Scott & Anor v Northern Territory of Australia & Ors [2005] NTCA 1

PARTIES:	LETTY MARIE SCOTT NATHAN WILLIAM SCOTT v NORTHERN TERRITORY OF AUSTRALIA BARRY MEDLEY HAROLD ROBERTSON MICHAEL LAWSON
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 3 of 2004 (20304424)
PARTIES:	LETTY MARIE SCOTT NATHAN WILLIAM SCOTT v ATTORNEY-GENERAL OF THE NORTHERN TERRITORY OF AUSTRALIA DR KEVIN LEE
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION

FILE NO:	No 14 of 2004 (20402930)
DELIVERED:	22 February 2005
HEARING DATES:	23 August 2004
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN J AND PRIESTLEY AJ

CATCHWORDS:

COURTS – jurisdiction – cross vesting – whether the Northern Territory Supreme Court has power to order exhumation of body in civil proceedings – whether similar power exists in Supreme Court of Queensland – whether Supreme Court of NT can order exhumation in respect of body interred in Queensland – whether power exists under cross-vesting legislation

COURTS – federal jurisdiction – diversity jurisdiction – matter remitted to Supreme Court of NT by High Court – whether federal jurisdiction extends to order exhumation in Queensland

Constitution s 75(i) and s 75(iv)
Coroner Act 2003 (Qld) s 8, s 8(4), s 13, s 19, s 20
Coroners Act (NT) s 20, s 21, s 24, s 44(1) and s 44(2)
Crimes Act s 236
Criminal Code (Qld) s 236
Equity Act (SA) s 7
Fatal Injuries (Compensation) Act
Judiciary Act s 44(2), s 44(3), s 78b, s 79, s 80
Jurisdiction of Courts (Cross-vesting) Act (Qld) 1987 s 4(1), s 4(3), s 5
Jurisdiction of Courts (Cross-vesting) Act (Vic) s 4(3)
Jurisdiction of Courts (Cross-vesting) Act 1987 (NT) s 5, s 9(a)
Land Act 1994 (Qld) s 83(1)
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Supreme Court Act (SA) s 7, s 8, s 9, s 15
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Supreme Court Procedure Act (SA) s 1
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REPRESENTATION:

Counsel:

Appellant:	Self
Respondent:	M. Grant
Attorney-General for Queensland (Intervening)	B. Thomas

Solicitors:

Appellant:	Self
Respondent:	Solicitor for the Northern Territory
Intervener:	Attorney-General for Queensland

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN
No. AP 3 of 2004 (20304424)

BETWEEN:

LETTY MARIE SCOTT
NATHAN WILLIAM SCOTT
Appellants

AND:

NORTHERN TERRITORY OF AUSTRALIA
BARRY MEDLEY
HAROLD ROBERTSON
MICHAEL LAWSON
Respondents

IN THE FULL COURT OF THE
SUPREME COURT OF THE
NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN
No. 14 of 2004 (20402930)

BETWEEN:

LETTY MARIE SCOTT
NATHAN WILLIAM SCOTT
Plaintiffs

AND:

ATTORNEY-GENERAL OF THE NORTHERN TERRITORY OF AUSTRALIA
DR KEVIN LEE
Defendants

CORAM: MARTIN (BR) CJ, MILDREN J AND PRIESTLEY AJ

REASONS FOR JUDGMENT

(Delivered 22 February 2005)

Martin CJ:

[1] For the reasons given by Mildren J I agree that the Supreme Court of the Northern Territory has jurisdiction in both sets of proceedings to order an exhumation of the body of the late Douglas Bruce Scott and to order a further autopsy. I agree with the answers proposed by Mildren J to the questions posed in proceeding No 14 of 2004.

[2] I also agree with Mildren J that in appeal AP 3 of 2004 the applications for extension of time and leave to appeal should be refused. That appeal was against an interlocutory order and the refusal does not prevent a further application being made in proceeding No 47 of 2003. I also agree with Mildren J that there are a number of issues to be resolved concerning the merits of such an application upon which this Court should not comment.

Mildren J:

Introduction

[3] This is an application for leave to appeal from the interlocutory judgment of a single judge. Leave to appeal is required by virtue of s 53 of the Supreme Court Act. In addition the applicants seek an extension of time within which to make this application pursuant to Rule 82.02 of the Supreme Court Rules.

[4] The issue on the application for leave to appeal is whether or not Bailey J was correct in determining that the Supreme Court had no jurisdiction to make an order that the body of Douglas Bruce Scott be exhumed in Townsville in the State of Queensland and be subjected to a second autopsy by a group of overseas pathologists of the plaintiffs' choosing.

[5] Briefly the history of the matter before Bailey J is that the plaintiffs commenced action against the defendants in the High Court of Australia for damages in tort arising out of the death of the late Douglas Bruce Scott, the former husband of the plaintiff Letty Marie Scott and the father of the plaintiff Nathan William Scott. The late Douglas Bruce Scott died in Berrimah Prison on 5 July 1985. The plaintiffs claim that the deceased was murdered by the defendants, Medley, Robertson and Lawson, who were prison officers at the prison at the relevant time. Only the first, second and fourth defendants have been served with the writ and statement of claim. The whereabouts of the third defendant, Robertson, are unknown.

[6] On 17 December 2002, McHugh J remitted the matter to this Court and granted liberty to the plaintiffs to file and serve any amended statement of claim on or before 31 January 2003. McHugh J said that the plaintiffs' writ and statement of claim are "far from clear, they do not specify the true nature of the plaintiffs' claims and will need amendment if the present action is to proceed."

[7] The plaintiffs sought leave to appeal from Justice McHugh's decision to remit the matter to this Court. On 3 October 2003, the High Court refused special leave.

[8] The applicants filed an amended statement of claim on 20 January 2003. By summons filed on 8 October 2003 the applicants sought various orders including an order that the body of the deceased be exhumed and subjected to a second autopsy by pathologists of the applicants' choosing.

[9] A similar question is raised in action 14 of 2004 which has been referred to the Full Court. By consent of the parties both of these matters have been heard together. In the matter of the reference there are a number of agreed facts which are set out as follows:

1. Douglas Bruce Scott ("the deceased") died on 5 July 1985.

2. A forensic pathologist performed an autopsy on the body of the deceased on 5 July 1985 and produced a post-mortem report following that examination.

3. The death of the deceased was subject to an inquest pursuant to the former Coroners Act (now repealed with the passage of the Coroners Act 1993 (NT)). The Coroner handed down his findings on the inquest on 16 September 1987.

4. The remains of the deceased are interred in a public cemetery in Townsville in the State of Queensland.

5. The plaintiffs have commenced proceedings by Originating Motion in the Supreme Court of the Northern Territory seeking *inter alia* orders pursuant to sub-sections 44(1) and 44(2) of the Coroners Act 1993 (NT) ("proceeding No 14 of 2004").

6. By paragraph 2 of the Amended Originating Motion in proceeding No 14 of 2004 the plaintiffs seek an order in the following terms:

> "The applicants seek an order for the exhumation and re-autopsy of the remains of the deceased Douglas Bruce Scott at Townsville Queensland, pursuant to s 9 of the Northern Territory *Jurisdiction of Courts (Cross-vesting) Act*, pursuant to s 4 of the Queensland *Jurisdiction of Courts (Cross-vesting) Act*, and pursuant to the common law in Australia, pursuant to the Court's inherent power as a superior court, pursuant to the *Service and Execution of Process Act*, pursuant to the Court's power under the Northern Territory *Coroners Act*, the Queensland *Coroners Act*, the *Lands Act* of Queensland."

[10] The questions for determination by this Court, if this Court accepts the reference are as follows:

(1) Does the Supreme Court of the Northern Territory have jurisdiction and power in the context of proceeding No 14 of 2004 to order the exhumation of the remains of the deceased?

(2) If no to (1) above, does the Supreme Court of the Northern Territory have jurisdiction and power in the context of proceeding No 14 of 2004 to order the exhumation of the remains of the deceased by operation of s 9 of the Jurisdiction of Courts (Cross-vesting) Act (NT) and s 4 of the Jurisdiction of Courts (Cross-vesting) Act 1987(Qld)?

(3) If yes to (1) or (2) above, does the Supreme Court of the Northern Territory have jurisdiction and power in the context of proceeding No 14 of 2004 to order a further autopsy in relation to the body of the deceased?

The Reference to Full Court:

(1) Does the Supreme Court of the Northern Territory have jurisdiction etc?

[11] It is convenient to answer the questions referred to the Full Court first.

[12] The relief that the plaintiffs have sought in action 14 of 2004 are orders pursuant to s 44(1) and s 44(2) of the Coroners Act (NT). These provisions provide:

> (1) A person may apply to the Supreme Court for an order that some or all of the findings of an inquest are void.
>
> (2) The Supreme Court may declare that some or all of the findings of an inquest are void and may order a coroner –
>
> (a) to hold a new inquest, or direct a coroner other than the coroner who held the first inquest, to hold a new inquest; or
>
> (b) to reopen (or direct another coroner to reopen) an inquest and to re-examine a finding.

[13] Sections 20 and 21 deal with autopsies. These provisions provide as follows:

> **20 Autopsies**
>
> (1) If a coroner reasonably believes that it is necessary for an investigation of a death, the coroner may direct a medical practitioner to perform an autopsy on the body of the deceased person.
>
> (2) A medical practitioner performing an autopsy may cause to be preserved any material that appears to the coroner or the medical practitioner to bear on the cause of death.
>
> **21 Application for Autopsy**
>
> (1) If a coroner has jurisdiction to investigate a death, a person may ask a coroner to direct that an autopsy be performed on the body of the deceased person.

(2) If a coroner refuses a person's request under sub-section (1) the coroner shall immediately give to the person notice in writing including reasons for the refusal.

(3) Within 48 hours after a person receives a notice for refusal referred to in sub-section (2), the person may apply to the Supreme Court for an order for an autopsy.

(4) The Supreme Court shall, if it thinks fit, make an order –

(a) directing the coroner to require a medical practitioner to perform an autopsy; and

(b) prohibiting disposal of the body of the deceased person until the coroner has the results of the autopsy and has ordered its disposal.

[14] Section 24 of the Act deals with exhumation. This section provides as follows:

24 Exhumation

(1) The coroner may order that the body of a deceased person be exhumed if the coroner reasonably believes that is necessary for an investigation of a death.

(2) The coroner shall ensure that at least 48 hours notice in writing is given to the senior next of kin of the deceased person and to the trustees or owners of the cemetery, burial ground or place of burial where the body of the deceased person is buried before the body is exhumed unless the coroner is satisfied it not possible to give the notice.

(3) If the senior next of kin of the deceased person asks the coroner not to exhume the body of the deceased person, the body shall not be exhumed until 48 hours after the request has been made.

