wales* [1989] HCA 46; 168 CLR 23; *Barton v R* [1980] HCA 48; 147 CLR 75; *Dupas v R* [2010] HCA 20; 241 CLR 237.

The nexus between a defendant's right to a fair trial and his or her fitness to plead or be tried was developed earlier in this paper. It may be illustrative to repeat Gaudron's J observations in *Eastman v The Queen:*[125]

> It is sufficient to approach the present matter on the basis that the common law guarantees an accused person a fair trial according to law and that one aspect of that guarantee is that a criminal trial cannot proceed unless the accused is fit to plead. (Emphasis added)

The language of the minority in *Eastman v The Queen* is consistent with the proposition that a defendant's "unfitness" is a fundamental and incurable defect. For instance, Gaudron J indicated that there is a fundamental failure in the trial process if an unfit defendant is put to trial. If a trial were to proceed it would be "fundamentally flawed". Hayne J suggested that a trial that proceeded where the defendant was unfit would not be a trial at law.

In *Mantell v Molyneux,* Adams J applied the comments in *Eastman v The Queen* to the exercise of the Local Court's jurisdiction. His Honour noted that a trial could not be fair if a defendant was not fit to plead. Attempting to sympathetically modify the summary hearing process would "not overcome the fundamental unfairness" of proceeding to hearing.[126]

It could be argued, therefore, that the authorities support several propositions. First, if the defendant is not fit to be tried, the defendant cannot receive a fair trial. Second, if the summary hearing proceeds it would be infected by a fundamental defect that cannot be cured. Finally, in such circumstances, a permanent stay of proceedings is the appropriate remedy.

Temporary Stay of Proceedings

There may be occasions where the defendant's fitness to plead may be transient. For example, a competent interpreter may be unavailable. Similarly, treatment of a

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[125] *Eastman v The Queen* per Gaudron J at [64]
[126] *Mantell v Molyneux* at [36]

defendant's mental illness may render the defendant fit to plead and fit to be tried. In such circumstances, the appropriate remedy may be a temporary refusal to exercise jurisdiction until the fundamental defect is removed.[127]

Jurisdiction of the Local Court to Order a Stay of Proceedings

It is clearly settled that the Local Court possesses jurisdiction to stay criminal proceedings. In *DPP v Shirvanian*[128] the Court of Appeal (with Powell JA dissenting) said:

> In my view *Jago v District Court (NSW)* resolves in Australian law the question whether a court has the power in an appropriate case to stay criminal proceedings permanently for oppression amounting to abuse of process. The narrowness of the criteria upon which the power might properly be exercised was expressed in different ways by the various justices. However each (with the exception of Brennan J) asserted the ultimate proposition: see (at 33-34), per Mason CJ; (at 58), per Deane J; (at 71), per Toohey J; (at 75), per Gaudron J.
>
> *Jago* involved an inferior statutory court, the District Court of New South Wales. Unless something can be found in the relevant legislation to deprive a magistrate of the Local Court of similar power then there is no basis in point of principle for distinguishing between the District Court and the Local Court. This was the view taken by the Queensland Court of Criminal Appeal in *Williamson v Trainor* [1992] 2 Qd R 572 in relation to a Magistrates Court in that State. Since the passing of the *Local Courts Act* 1982 and the enactment in 1992 of Pt 9 of the *Constitution Act* 1902 (later doubly entrenched), magistrates of the Local Court have become constitutionally tenured judicial officers. They have power to impose substantial fines and terms of imprisonment. They are, like all judicial officers, charged with the duty to administer justice according to law.
>
> Since the principle which gives rise to the power in a proper case to grant a stay is that "the public interest in holding a trial does not warrant the holding of an unfair trial" (*Jago* (at 31), per Mason CJ), it follows that such power resides in a magistrate

[127] For example, see *Dietrich v The Queen* (1992) 177 CLR 292

[128] (1998) 44 NSWLR 129 at pp 134 -135 per Mason P (Beazley JA agreeing)

> of the Local Court hearing a (summary) trial unless excluded by clear words. The duty to observe fairness, at least in its procedural sense, is a universal attribute of the judicial function. Those aspects of a fair trial known as the principles of natural justice apply by force of the common law and the presumed intent of parliament unless clearly excluded in a particular context. In my view, the same can be said about the power to prevent abuse of process as an incident of the duty to ensure a fair trial. And I can see no principled ground for excluding a power to grant a stay to prevent or nullify other categories of abuse of process.

In *R v KF,* Magistrate Heilpern said that the Local Court possesses the necessary power to stay proceedings for a Table offence where the DPP have not elected i.e. where the offence will be dealt with summarily.[129] Although Magistrate Heilpern did not cite *DPP v Shirvanian,* his Honour's conclusion appears consistent with the Court of Appeal's analysis.

Conclusion

The legal analysis will hopefully assist practitioners to conceptualise the issues and the potential legal arguments. The bulk of the presentation will address the practical realities of combating fitness in the Local Court.

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[129] *R v KF* at [11]

REFERENCES

Fitness to Plead in the Local Court, Tracey Randall - March 2011

The Power of a Court to Stay a Prosecution as an Abuse of Process: Judicial Enforcement of Fundamental Values & Principles, presented at the Reasonable Cause Criminal CLE Conference on 16 September 2012

Section 32 - Summary of Principles, Lester Fernandez - June 2007

What To Do When A Section 32 Application Is Refused, Karen Weeks - March 2012

Crime and Mental Health Law in New South Wales: A Practical Guide for Lawyers and Health Care Professionals, 2nd edition 2010, Dan Howard SC, Reed International Books Australia Pty Ltd

Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: Consultation Paper*, June 2013

New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility & Consequences,* Report 138, May 2013