> (4) Within 48 hours after receiving notice of the order under sub-section (2), the senior next of kin of the deceased person may apply to the Supreme Court for an order that the body of the deceased not be exhumed and the Supreme Court may, in its discretion, make an order that the body not be exhumed.

[15] There is nothing in the Coroners Act which confers jurisdiction on the Supreme Court of the Northern Territory to order the exhumation of a body; nor does the Act by its terms take away any powers the Court may have derived from elsewhere. I therefore do not think that it can be concluded that the Coroners Act "covers the field".

[16] The jurisdiction of the Supreme Court of the Northern Territory is primarily to be found in s 14 of the Supreme Court Act.

[17] Section 14(1)(b) provides that the Court has, subject to the Supreme Court Act and to any other law in force in the Territory, in relation to the Territory, the same original jurisdiction, both civil and criminal, as the Supreme Court of South Australia had in relation to the State of South Australia immediately before 1 January 1911.

[18] The jurisdiction of the Supreme Court of South Australia as at that time was relevantly contained in Act 31 of 1855-6 ss 7, 8, 9 and 15; the Equity Act 1866-7 (No 20 of 1866-7) s 7; and s 1 of the Supreme Court Procedure Act 1866 (No 7 of 1866). Those provisions conferred jurisdiction on the court in respect of "all pleas, civil, criminal, and mixed, and jurisdiction in all cases whatsoever… as Her Majesty's Courts of King's Bench, Common Pleas, and

Exchequer, at Westminster, or either or them, lawfully have or hath in England"; it also conferred on the court jurisdiction as a Court of Oyer and Terminer and Gaol Delivery; and it conferred on the court equitable jurisdiction. Section 9 of the Act 31 of 1855-6 provided:

> That the said Supreme Court shall be a Court of Ecclesiastical Jurisdiction, with full power to grant probates, under the seal of the said Court, of the last wills and testaments of all or any of the inhabitants of this Province and its dependencies, and of all other persons who shall die and leave personal effects within this Province or its dependencies, and to commit letters of administration under the seal of the said Court, of the goods, chattels, credits, and all other effects whatsoever of the persons aforesaid who shall die intestate or who shall not have named an executor resident within the said Province or its dependencies…

[19] Although further powers were conferred on the court by the Supreme Court Act of 1878 (No 116 of 1878), the Supreme Court of South Australia was not invested with the like jurisdiction as the ecclesiastical courts of England. Unlike other English laws, the laws of England relating to ecclesiastical matters did not become part of Territory law through the settled colonies principle: see Blackstone, *Commentaries*, 18th ed, BK.1, p 111; Alex C. Castles, *An Australian Legal History*, Law Book Company (1982) p 12. The question then becomes what jurisdiction or powers if any did the Supreme Court derive through the Court of King's Bench relating to the making of exhumation orders?

[20] There are many authorities supporting the proposition that a superior court of record has the power at common law to order the exhumation of a body for the purpose of holding a post-mortem or a further post-mortem. The

earliest known authority in Australia is *Regina v Clarkson* (1850) 1 Legge 593. In that case, the Attorney-General moved that permission be granted by the court for the exhumation of a deceased person as there was some doubt as to whether the coroner had power to order the same, two inquests having already been held. In that case the Full Court made an order that the coroner exhume the deceased's body and as soon as the examination was complete re-inter the body immediately. The power to make that order depended upon the fact that the court held that the coroner was functus officio, that the Court was the "grand conservator of the peace and… sovereign coroners of the colony," and that it was appropriate to make the order as the coroner was a party to the action brought.

[21] In *Beard v Baulkham Hills Shire Council* (1986) 7 NSWLR 273, Young J said, at 280:

> …this Court under its Common Law powers (see *R v Clarkson* (1850) 1 Legge 593) and a coroner under the Coroners Act 1980, s 53, have powers to order the exhumation of a body for the purpose of holding a post-mortem or a further post-mortem…

[22] An order for the exhumation of the body of a deceased person was made by the Supreme Court of Victoria for the purposes of forensic examination for evidential purposes in *R v J G Beaney* (1866) 3 WW & a'B (L) 73.

[23] There is something of a suggestion in the judgment of Young J in *Beard v Baulkham Hills Shire Council* supra, at 276 that at all material times in England, burials have been a matter for the ecclesiastical law and that the

common law, apart for some very exceptional cases, had never sought to interfere where the ecclesiastical courts had worked out a fair system of jurisprudence. There are English authorities which show that the ecclesiastical courts did exercise jurisdiction to grant faculties to exhume a corpse for reasons other than reinterment at a different place: see *In re Sara Pope* (1851) 15 Jur. 614; *The Queen v Dr Tristram, Judge of the Consistory Court of London* (1898) 2 QB 371.

[24] The Court of King's Bench also exercised jurisdiction in cases of this kind, see *Stanlack's* case 1 Ventris 181; 86 ER 123; *R v Clerk* 1 Salkeld 377, 91 ER 328-329; *R v Sanders* 1 Strange 168, 93 ER 452; *Barclee's* case 2 Sid 101, 82 ER 1279. It appears that the Australian authorities do not rely upon any power which rested with the ecclesiastical courts, but rather upon the common law powers exercised by the Court of King's Bench: see esp. *R v Clarkson* (supra).

[25] In *Stanlack's* case 1 Ventris 182, 86 ER 123, the court said:

> If a coroner omits to enquire, this Court, as supream coroner throughout England may enquire; or may make commissioners as to enquire; or commissioners of oyer and terminer may enquire; but then it is not super visum corporis, and therefore may be traversed. But Hale said, where a coroner hath enquired, no melius inquirendum can go, as upon an office found after the death of the King's tenant. For unless they could take some exception to the inquisition to quash it, the coroner could not enquire again; but if the misdemeanour of the coroner was somewhat more clearly made out, the Court said they would set the inquisition aside, and cause a new one to be made.

[26] There are a number of American decisions to which we were referred by the applicants in which courts have made orders for the exhumation of the body including cases where the purpose of holding the post-mortem was purely in aid of a civil remedy: *Gray v State* (1905) 114 SW Rep. 635 at 642-643; 647-648; *State v Wood* (1928) 142 A 728 at 729-730; *Kusky v Laderbush* (1950) 74 A.2d 546 at 547; *Roberts v State* (1951) 50 So.2d 356 at 362-363; *Stasteny v Tachovsky* (1964) 132 N.W. 2d 317 at 324-325; *Life Investors Insurance Company of America v Heline* (1979) Iowa, 285 NW 2d 31 at 33-35; and in *Re the Estate of Tong* (1980) Colo. App., 619 P.2d 91 at 92.

[27] It is clear from the authorities to which I have referred that this Court does have jurisdiction at common law to order the exhumation of a body for the purposes of forensic examination of the remains whenever it is necessary to do so for the furtherance of the administration of justice. I see no reason why the jurisdiction should be confined to cases falling within the Court's criminal jurisdiction.

[28] Accordingly, I consider this Court does have jurisdiction and power in an appropriate case to order the exhumation of the remains of a deceased person. However, in my opinion the power of the Court is limited to those persons who are buried in the Northern Territory unless there is some statutory power enabling the Court to exercise jurisdiction in respect of a body which is not buried in the Northern Territory.

[29] Reference was made by the appellants in their submissions to the Service and Execution Process Act 1992 (Cth). I am unable to see how that Act assists the applicants. The purpose of that Act is to enable service of process and service of subpoenas to be lawfully effected interstate and to enable judgments and warrants to be executed beyond State and Territorial boundaries. It does not confer jurisdiction over a subject matter such as the power to order the exhumation of a body in another State, although, if the power exists and an order is made, that Act may become useful should it be necessary to seek enforcement of the order in the event of non-compliance. Apart from the Jurisdiction of Courts (Cross-vesting) Acts, no other source of statutory power was referred to by the parties and I am unaware of any other possible source.

[30] I would therefore answer the first question "No".

The Reference to the Full Court:

(1) Does the Supreme Court have jurisdiction and power to order exhumation vide cross-vesting acts?

[31] I turn now to consider whether or not the Supreme Court of the Northern Territory has jurisdiction and power in the context of proceeding No 14 of 2004 to order the exhumation of the remains of the deceased by operation of the provisions of the Jurisdiction of Courts (Cross-vesting) Acts of the Northern Territory and the State of Queensland.

[32] It was submitted by the applicants that this Court had jurisdiction by virtue of s 4(1) of the Jurisdiction of Courts (Cross-vesting) Act (Qld) and s 9(a) of the Jurisdiction of Courts (Cross-vesting) Act (NT). It was further submitted that this jurisdiction existed independently of any matter being transferred from the Supreme Court of Queensland vide s 5 of the Cross-vesting Acts. Counsel for the Attorney-General for Queensland submitted that the power and jurisdiction derived from s 4(1) was contingent upon an existing matter being first transferred from the Supreme Court of Queensland. I am of the view that the applicants' contentions are correct.

[33] In *Bank Invest AG v Seabrook and Others* (1988) 14 NSWLR 711 at 713, Street CJ said, in relation to similar legislation in NSW, that the legislation now operative throughout Australia achieved, amongst other things, the objective that:

> … first it enables any one of [the eight State and Territory Supreme Courts, the Federal Court and the Family Court] to exercise the jurisdiction of, and to apply the law that would be applied by, any one of the other nine; secondly it enables any one of those courts in which proceedings are commenced to transfer them to any one of the other nine.
>
> The introduction of this scheme is a significant move towards providing throughout our nation the services of an integrated court system transcending the boundaries, both geographic and jurisdictional, that have in the past obstructed the courts in meeting the requirements of the Australian public.

[34] In the same case, Rodgers A-JA said at 724-725:

> By each State Act the Supreme Court of every other State is invested with a civil jurisdiction of the Supreme Court of the enacting State,

> both original and appellate (s 4(3)) with only immaterial exceptions. As well as its beneficial effects, this investment of jurisdiction entailed the danger of forum shopping. If the Supreme Court of State X had the jurisdiction of the Supreme Court of State Y, why not institute proceedings there in pursuit of some real or imaginary advantage, notwithstanding the dispute as such bore no relation to State X? It was in order to prevent this happening as well as to enable a transfer to another Supreme Court in cases where the requirements of the legislation were satisfied that s 5(2) was enacted.

[35] As Rogers A-JA observed at 725-726:

> It is important that full effect be given by the courts to the imaginative and detailed code for ensuring that throughout Australia disputes are dealt with by the one court and that be the court most appropriate for the particular dispute. Consistently with the preservation of dual State and Federal court systems and with State courts dispensing justice within the State boundaries, there has been a legislative recognition of the need to transcend State boundaries in appropriate cases. No longer is it appropriate to regard the court of another State as a "foreign" court.

[36] In *Bond Brewing Holdings Ltd and Ors v Crawford and Ors* (1989-1990) 1 ACSR 213 at 217-218, Ipp J said:

> According to the explanatory memorandum the reasons for the proposed scheme were that litigants had occasionally experienced inconvenience and had been put to unnecessary expense as a result of uncertainties as to the jurisdictional limits of Federal, State and Territory Courts, and also, the lack of power in these courts to ensure that the proceedings which were instituted in different courts but which ought to be tried together were tried in the one court.
>
> The explanatory memorandum stated that:
>
> > "The primary objective of the cross-vesting scheme is to overcome these problems… so that no action will fail in a court through lack of jurisdiction and that as far as possible no court will have to determine the boundaries between Federal, State and Territory jurisdictions.

> The provisions relating to cross-vesting will need to be applied only in those exceptional cases where there are jurisdictional uncertainties and where there is a real need to have matters tried together in the one court."

Similar sentiments are expressed in the preamble to the Act.

In my view the purpose of the Act is to alleviate the difficulties referred to in the explanatory memorandum. It is not intended by the Act that jurisdiction should be exercised willy nilly by the courts of other States as if each should, without more, exercise the jurisdiction of the Supreme Court of Victoria.

[37] Section 4(1) of the Queensland Act provides:

> The Supreme Court of another State or of a Territory has and may exercise original and appellate jurisdiction with respect to State matters.

[38] By s 3(1) "State matter" is defined to mean a matter:

> (a) in which the Supreme Court has jurisdiction otherwise than by reason of a law of the Commonwealth or of another State; or
>
> (b) removed to the Supreme Court under section 8.

[39] There is nothing in the cross-vesting Acts which supports the view that, before jurisdiction can be exercised under s 4(1), there must be an existing matter transferred to the Court exercising that jurisdiction pursuant to s 5. Reference was made to s 9, which provides:

> 9. EXERCISE OF JURISDICTION PURSUANT TO CROSS-VESTING LAWS
>
> The Supreme Court –

(a) may exercise jurisdiction (whether original or appellate) conferred on that court by a provision of this Act or of a law of the Commonwealth or a State relating to cross-vesting of jurisdiction; and

(b) may hear and determine a proceeding transferred to that court under such a provision.

[40] In my opinion s 9(a) is independent from s 9(b). Section 9 does not say, as it might easily have done if that were the intention, that the Court may exercise jurisdiction and hear and determine a proceeding if, and only if, a proceedings has been transferred. Also, the submission of the Attorney-General overlooks the distinction between a "State matter" and a "proceeding".

[41] It was submitted by Mr Grant that in order for the Supreme Court of the Northern Territory to exercise the cross-vested jurisdiction of the Supreme Court of Queensland, there must be a "matter" in which the authority to adjudicate in relation to either the parties or the subject matter is derived from Queensland laws. It was submitted that the term "matter" as it appears in the cross-vested legislation should be given its Constitutional (in the generic sense) meaning, that is, that "matter" comprises the substantive subject matter for determination in a legal proceeding involving some immediate right, duty or liability to be established by the determination of the Court: see *Re Judiciary Act 1903-1920*; *Re Navigation Act 1912-1920* (1921) 29 CLR 257.

[42] A similar conclusion was reached by the Full Federal Court in *Acton Engineering Pty Ltd v Campbell* (1991) 103 ALR 437. In that case Lockhart J with whom Black CJ and Davies J agreed, said at p 450:

> The word "matter" is of wide import. In my opinion a matter arising out of the Corporations Law is "a judiciable controversy, identifiable independently of the proceedings which are brought for its determination and encompassing all claims made within the scope of the controversy". :see *Fencott v Muller* (1983) 46 ALR 41; 152 CLR 570 per Mason, Murphy, Brennan and Deane JJ at 603. See also *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; 33 ALR 465; *Crouch v Commissioner for Railways (Qld)* (1985) 62 ALR 1; 159 CLR 22 per Mason, Wilson, Brennan, Deane and Dawson JJ at 37-38; and Quick and Garran in *The Annotated Constitution of the Australian Commonwealth* (p 765).

[43] The cross-vesting act makes a clear distinction between a "matter" and a "proceeding". In s 3(1) "State matter" is defined to mean a matter… "in which the Supreme Court has jurisdiction otherwise than by reason of a law of the Commonwealth or of another State…". Section 5 which deals with the transfer of proceedings refers to a "proceeding". In *Blake v Norris* (1990) 20 NSWLR 300, Smart J held, following the decision of Miles CJ in *Jackson v John Fairfax & Sons Ltd* (1988) 96 FLR 145, that whilst it was possible to transfer a discreet cause of action in a situation where there were several causes of action brought in the same cause, there was no power to transfer part of a cause of action or a separate issue arising in a cause of action. At pages 307-308 his Honour said:

> I agree that if there are several causes of action, there is power to transfer one of those causes of action. A separate cause of action is a proceeding. There would be power to transfer a cross claim. Miles CJ

was not faced with the question whether there was power to transfer part of a cause of action, that is, the issue of liability.

Recital I states:

> "I If a proceeding is in instituted in a court that is not the appropriate court, to provide a system under which the proceedings will be transferred to the appropriate court."

Issues cannot be instituted in the court. A plaintiff sues upon his cause of action and that embraces both the issue of damages and the issue of liability. The substantiative provisions of the Act bear out the view that a proceeding is a cause of action. There are no provisions in the Act which purport to deal with what should happen where, for example, a separate issue is transferred.

…While in some cases it may seem beneficial to be able to transfer an issue to the court of another State and when that issue has been determined resume consideration of the matter and make final orders, that has not been envisaged in the Act. There is no power to remit issues for decision although that concept is a well-established one.

[44] That case has since been followed and applied by Hill J in *Soverina Pty Ltd v NatWest Australia Bank Limited* (1993) 40 FCR 452 at 458. In *Australian Commercial Research and Development Limited v ANZ McCaughan Merchant Bank Limited* (1990) 1 Qd.R. 101 at 106 McPherson J said, in respect of s 4(3) of the Jurisdiction of Courts (Cross-vesting) Act 1987 (Vic) which is in identical terms to s 4(1) of the present Queensland Act:

> The word "matter" is not separately defined, but in a context like this it may be taken to mean a justiciable controversy or dispute (*cf. Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261, at 292). A justiciable controversy or dispute involving, as does this, companies incorporated in that State is a matter in which the Supreme Court of Victoria has jurisdiction otherwise than by reason of the law of the Commonwealth or any other State.

[45] In *Cross-Vesting of Jurisdiction: A Review of the Operation of the National Scheme* (Garrie J Moloney and Susan McMaster (1992) Australian Institute of Judicial Administration Inc.) the learned authors considered whether or not what was cross-vested under the Scheme was jurisdiction over State matters and whether "matters" probably meant only a cause of action and not an application for an interlocutory injunction which itself is not a cause of action, but rather is dependent upon the existence of a prior cause of action. The learned authors observed (at 78):

> We are not convinced that this argument is correct, or even if it is, whether it would adversely affect the proper functioning of the scheme. The Cross-Vesting legislation makes a clear distinction between a matter and a proceeding. A single proceeding, it would appear, may involve several matters. The proceeding is the curial framework or process in which the matters in dispute are determined. Moreover, the probable meaning of "matter", in this context, is a justiciable controversy, which includes all claims within the scope of that controversy rather than merely a cause of action. On this view, an interlocutory application in a pending proceeding or a proposed one can still be regarded at the very least as a step which is incidental to the proceeding or proposed proceeding and so within the notion of a matter for these purposes. But even if the argument put in *Murphy Corporation* were correct, the controversy itself is a State matter, and the Court would have the necessary cross-vested jurisdiction over it. …
>
> 5.17 The instances where one participating court would be asked to exercise the inherent jurisdiction of another court will be infrequent. Nonetheless, it is our view that the intention of the Cross-Vesting legislation was to cross-vest *all* the jurisdiction available to a participating court in all the other participating courts and this includes inherent jurisdiction.

[46] It was submitted that the "matter" said to be the subject of the present litigation should be determined by identifying the subject matter for

determination in the action, the right, duty or liability to be established in the proceeding and the controversy between the parties to each proceeding to the quelling of which the authority to adjudicate is invoked. On that basis, it was submitted that the subject matter to be determined in the case under appeal is a Lord Campbell's Act claim by the plaintiffs pursuant to the Fatal Injuries (Compensation) Act and the matter to be determined in the matter under reference was whether or not the findings of the inquest handed down in 1987 were void. Thus it was said that the "matter" did not fall within the jurisdiction of the Supreme Court of Queensland. However such a narrow construction of "State matter" would be to fail to recognise the distinction between a "State matter" and a "proceeding".

[47] I do not think that is the true nature of the "matter". The "matter" in para 8 of the interlocutory summons before Bailey J is an application for exhumation and re-autopsy to be conducted on the remains of the deceased. Similarly, in my opinion the "matter" in the referred proceedings is whether or not the Court should order that the body of the deceased should be exhumed, etc. As the deceased is buried in the State of Queensland the question of whether or not the Supreme Court of Queensland has power to make such an order is to be determined by the law of the State of Queensland.

[48] Counsel for the Attorney-General of the State of Queensland submitted that under Queensland law the Supreme Court of Queensland had no power to order the exhumation of a body for forensic purposes. We were referred to

s 83(1) of the Land Act 1994 which confers on the Minister the power to give written approval for the exhumation of human remains, the relevant Minister being the Minister for Natural Resources, Mines and Energy. However, that power seems to be limited to the exhumation for "cemetery purposes". In the case of a "reportable death" the Queensland State Coroner may order a body to be exhumed for the purposes of an autopsy pursuant to s 20 of the Coroners Act 2003. Section 8 defines what is meant by "reportable death", but s 8(4) makes it clear that "a death that happened outside Queensland is not a reportable death if the death has been reported to a non-Queensland Coroner". Pursuant to s 11(4)(b) the State Coroner may direct a coroner to investigate any death where the State Coroner has been directed by the Minister to have the death investigated, whether or not the death is a reportable death. It may be that an exhumation might be ordered as an indirect consequence of such an investigation pursuant to s 13 of the Coroners Act 2003: see also s 19.

[49] Our attention was also drawn to s 27 of the Transplantation and Anatomy Act 1979 (Qld) which in certain circumstances empowers the senior available next of kin of a deceased person to authorise a post-mortem examination of the body of the deceased. Section 28(2) precludes the senior available next of kin authorising a port-mortem in certain circumstances, but there is no evidence that these circumstances apply in this case. However s 30(3) of that Act provides that a post-mortem examination under the Act shall be made by a "medical practitioner in a place approved by the chief

health officer". It was submitted that "medical practitioner" means a person who is registered under the Medical Practitioners Registration Act 2001 (Qld). Finally our attention was drawn to s 236 of the Criminal Code (Qld) which makes the improper dealing with human remains an offence and contains a reverse onus of proof in respect to the improper dealing with corpses by placing an obligation on a person to establish the lawful justification or excuse for improperly interfering with human remains.

[50] It was submitted that the above legislation "covers the field with respect to exhumations and autopsies in Queensland". We were referred to the decision of the Full Court of the Supreme Court of South Australia in *Haydon v Chivell* [1999] SASC 336; BC9904645. However the legislation in South Australia is significantly different from that of Queensland, and, in any event, the question of the jurisdiction of the Supreme Court of South Australia, as (opposed to the powers of the Coroner) was not in issue. In England it has been held that the statutory powers granted to coroners to order a post-mortem are not exclusive: *Reg v H. M. Coroner for Greater London (Southern District), Ex parte Ridley* (1985) 1 WLR 1347. Having regard to the authorities to which I have previously referred, I consider that the Supreme Court of Queensland has jurisdiction at common law to order the exhumation of the remains of the deceased. The jurisdiction of that Court is derived from that of the Supreme Court of New South Wales: see Supreme Court Act 1867 (Qld) s 34. I do not accept the argument of counsel for the Attorney-General for the State of Queensland that the various

Queensland Acts to which he has referred provide a code which has somehow ousted the common law jurisdiction of the court. There is nothing in the legislation of Queensland to which we were referred which abrogated the common law powers of the Queensland Supreme Court either directly or by necessary implication. Therefore pursuant to s 4(1) of the Queensland Act and s 9(a) of the Northern Territory Act this Court has jurisdiction to exercise the common law jurisdiction of the Supreme Court of Queensland in a proper case.

[51] I consider that the fact the order is sought to be made as a means of gathering further evidence, does not preclude the exercise of jurisdiction. For the reasons discussed in relation to what are State "matters", I consider that the fact that the order sought is merely in aid of the discovery of facts relevant to the ultimate question to be decided by the Court is not in itself a reason for denying jurisdiction.

The Reference to the Full Court:

(2) Does the Court have power to order a further autopsy?

[52] I have no doubt that the Supreme Court does have power by virtue of the operation of the cross-vesting legislation to order a further autopsy in relation to the body of the deceased if such were necessary. The fact that there has already been an autopsy does not prevent the Court from exercising jurisdiction in a proper case to order a further autopsy.

[53] However, before such powers are exercised, careful consideration must be given to a number of matters including whether there are facts warranting the exercise of the power, and if so, to whom the order is to be directed. There is no point in directing the order to the Northern Territory Coroner as there are no provisions in the respective Coroners Acts of the State of Queensland and the Northern Territory enabling a Coroner from one jurisdiction to request assistance from the Coroner of another. In my opinion the order should be directed at the relevant Queensland authorities and also to the trustees of the cemetery. In my view it would not be possible for an order to be made permitting persons who are not registered medical practitioners in Queensland to conduct any re-autopsy. There is also a question as to who should bear the costs of the exhumation, autopsy and reinterment of the body which will have to be considered but as that matter has not been agitated in these proceedings, I decline to comment on that matter further.

[54] There is also a question of the need to give notice of the proposed orders before they are made to the appropriate authorities in Queensland including the trustees of the cemetery, to give them an opportunity to be heard, particularly on who should bear the costs. I do not think it is necessary in these proceedings to have the relevant Queensland authorities or the trustees of the cemetery to be joined as parties as the only relief being sought is of an interlocutory nature. It is now common practice for courts to issue orders against persons who are not parties to actions in relation to discovery: see

for instance Rule 229 of the Uniform Civil Procedure Rules 1999 (Qld) which permits delivery of interrogatories to a non-party in certain circumstances (and see *Pacific Century Production Pty Ltd v Netafim Australia Pty Ltd* (2004) 2 Qd.R 422); and in the case of non-party discovery see Order 32 of the Supreme Court Rules (NT)). In my opinion an order of this nature is akin to an order for discovery against a non-party: see also *Haydon v Chivell* (1995) 165 ALR 1 at 3 per Gaudron J.

[55] I would therefore answers the questions in the stated case:

1. No

2. Yes

3. Yes

The application for leave to appeal and for an extension of time

[56] So far as the application for an extension of time is concerned in matter AP 3 of 2004, the judgment of Bailey J was delivered on 6 November 2003. According to the affidavit of Letty Marie Scott, sworn on 13 February 2004, an application for special leave to appeal from the judgment of Bailey J was lodged in the High Court on 20 November 2003. An application for leave to appeal to the Court of Appeal is required to be made within seven days after the material date which in this case means by 13 November 2003. The appellants assert that because they had lodged their application for leave in

the High Court, the respondents could not be prejudiced as they were put on notice that the appellants wished to appeal Bailey J's decision.

[57] The principles to be applied in determining whether or not to grant leave to appeal were stated by this Court in *Nationwide News Pty Ltd (t/as) Centralian Advocate and Others v Bradshaw and Another* (1986) 41 NTR 1. In short, in deciding whether to grant leave to appeal the discretion of an appellate court is unfettered. However, as a general guide an applicant will be required to show that the interests of justice make it desirable to grant leave. Where, as here, leave is sought to appeal from an interlocutory judgment relating to a matter of practice and procedure a more stringent test is applied. In cases such as the present, as a general rule, the Court of Appeal will not interfere unless a prima facie case is made out showing that the discretion of the primary judge miscarried or at least that some injustice will result as a consequence of it.

[58] In *Nationwide News Pty Ltd (t/as) Centralian Advocate and Others v Bradshaw and Another*, both O'Leary CJ and Nader J referred with approval to the judgment of Sir Frederick Jordan in *re The Will of F B Gilbert (deceased)* (1946) 46 SR (NSW) 318 at 323:

> I am of the opinion that,… there is a material difference between an exercise of discretion on a point of practice and procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or litigious disposition

> could, at will, in effect transfer all exercises of discretion in interlocutory applications from a judge in chambers to a Court of Appeal.

[59] It could not be said that the appellants have long purses, as they are indigent. By leave of the Court they have been allowed to present their case with the assistance of a law student, whose assistance to the Court is much appreciated. Whether the appellants have a litigious disposition is quite another matter indeed. Nevertheless, no argument was presented to the Court by Mr Grant who appeared for the first, second and fourth respondents, or by Mr Thomas who appeared for the Queensland Attorney-General (intervening) opposing the grant of an extension of time or the granting of leave, and I turn now to consider the appeal on its merits.

Some Preliminary Points

[60] Mr Grant raised a number of preliminary points that the application in respect of which the appeal is brought is framed in a defective fashion. The relevant application made to the Court below was contained in par 8 of the summons of 8 October 2003 which is in the following terms:

> That this Court order pursuant to its Federal Jurisdiction in this matter that an exhumation and reautopsy be conducted on the remains of Douglas Bruce Scott at Townsville Queensland by the United States and United Kingdom Forensic Investigative Committee into the death of Douglas Bruce Scott, consisting of Dr Henry C Lee, Dr Michael N Baden, Dr Cyril H Wecht, Dr Peter Dean and their assistants.

[61] Mr Grant pointed out a number of difficulties with the proposed order sought in that the order is not directed to any person so far as the

exhumation is concerned; that whether the appropriate person be the relevant Minister or the trustees of the Townsville Cemetery they are not respondents to the application; and so far as the Forensic Investigative Committee referred in par 8 of the summons is concerned, it is common ground that the Forensic Experts named therein have each sought a fee of US$10,000 with first class travel and accommodation expenses for the purpose of conducting the further post-mortem examination; that their attendance is contingent upon that payment; and that the applicants are without the means to meet these expenses. Moreover, the proposed order sought made no provision for the storage of the body following its exhumation; nor does it specify the manner with which the body is to be dealt with following the examination.

[62] In these circumstances although jurisdiction did exist to make an order for exhumation under the Cross-vesting Acts, for the reasons already given, in my opinion, the failure to serve upon the appropriate authorities notice of the application was a sufficient reason to refuse the order sought. Furthermore, for the reasons already given, no order could be made authorising an autopsy by a person who is not a registered medical practitioner in Queensland and there is no evidence that any members of the Forensic Investigative Committee were so registered. On those grounds alone, I think that the application ought to have been refused and, that being so, the application for an extension of time and for leave to appeal must be dismissed.

[63] Before leaving this topic, I consider that I should deal with an alternative argument based upon the proposition that this Court has power to make such an order because it is exercising federal jurisdiction. The appellants' argument contains a number of steps. The first step is that as this is a remitted matter from the High Court, this Court is exercising Federal Jurisdiction. I accept that proposition: see *Johnstone v The Commonwealth* (1978-79) 143 CLR 398 at 408-9. The plaintiff originally sought to issue proceedings in the original jurisdiction of the High Court pursuant to ss 75(i) and (iv) of the Constitution. The matter was remitted by the High Court to the Supreme Court pursuant to s 44(2) of the Judiciary Act (1903) (Cth). Section 44(3) of the Judiciary Act 1903 provides:

> Where the High Court remits a matter, or any part of a matter, under sub-section (2) or (2A) to a court:
>
> (a) that court has jurisdiction in the matter, or in that part of the matter, as the case may be; and
>
> (b) subject to any directions of the High Court, further proceedings in the matter, or in that part of the matter, as the case may be, shall be as directed by that court.

[64] Sections 79 and 80 of the Judiciary Act 1903 provide as follows:

> **State or Territory laws to govern where applicable**
>
> 79. The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising Federal Jurisdiction in that State or Territory in all cases to which they are applicable.

Common law to govern

> 80. So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is held shall, so far as is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

[65] It is clear that so far as any directions which may have been given pursuant to s 44(3) are concerned, the substantive rights of the parties are determined by the law of the Northern Territory (see *Pozniak v Smith* (1982) 151 CLR 38 at 44) and the laws relating to procedure, evidence and the competency of the witnesses will also be determined by the law of the Northern Territory.

[66] It was submitted on behalf of the applicants that because the Court was exercising Federal Jurisdiction it had an Australia wide geographical reach which it might otherwise not have enjoyed. That submission was based upon observations made by the High Court in *Commonwealth v Mewett* (1997) 191 CLR 471 at 524 and *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at par [53].

[67] In the latter case is was said (per Gleeson CJ, Gaudron, McHugh, Gummow and Haine JJ):

> The jurisdiction of this Court and the Federal Court and the Family Court is clearly Australia wide; so to (but, perhaps, less obviously) is the jurisdiction of courts invested with federal jurisdiction when that jurisdiction is exercised. Thus, strictly the question that arises in

> matters of Federal Jurisdiction does not involve any choice between laws of competing jurisdictions, *but identification of the applicable law in accordance with s 79 and 80 of the Judiciary Act* (emphasis mine).

[68] It is clear that neither s 79 or s 80 would confer jurisdiction on this Court to make some kind of order affecting a body interred in the State of Queensland unless there were a valid law conferring such a jurisdiction or power on this Court either by the common law or by a law of the State of Queensland which is given effect by a law of the Northern Territory, it being abundantly clear that there is no law of the Commonwealth that would confer such a power: see *Re Wakim; ex parte McNally & Another* (1999) 198 CLR 511 at 573; *Austral Pacific Group Ltd (in liquidation) v Airservices Australia* (2000) 173 ALR 619 at [51] per McHugh J. The only means by which that power exists in the Supreme Court rests upon the provisions of the Jurisdiction of Courts (Cross-vesting) Act 1987 (NT) and by the Jurisdiction of Courts (Cross-vesting) Act 1987 (Qld).

[69] Accordingly, I would refuse the application for an extension of time and for leave to appeal.

PRIESTLEY AJ:

Introduction

[70] On 23 August 2004 this Court heard argument on four legal questions arising from two related legal proceedings. These legal proceedings are being taken by Mrs L Scott and her son Mr N Scott. One of the proceedings

is an application for leave to appeal in a case in which they are plaintiffs at first instance. The application was argued before this Court as on appeal and I will refer to it as the appeal proceeding. The other proceeding is an Originating Motion in which Mrs Scott and Mr Scott are applicants. Part of this proceeding has been referred to this Court. I will refer to it as the reference proceeding. (Also, for the sake of brevity, in referring to this Court, which is the Supreme Court of the Northern Territory, I will usually be calling it either the NT Supreme Court or the Court.)

[71] After setting out some preliminary background material I will deal first with the appeal and then with the reference proceedings. For simplicity, I will call Mrs and Mr Scott the plaintiffs throughout.

General Background

[72] The plaintiffs are the widow and the son of the late Mr Douglas Scott who died in his cell in the Darwin Prison on 5 July 1985. An autopsy was performed on his body on the same day by Dr K Lee. A coronial inquiry by Mr McGregor found in September 1987 that Mr Scott's death was by hanging and that he had committed suicide. The plaintiffs do not accept the finding of suicide and over a lengthy period have been seeking to prove that Mr Scott was murdered by four prison officers.

[73] The two legal proceedings with aspects of which this court is presently concerned are part of the plaintiffs' efforts to obtain remedies for the death

of their husband and father. There have been other legal proceedings in the past but it is not necessary to recount the full history in the present proceedings, which raise legal questions concerning the powers of the NT Supreme Court, the answers to which do not depend on the particular facts of the cases. (Of course, if the powers as contended for by the plaintiffs exist, then the questions of whether they should be exercised, and if so, in what manner, would be very much bound up with the particular facts before the Court.)

[74] The practical purpose behind the plaintiffs' raising of the four legal questions now before the Court is based on the facts that the late Mr Scott is buried outside the geographical jurisdiction of the Northern Territory (in Townsville in the State of Queensland) and the plaintiffs wish to have his remains exhumed and a further autopsy conducted on them. They obtained an opinion from a committee of expert United States and United Kingdom pathologists which they contend justifies the conclusion that a further autopsy will lead to further expert opinion which will support their case that the late Mr Scott was murdered.

[75] The appeal proceeding comes from an action which the plaintiffs commenced in the diversity jurisdiction of the High Court. It raises one of the four questions presently before this Court.

[76] The reference proceeding comes from an Originating Motion commenced in the NT Supreme Court. From it the other three questions were referred to this Court.

[77] The Diversity Jurisdiction Proceeding. The plaintiffs commenced this proceeding by Writ of Summons dated 25 September 2002 in the original jurisdiction of the High Court. In their Statement of Claim they alleged that the late Mr Scott had been murdered by prison officers on 5 July 1985 while on remand in the Darwin Prison.

[78] In the High Court, on 17 December 2002, McHugh J ordered that the action be remitted to the NT Supreme Court. He also granted liberty to the plaintiffs to file and serve any amended statement of claim on or before 31 January 2003. The plaintiffs filed an amended statement of claim in the NT Supreme Court on 20 January 2003. Here, the matter was given the Supreme Court Proceeding No 47 of 2003 (47 of 03).

[79] The plaintiffs also filed an application in the High Court for special leave to appeal against McHugh J's remitter decision. This application was dismissed by the High Court on 3 October 2003.

[80] The plaintiffs then, in October 2003, filed a summons in 47 of 03 seeking a number of interlocutory orders. This summons was heard by Bailey J on 6 November 2003. The summons sought an order for summary judgment and a number of other orders. The one numbered as Order 8 was as follows:

> "That this Court order pursuant to its Federal Jurisdiction in this matter that an exhumation and reautopsy be conducted on the remains of Douglas Bruce Scott at Townsville Queensland by the United States and United Kingdom Forensic Investigative Committee into the Death of Douglas Bruce Scott, consisting of Dr Henry C Lee Dr Michael M Baden, Dr Cyril H Wecht, Dr Peter Dean and their assistants."

[81] Bailey J dismissed the plaintiffs' summons, refusing to make any of the orders asked for.

[82] Following the dismissal of their summons, the plaintiffs, on 13 February 2004, filed an application for extension of time and for leave to file and serve notice of appeal. The substance of the proposed notice of appeal was that it was against only that part of Bailey J's orders ordering that the application for Order 8 be dismissed. The question raised by the proposed notice was described by the defendants in one of their written submissions (par 8 of submission (vi) in the list of submissions I set out below), as:

> "Whether the Supreme Court of the Northern Territory has jurisdiction in these circumstances to order the exhumation and re autopsy of the body of the deceased which is interred in Townsville."

[83] This was the question which the parties argued in the appeal proceedings.

[84] There was no opposition to the granting of extension of time and leave to appeal in regard to this question.

[85] The appeal proceedings were given the number AP 3 of 2004, but as, since then they have mostly still been called 47 of 03, I will do the same.

[86] The Reference Proceeding (the Three Questions from the Originating Motion). Also, early in 2004, the plaintiffs commenced proceedings in the NT Supreme Court by Originating Motion No 14 of 04 (which I will simply refer to as 14 of 04). In this motion they sought seven orders which, stated summarily, with the exception of the second one which is reproduced in full, were as follows:

1.	Orders under the Coroners Act that the findings of the inquest by Mr McGregor, as Coroner in September 1987 touching the death of the late Mr Scott are void and directing a coroner to hold a new inquest, on a number of grounds.
2.	"… an order for the exhumation and re-autopsy of the remains of the deceased Douglas Bruce Scott at Townsville Queensland, pursuant to s 9 of the Northern Territory Jurisdiction of Courts (Cross-vesting) Act, pursuant to s 4 of the Queensland Jurisdiction of Courts (Cross-vesting) Act and pursuant to the common law in Australia, pursuant to the Court's inherent power as a superior court, pursuant to the Service and Execution of Process Act pursuant to the Court's power under the Northern Territory Coroners Act, the Queensland Coroners Act, the Lands Act of Queensland."
3.	Judicial review to quash the Form of Inquisition given by the Coroner in September 1987.
4.	An extension of time for the application for Judicial Review.
5,6 and 7.	Similar relief in regard to the post mortem report of Dr Lee and the entry in the Register of Deaths as to the cause of death of the late Mr Scott.

[87] From this Originating Motion (presumably from the second order sought) three questions were referred to this court for determination:

(1) Does the Supreme Court of the Northern Territory have jurisdiction and power in the context of proceeding No 14 of 04 to order the exhumation of the remains of the deceased?

(2) If no to (1) above, does the Supreme Court of the Northern Territory have jurisdiction and power in the context of proceeding No 14 of 04 to order the exhumation of the remains of the deceased by operation of s 9 of the Jurisdiction of Courts (Cross- vesting) Act (NT) and s 4 of the Jurisdiction of the Courts (Cross- vesting) Act 1987 (Qld)?

(3) If yes to (1) or (2) above, does the Supreme Court of the Northern Territory have jurisdiction and power in the context of proceeding No 14 of 04 to order a further autopsy in relation to the body of the deceased?

[88] Section 78B of the Judiciary Act. Notices under s 78B of the Judiciary Act were served upon the Attorneys-General for each jurisdiction in the Commonwealth. With the exception of Queensland, none intervened although all indicated that if the matter were to go to the High Court they might reconsider their position.

[89] Parties and Representation. The plaintiffs, being the parties seeking leave to appeal in 47 of 03, and the initiating parties in 14 of 04, appeared in person at the oral hearing (by videolink from Sydney) and were granted leave to have Mr Taylor, as their friend, make submissions on their behalf (also by videolink from Sydney).

[90] The four respondents to the application for leave to appeal in 47 of 03, in the main action in which they were the defendants, were allegedly the prison officers whom the plaintiffs claimed had murdered Mr Scott. For simplicity again, I will call them defendants throughout. One of them had not been

found or served. Mr Grant appeared for the other three. He also appeared for the two defendants in 14 of 04, who were Mr Toyne, the Attorney-General for the Northern Territory, and Dr Lee, the pathologist who had done the autopsy.

[91] Mr Thomas appeared for the Attorney-General of Queensland, seeking leave to intervene in 47 of 03, and seeking leave to appear as amicus curiae in 14 of 04. He was granted leave as sought in each case.

[92] Written and Oral Submissions. Before the oral hearing written submissions had either been filed or handed to the Court on behalf of the plaintiffs, on behalf of those for whom Mr Grant appeared and on behalf of the Attorney-General of Queensland. Useful lists of authorities were also made available. The Court heard oral submissions on 23 August 2004 from Mr Taylor, Mr Grant and Mr Thomas. The Court gave Mr Grant leave to file further written submissions by 26 August 2004 and Mr Taylor by 1 September 2004.

[93] The written submissions were very extensive. Those of the plaintiffs not only referred to a great deal of case law and academic writing, but also put forward a number of overlapping arguments, some in the alternative, and then developed in various ways in the oral argument. The opposing parties sought to deal with these in oral argument. Then, the further written submissions lodged for the plaintiffs and the defendants to some extent made clear the final positions of the parties, but also to some extent left

unclear precisely which of the many arguments were still being relied on, and which not.

[94] In this situation, it does not seem to me to be practical to try to state all the twists and turns of argument and then to deal with each of them. Having considered them all I have come to conclusions the reasons for which I think I can state in a way falling within the ambit of all the parties' submissions and which should make clear to them why I have accepted or rejected the material parts of their submissions or not found it necessary to deal with some of them. Since I am taking this briefer than usual course, it seems to me that I should for record purposes identify the written submissions put before the court. I have done that in the list below in which they are set out so far as possible in order of date and named by the descriptions they bear:

(i)	5 April 2004;	Applicants Submission-Authority Precedent;
(ii)	7 June 2004;	(Plaintiffs) Summary of Argument;
(iii)	7 June 2004;	Plaintiffs' Submissions for Appeal;
(iv)	11 June 2004;	Outline of Submissions on Behalf of the Attorney-General, State of Queensland;
(v)	11 August 2004;	Applicants further summaries of argument;
(vi)	18 August 2004;	Defendants/Respondents Outline of Submissions;
(vii)	(undated);	Outline of submissions on behalf of the Attorney- General, State of Queensland;
(viii)	19 August 2004;	(Plaintiffs) Reply to Outline of Submissions on behalf of the Defendants/Respondents and the Queensland Attorney General;

(ix)	20 August 2004;	(Plaintiffs) Final Reply to Outline of the Submissions on behalf of the Defendants/Respondents and the Queensland Attorney General;
(x)	20 August 2004;	(Plaintiffs) Supplementary Matter-Reply to Outline of Submissions on behalf of the Defendants/Respondents and the Queensland Attorney- General
(xi)	(Undated);	(Plaintiffs) Draft of Reply;
(xii)	23 August 2004;	(Plaintiffs) Summary of Constitutional and Federal Jurisdictional Matters;
(xiii)	23 August 2004;	(Plaintiffs) Supplementary List of Authorities;
(xiv)	24 August 2004;	(Plaintiffs) Notice to the Court of Appeal/Full Court of Supreme Court
(xv)	27 August 2004;	Defendants/Respondents Supplementary Outline of Submissions in relation to Cross-vesting;
(xvi)	28 August 2004;	Plaintiffs Reply to Defendants/Respondents Supplementary Outline of Submissions in Relation to Cross-vesting;
(xvii)	31 August 2004;	(Plaintiffs) Supplementary Reply to Defendants/Respondents Outline of Submissions in Relation to Cross-Vesting: The Ecclesiastical Jurisdiction, together with attached authorities – Exhumation cases

[95] The oral submissions are recorded in the transcript.

[96] On 7 December 2004 the High Court delivered judgment in *BHP Billiton v Schultz* (2004) HCA 61, (2004) 211 ALR 523 and shortly afterwards counsel for the defendants wrote both to the Court and the plaintiffs notifying them of the decision and its possible relevance to the matters before the Court.

This led to two more submissions being sent to the Court by the plaintiffs, dated 2 and 4 February 2005, dealing with that case.

[97] In the course of the oral submissions it was recognised by the parties and the Court that the primary issue was whether in either or both 47 of 03 and 14 of 04, the NT Supreme Court had jurisdiction to make the orders sought for exhumation and reautopsy. There was some discussion of the extent to which some substantial procedural difficulties which were raised by counsel for the defendants could be taken into account at this stage. These arguments could be seen as going more widely than to the abstract issue of jurisdiction only, and as having bearing on the questions of extension of time and the granting of leave, although these questions were not explicitly mentioned. Although I can see that the way the position was left may have left it open to the Court to take the defendants' procedural arguments into account on the questions of extension of time and the granting of leave, nevertheless, the discussion left me with the impression that if the Court were to hold in either case that the Court had jurisdiction, the further question, whether an order, or orders, should be made on the merits, was not to be answered by the Court at this stage, but would be left to a later hearing during which the procedural difficulties I have mentioned would be considered.

[98] I will come back to this matter when considering questions of leave and extension of time.

[99] I now turn to deal separately with the two proceedings.

The Appeal Proceeding (ie, the Diversity Jurisdiction Proceeding, (47 of 03))

[100] I begin by setting out a series of propositions (some legal, some of fact) which state in a summary way the steps which lead to the answers which in my opinion should be given to the question the Court is asked to answer in 47 of 03. I will then discuss those of the steps which either are controversial or need explanation. I have confined the propositions and their discussion to the minium (and as far as I can see the least controversial) necessary for the purposes of the instant proceedings and have resisted the invitation implicit in the plaintiff's submissions to write a treatise on virtually every aspect of federal jurisdiction. (In saying this I am not criticising the plaintiffs' submissions which were very thorough and wide ranging and in places reaching professorial standard, but simply trying to make it clear that for purposes of the present cases a much simpler approach is possible.)

[101] The propositions:

1. 47 of 03 began as a "matter" in the original jurisdiction of the High Court, pursuant to s 75(iv) of the Constitution, in which the plaintiffs' claim was based on an alleged tort committed in the Northern Territory.

2. If the matter had been tried in the High Court in exercise of its original jurisdiction, s 79 of the Judiciary Act would have bound the High Court to apply the laws of the Northern Territory in deciding the case.

3. The “matter” was remitted to the NT Supreme Court by the High Court in exercise of the remitter power in s 44(2) Judiciary Act.

4. In adjudicating upon the “matter” the NT Supreme Court will be exercising federal jurisdiction and will be standing in the “jurisdictional shoes of the High Court”[1]in doing so.

5. In preparing for the trial of the “matter”, the plaintiffs are invoking the power of the NT Supreme Court to compel the availability of relevant evidence at trial of the “matter”. This takes the form of asking the Court to order the exhumation of the remains of the late Mr Scott and to order that there be a reautopsy of them.

6. If the late Mr Scott’s remains were within the geographical bounds of the Northern Territory the Court would have the power to make the order.

7. The late Mr Scott’s remains are interred in Townsville, Queensland

8. The Supreme Court of Queensland has jurisdiction in a case properly constituted before it to order the exhumation and reautopsy of the late Mr Scott’s remains.

9. By operation of the Northern Territory Jurisdiction of Courts (Cross-vesting) Act 1987 the NT Supreme Court is vested with the

[1] The words are those of Mason J in *McCauley v Hamilton Island Enterprise* (1986) 69 ALR 270 at (275 -6).

jurisdiction of the Supreme Court of Queensland referred to in proposition 8 and thus has jurisdiction to make the orders sought.

[102] There are some further propositions that should be noted:

10. The consequence of the "matter" in the NT Supreme Court being in the federal jurisdiction being exercised by it while in its role of standing "in the jurisdictional shoes of the High Court", is that the rules relating to accrued jurisdiction will apply if the substratum of the facts of the controversy with which the "matter" is dealing gives rise to more than one legal claim.

11. If the claim in 47 of 03 for an order for the exhumation and reautopsy of the late Mr Scott's remains, being an interlocutory claim as described in proposition 5, is part of one single controversy within the "matter" (the tort claim) remitted to the NT Court, then, in exercising its remitted federal diversity jurisdiction in adjudicating upon the "matter", the Court will have jurisdiction also in regard to the exhumation and reautopsy claim, which will be the accrued Queensland Supreme Court common law jurisdiction with which the NT Supreme Court is vested.

12. The preceding proposition 11 provides an additional, but not necessary, reason for concluding that the NT Supreme Court has jurisdiction. It is not necessary because, even if the exhumation and reautopsy claim is not properly to be regarded as part of one single

controversy, or if for any other reason the NT Supreme Court does not have jurisdiction to deal with that claim within accrued jurisdiction, the NT Supreme Court will in any event have jurisdiction as set out in propositions 8 and 9 to make the orders sought by virtue of its being vested with the common law jurisdiction of the Supreme Court of Queensland by the operation of the Northern Territory Jurisdiction of Courts (Cross-vesting) Act 1987.

Discussion of Propositions

[103] Propositions 1, 2 and 3 were either common ground or not in issue. An explanation of proposition 2 will be necessary for an understanding of proposition 8 but I will defer giving it until I reach proposition 8.

[104] Propositions 3 and 4 deserve some explanation. The clearest authority for them, for present purposes, appears in *Johnstone v The Commonwealth (1979)* 143 CLR 398. In that case, Aickin J, after discussing arguments for and against the position he adopted, said, at 408:

> "These considerations appear to me to support the view that the effect of s.44 [of the Judiciary Act] is to confer federal jurisdiction on State courts in cases where this Court remits a case to them, and that federal jurisdiction is in those same matters in which this Court has federal jurisdiction by virtue of s.75 of the Constitution. That jurisdiction is coextensive with the jurisdiction of this Court, subject only to the Supreme Court having jurisdiction over the same kind of party and the same kind of subject matter as that over which the High Court has jurisdiction, without investigation of the question whether the Supreme Court would have had jurisdiction (whether State or Federal) over the particular parties and the particular subject matter if the action in question had been commenced in that Supreme Court rather than in the High Court."

[105] *Johnstone* has been accepted as correct in a number of later cases in the High Court: see for example *Posniak v Smith (1982)* 151 CLR 38 at 41, 42, 44, and 48; and *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1984) 154 CLR 579 at 583, 584.

[106] The reasoning in *Johnstone* must apply to the NT Supreme Court. (It was assumed throughout the submissions, and, in my opinion, correctly so, that this Court has jurisdiction over the same kind of party and the same kind of subject matter as those over which the High Court had the original jurisdiction initially invoked by the plaintiffs in this case.)

[107] As I understand the submissions of those opposing the plaintiffs, they did not dispute proposition 4 subject to a submission made on behalf of the defendants that the conceded jurisdiction was jurisdiction in the sense of power only and not carrying with it the ability to make orders enforceable outside the geographical boundaries of the Northern Territory. I will indicate later (par [145]) why I do not think that this argument assists the defendants.

[108] The federal jurisdiction this Court is exercising in 47 of 03 is federal jurisdiction of a particular kind: jurisdiction in a diversity jurisdiction matter concurrent with the High Court's original jurisdiction in such matters. In *McCauley v Hamilton Island Enterprise* (1986) 69 ALR 270, Mason J said (at 275-6) that when a matter was remitted to the Federal Court under s 44(2A) of the Judiciary Act, the Federal Court then stood "in the

jurisdictional shoes" of the High Court. I think the same must apply when a matter is remitted to this (Territory) Court under s 44(2) of the Judiciary Act.

[109] Proposition 5 is a matter of fact.

[110] Proposition 6 is based on an aspect of the common law jurisdiction (which I will call the coronial/exhumation jurisdiction) of the NT Supreme Court. It is not a necessary logical step in the argument I am developing but the proposition is closely connected with proposition 8 and is useful in the explanation of that proposition.

[111] The NT Supreme Court's jurisdiction has come about in the following way. The Supreme Court Act of 1979 (NT) is currently the principal act governing the establishment and jurisdiction of the NT Supreme Court. It confers common law jurisdiction (among other types) upon the Court. Pursuant to that common law jurisdiction, the Court decides cases by common law rules, and during the hearing of cases applies common law procedural rules, in each instance, to the extent that they have not been displaced or altered by or pursuant to statute. The existence of this common law jurisdiction is implicit in many places in the Supreme Court Act (e.g. in s 55 and s 61-68). It is also made explicit (although in a roundabout way) in par 14(1)(b) of the same Act, which gives the Court the same original jurisdiction as the Supreme Court of South Australia had in relation to the State of South Australia immediately before 1 January 1911. In that State

the English common law was treated as having been received as from 28 December 1836 (see *Lectures on Legal History* by WJV Windeyer, second edition, 1957 Reprint, at 297, note 4.).

[112] The common law jurisdiction of the NT Supreme Court includes the common law jurisdiction to set aside the verdicts of coroners, order further inquests and order the exhumation of bodies for related purposes. One modern Australian authority in which this proposition is recognised (in regard to New South Wales at least) is *Beard v Baulkham Hills Shire Council* (1986) 7 NSWLR 273, a New South Wales Supreme Court decision of Young J as he then was. He relied on a mid-19th-century decision of the Full Court of the Supreme Court of New South Wales for the proposition. This case was *Regina v Clarkson* (1850) 1 Legge 593 in which the Court was asked to order exhumation of a body for the purpose of a post mortem examination. The Court made the order, relying on its common-law jurisdiction to do so, which it referred to in the following way:

> "From the cases cited, it was plain, this Court being the grand conservators of the peace and as sovereign coroners of the colony had the power to grant the order as asked, for the ends of public justice, and that criminal justice be done."

[113] This was an assertion by the Full Court of what was said to be a very old common law jurisdiction of the King's Bench in England. Upon checking the assertion, it seemed to me to be soundly justified.

[114] Although it was not available to Young J when he briefly discussed the matter in *Beard*, a very similar decision to *Clarkson* had been handed down by the same court in 1832 (comprising on that occasion Forbes CJ, and Stephen and Dowling JJ). In this case the court also recognised the jurisdiction. The case was *In re Blanchard* [1832] NSWSC 44 (recently made generally available thanks to Austlii). In it, the Sydney Herald of 28 June 1832 recorded that the court:

> "…had found from ancient authority that the Court had power to quash the proceedings of an inquest, for want of form, and to issue an order to the Coroner for the holding of a new inquest as reported in 7 (sic, this should be 1) Strange, 167."

[115] The order made in the case was that the Inquisition returned should be quashed for defect of form and substance and that the Coroner forthwith cause the body to be disinterred and hold a new inquest thereon and return the same into the Court.

[116] In *Blanchard* and in *Clarkson* the following authorities were among those listed as having been looked at by the Court:

(i) *Barclees Case* (1658), 2 Siderfin 101; 82 ER 1279
(ii) *Rex & Regina v Bunney* (c.1689) 1 Salkeld 190, 91 ER 172
(iii) *Regina v Clerk* (c 1702), 1 Salkeld 377, 91 ER 328
(iv) *Rex v Saunders* (c.1719) 1 Strange 167, 93 ER 452
(v) *Rex v Dalton* (c.1732) 2 Strange 911, 93 ER 936
(vi) *Rex v Magrath* (c.1746) 2 Strange 1241, 93 ER 11
(vii) *In the Matter of Culley* (1833) 5 Barnewall & Adolphus 230, 110 ER 777.

[117] Cases (i), (ii), (v) and (vi) were listed only in *Blanchard*. Cases (iii) and (iv) were listed in both *Blanchard* and *Clarkson*. Case (vii) was mentioned only in *Clarkson*. In a number of these cases reference was made to yet other cases of the same type now most readily available in the English Reports.

[118] All the cases demonstrate that the New South Wales Full Court was on very solid ground in asserting the jurisdiction that it did in *Blanchard* and *Clarkson*.

[119] The cases are all examples of, and in some instances state fairly directly, statements of the law by Sir Edward Coke.

[120] In *The Warden and Commonalty of Sadlers* 1 Co Rep 54b; 76 ER 1012, Coke noted in passing (at 57b; 1017) that the Chief Justice of the King's Bench was "the supreme coroner of all England" and later, in the Fourth Book of his Institutes, at 73, in the course of describing the powers of the King's Bench said, among other things:

> "The justices in this Court are the sovereign justices of oier and terminer, gaol-delivery, conservators of the peace, &c. in the realm …; …The justices of this Court are the sovereign coroners of the land..." (spelling as in original)

[121] In Jervis, *The Office and Duties of Coroners*, 1829, the law was stated exactly as set out in the previous paragraph. Lord Coke was cited as authority. He has always been regarded as of the highest authority on common law matters up to his time (see, for example, the short biography by

(now Sir John) Baker in *Biographical Dictionary of the Common Law*, AWB Simpson ed, 1984, at 117-121).

[122] *Halsbury's Laws of England*, 4th ed., vol 9 (2) (reissue, 1998), par 804, shows that the position remained the same in England until 1887 when some aspects of it were regulated by the Coroners Act 1887, since repealed and replaced by the Coroners Act 1988. In both Acts the common-law jurisdiction was expressly preserved: s 35 and s 33, and see the discussion in *In re Rapier* [1988] QB 26 at 29; see also *Halsbury* where above cited, but note that *Halsbury* in a later paragraph, par 968, n 3, rather curiously says there are no separate common-law powers, citing *Rapier* which seems quite clearly to say the opposite.

[123] I have had the advantage of seeing in advance the reasons of Mildren J in this case. In par [17]-[28] he explains, more fully than I have done, how the NT Supreme Court came to have, by way of South Australia, the same common-law coronial/exhumation jurisdiction as I have above described as still existing in New South Wales, and also explains how, in the Northern Territory, as in New South Wales, it has not been removed by statute. I respectfully adopt his explanation of the Northern Territory position.

[124] Proposition 7 is an uncontested fact.

[125] Proposition 8 states an aspect of the common-law jurisdiction of the Queensland Supreme Court which is in substance the same as that of the NT Supreme Court, and which came about by way of a similar history. Although

the jurisdiction of the NT Supreme Court came by way of South Australia and that of the Queensland Supreme Court by way of New South Wales, this aspect of common-law jurisdiction was the same in both those colonies at the time of acquisition of the jurisdiction by the Northern Territory and Queensland.

[126] Stating the Queensland position a little more fully, it follows from what I said earlier about the origin of and the continuing existence in New South Wales of the ancient English common law coronial/exhumation jurisdiction, that when Queensland was separated from New South Wales in 1859, and the law previously in force in what became Queensland (namely New South Wales law) was continued in force in the new colony, (see Windeyer, *Lectures on Legal History* , 2nd ed., 1957 reprint, at 297, n 6) that common-law jurisdiction became part of the common-law jurisdiction of the Supreme Court of Queensland, and would remain so unless altered by statute.

[127] For the defendants and the Queensland Attorney-General it was submitted that jurisdiction had been superseded by statute.

[128] The statutes referred to were the Coroners Act, the Land Act, the Transplantation and Anatomy Act and the Crimes Act. Upon my reading of the relevant provisions in these statutes, they do not cover the field, in the sense of dealing with all the circumstances in which exhumation and autopsy may be sought for legitimate purposes.

[129] The Coroners Act empowers the State Coroner to order exhumations in cases of reportable deaths (s 20) but a death is not a reportable death if it has been reported to a non-Queensland coroner (s 8(4)), as in the present case. The submissions for the defendants and the Queensland Attorney-General did not refer this Court to any statutory power in Queensland legislation to order exhumation in cases of non-reportable deaths.

[130] The provision of the Land Act to which this Court was referred was s 83. This section appears in Division 10 of the Act, entitled Cemeteries and consisting of s 79 to s 83. In the context of Division 10, s 83 appears to be dealing with exhumations for Cemetery purposes, without derogation from the powers of the State Coroner, from which it follows that Division 10 has no application outside the field of cemetery purposes.

[131] This leaves untouched by statutory coverage the topic of exhumations in the case of non-reportable deaths.

[132] As to post- mortem examinations, reliance was placed by the defendants and the Queensland Attorney-General upon Part 4 of the Transplantation and Anatomy Act 1979. This Part is entitled Post-Mortem Examinations and consists of s 26 to s 30. This Part seems to me to be entirely enabling, in that it allows specified persons in specified situations to use or obtain authority they might not otherwise have.

[133] In my opinion, Part 4 does not do away with, or disclose any intention to do away with, the common-law coronial jurisdiction of the Queensland

Supreme Court. That is in effect a residual jurisdiction of last resort which the cases referred to in *Blanchard* and *Clarkson* show was used flexibly by the Kings Bench as a means of regulating coronial inquiries in appropriate cases. There is no apparent reason, or at least, none apparent from any of the materials to which the court was referred, for thinking that this occasionally useful jurisdiction had at any time lost any of its usefulness, or that any thought has ever been given to abolishing it.

[134] The provision in the Crimes Act which was referred to was s 236. The heading to this is "Misconduct with regard to corpses" which sufficiently indicates the scope of the section for present purposes. The section makes such misconduct a misdemeanour. It applies only to some dealing with the human body or human remains which occurred without lawful justification or excuse. It seems to me to be quite neutral in regard to the submission put by counsel for the defendants and the Queensland Attorney-General, which was that the various provisions relied on, when taken all together, have covered the relevant field, to the exclusion of the common-law jurisdiction.

[135] In my opinion, nothing in the Queensland statutory law to which this Court was referred has extinguished the common law jurisdiction in Queensland deriving from the declaration in *Clarkson* that it existed in New South Wales. That common-law jurisdiction remains and may be exercised by the Queensland Supreme Court in cases appropriately before it.

[136] Proposition 9. To explain this proposition it is first necessary to enlarge on proposition 2. Section 79 of the Judiciary Act says:

> "The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Court exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

[137] It seems to me that the laws of the Northern Territory must include any Northern Territory law pursuant to which the Supreme Court of the Northern Territory is constituted and given jurisdiction (in the widest sense of that term).

[138] Is there a Northern Territory law which gives the NT Supreme Court the common law coronial/exhumation jurisdiction of the Queensland Supreme Court, and if so, is that law one of the "laws of (the Northern) Territory" within the meaning of s 79 of the Judiciary Act?

[139] The answer to this question seems to me to be found in the terms of the cross-vesting legislation, the relevant statutes for the purposes of this case being the Northern Territory and Queensland Acts.

[140] The starting point is the Queensland Act.

[141] Subsection 4(3) of the Queensland Jurisdiction of Courts (Cross-vesting) Act 1987 says:

"(3) The Supreme Court of another State or of a Territory has and may exercise the original and appellate jurisdiction with respect to State matters."

[142] The Queensland Act relevantly defines a "State matter" as "a matter... in which the Supreme Court has jurisdiction otherwise than by reason of a law of the Commonwealth or of another State..."

[143] I can see no basis for saying that the Queensland Supreme Court has its common law coronial/exhumation jurisdiction by reason of any law either of the Commonwealth or of any other State. To the extent that that jurisdiction may depend on any law from outside Queensland, the source would have to be either Imperial or colonial.

[144] *Re Wakim; ex parte McNally* (1999) 198 CLR 511 has explained that provisions such as s 4(3) cannot confer jurisdiction upon a court of another polity unless that polity takes steps to authorise the acceptance of the proffered conferral of jurisdiction by its court[2]. It is this step, if taken, which brings about the vesting of jurisdiction in the court of the jurisdiction whose parliament takes the step. In the present case, this step was taken by the Northern Territory by the enactment of s 9 of the Northern Territory Jurisdiction of Courts (Cross-vesting) Act 1987 which says:

"The Supreme Court may –

(a) exercise jurisdiction (whether original or appellate) conferred on that Court by this Act or a law of the Commonwealth or a State relating to Cross-vesting of jurisdiction; and

[2] Gummow and Hayne JJ with whom Gleeson CJ and Gaudron J agreed, at 573 par 107.

(b) hear and determine a proceeding transferred to that Court under this Act or such a law."

[145] It is this provision which brought about the vesting in the NT Supreme Court of the jurisdiction of the Queensland Supreme Court in State matters. Despite contentions to the contrary which were put to the court, the vesting of jurisdiction by s 9 is not subject to conditions, and adds jurisdiction to the NT Supreme Court in a way that makes it part of the total jurisdiction of the court which will be exercisable in cases falling within it. This seems plain from the words of the legislation itself, and has been recognised in various decisions[3], the latest being *Billiton* (see above) in which Gummow J, summarily but clearly, in par 43-45 of his reasons recognised and explained the position as I have described it. What Gummow J says in these paragraphs disposes of the argument made by the defendants which I mentioned in par [107].

[146] So, by a provision of the Northern Territory Act there is vested in the NT Supreme Court Queensland Supreme Court state matters jurisdiction. If the High Court were hearing the case, since the alleged tort occurred in the Northern Territory, the High Court would be bound by the laws of the Northern Territory. I can see no reason why the statutory provision effecting the vesting of Queensland Supreme Court state matters jurisdiction in the NT Supreme Court is not such a law. That is, the High Court would be bound to recognise that part of the jurisdiction it was exercising was

[3] For example, Capvest v Capvest (1990) NSWSC unreported, per Young J; Butterworth's unreported cases 9002365; David Syme v Grey (1992) 38 FCR 303 per Gummow J passim and esp. at 331.

Queensland Supreme Court State matters jurisdiction being part of the laws of the Northern Territory. Likewise, the NT Supreme Court in exercising its remitted jurisdiction being jurisdiction concurrent with that of the High Court, will also have to recognise that it has the same Queensland jurisdiction.

[147] Conclusions from propositions so far. In my opinion, what I have said to this point leads to the conclusion that the answer to the question raised in 47 of 03 is yes, the NT Supreme Court has the jurisdiction referred to in the question.

[148] Propositions 10 and 11. I would reach the same conclusion by using propositions 10 and 11.

[149] Proposition 10. This proposition derives from an area of law, now called accrued jurisdiction, which has been the subject of much discussion and case law since the Federal Court was instituted. It has been dealt with at length in a number of High Court cases. Although the case law has mainly concerned the Federal Court itself, it applies to also to courts exercising federal jurisdiction, at least of the kind being exercised in the present case.

[150] The plaintiffs, in documents (xvi) and (xvii) in the list of submissions given above, set out at considerable length and with a quite full citation of authority, the present state of the rules on the topic of accrued federal jurisdiction. These are also conveniently collected and expounded in *Wakim*

and I will be able to deal with the subject sufficiently for present purposes by reference to that case.

[151] Accrued jurisdiction is the jurisdiction a Federal Court (or a court exercising federal jurisdiction of the kind being exercised in the present case) can exercise over a non-federal claim when that claim is raised in the course of the litigation of a federal claim or cause of action, by reason of the close connection (to use an inexact and non-technical term) between the federal and non-federal claims. Without the close connection, there would be no jurisdiction to decide the non-federal claim. Gummow and Hayne JJ put it more precisely in *Wakim* (at 583) as follows:

> "It must now be regarded as established that the jurisdiction of a federal court having jurisdiction in a matter arising under the law made by the Parliament is not 'restricted to the termination of the federal claim or cause of action in the proceeding, but extends beyond that to the litigious or justiciable controversy between parties of which the federal claim or cause of action forms part'." (Their quotation was from Mason, Brennan and Deane JJ in *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 290.)

[152] The further detail given in my next paragraph is fuller than required for dealing with the accrual point in its application to 47 of 03, but it will be necessary when considering that point in regard to 14 of 04, so I will continue with it here.

[153] In summary, the parts of pages 583-588 from the reasons Gummow and Hayne JJ in *Wakim* which are relevant for present purposes show that for there to be accrued jurisdiction there must be a federal claim to which a

non-federal claim is joined within the scope of one justiciable controversy and within the ambit of a "matter" in the sense in which that word is used in Chapter III of the Constitution. There will be the one justiciable controversy and the one "matter" even if different claims arise from it, if those different claims arise out of common transactions and facts or a common substratum of fact. When separate proceedings have been brought, involving different parties, (as in both *Wakim* and in the present case) and it is only later that it is asserted (again as in *Wakim* and the two present proceedings 47 of 03 and 14 of 04) that the claims involved, one or more being federal and one or more being non-federal, arise in one justiciable controversy, then those circumstances may suggest very strongly that there is more than one "matter". However, such considerations are not conclusively determinative. It is always a matter of impression and practical judgment whether such claims are within the scope of one controversy and thus within the ambit of a "matter".

[154] In *Wakim* three separate proceedings had been brought involving different parties. The case provides a good illustration of how different legal minds even at the highest level may receive different impressions and form different practical judgments on the same set of facts. Gummow and Hayne JJ, with the concurrence of Gleeson CJ and Gaudron J, thought that only one justiciable controversy was involved, so that all the claims should be dealt with in the one Federal Court proceeding. McHugh J was "sceptical" (at 563) but was not prepared to say on the incomplete material before the court

that the matter was outside federal jurisdiction (at 564) and Callinan J was firmly of the view that it could not be said that only one justiciable controversy was involved (at 627-628).

[155] Proposition 11. Proposition 10 was an attempt to state in brief form when the rules of accrued jurisdiction will apply. Proposition 11 states what the position will be if those rules apply to the two proceedings within 47 of 03 (that is, the main tort claim and the interlocutory proceeding within it). It also provides a convenient place for considering whether the court should conclude that those rules do apply. The same question will have to be considered when dealing with the reference proceeding. In regard to the diversity proceeding now being considered there does not seem to me to be much need for extended discussion. The interlocutory proceeding within it seems to me fairly obviously to be part of the same justiciable controversy as that for which the tort claim is the main vehicle. The question will need to be discussed in a little more detail when I come to the reference proceeding.

[156] Conclusion on jurisdiction in diversity proceeding. In my opinion, the answer to the jurisdiction question in the diversity proceeding, 47 of 03, is yes.

[157] Conclusion on extension of time and leave points in diversity proceeding. Earlier, (pars [97] and [98]) I indicated that at the conclusion of the oral argument, I was left with the impression that if the court were to find the

jurisdiction question in the plaintiffs' favour, then matters such as those relevant to the extension of time and leave questions were to be left and dealt with at a later stage.

[158] Because of this impression and in view of the facts that (i) the appeal question was fully argued, (ii) there was no argument from counsel for the defendants or the Queensland Attorney General opposing any necessary grant of extension of time for making the application for leave to appeal or opposing the grant of leave itself and (iii) the answer on the appeal question is favourable to the plaintiffs, it seems to me that it would be an appropriate exercise of discretion for the court to grant any necessary extension of time and then grant leave to appeal. Thus, I am of the opinion that such orders should be made.

The Reference Proceeding (14 of 04)

[159] The conclusions I have reached in regard to the appeal proceeding apply also, I think, to 14 of 04. The way to the conclusions is in some respects different. No questions concerning federal jurisdiction, apart from the accrual question are relevant to it.

[160] Of the 12 propositions set out in regard to the diversity jurisdiction proceedings, numbers 6, 7, 8 and 9 are the primary ones relevant to the separate proceeding 14 of 04.

[161] Nothing more than I have already said when discussing 47 of 03 needs to be said in regard to 14 of 04, about propositions 6, 7, 8 and 9. Propositions 8

and 9 are sufficient to support the conclusion that there is the necessary jurisdiction. The remaining propositions, subject to the need for some adjustment, provide a further foundation for jurisdiction. The adjusted propositions need to be explained, which I will do in the following paragraph.

[162] The plaintiffs have argued that 47 of 03 and 14 of 04 are parts of one single controversy in the sense of those words when used in the accrued jurisdiction cases, notwithstanding that they were commenced at different times and do not have identical parties.

[163] The diversity jurisdiction proceeding 47 of 03 is based on an allegation of wrongful killing (murder) for which the plaintiffs claim damages (a tort claim). The reference proceeding 14 of 04 seeks the setting aside of a coronial finding and consequential orders, in the nature of administrative law relief. The respondent parties are different from the defendants in the tort proceedings. At first sight the two proceedings seem unlikely candidates for membership of one single controversy.

[164] A central feature, however, in both proceedings, is the death of Mr Douglas Scott. As a matter of forensic logic in the strategy of the plaintiffs' case the exhumation and further autopsy are important. Also, in their minds at least, the two proceedings are part of the one campaign.

[165] In the Introduction to these reasons, when I did not have in mind the single controversy question, I described the reference proceedings as related legal

proceedings and a little later, still with no thought in mind of the present discussion, said that the two legal proceedings were part of the plaintiffs' efforts to obtain remedies for the death of their husband and father. These remarks still seem to me to be accurate enough, in a general way, now that I am thinking of the single controversy question, and the fact that I think that lends some support to the plaintiffs' submission. It seems to me that this particular submission of the plaintiffs is one on which reasonable minds are likely, reasonably, to differ.

[166] One guide given by Gummow and Hayne JJ in *Wakim* (at 586) gives some, although not decisive, help:

> "Often, the conclusion that, if proceedings were tried in different courts, there could be conflicting findings made on one or more issues, common to the two proceedings will indicate that there is a single matter. By contrast, if the several proceedings could not have been joined in one proceeding, it is difficult to see that they could be said to constitute a single matter."

[167] The two separate proceedings now before this Court, 47 of 03 and 14 of 04, could be instituted and tried separately, the former in a Northern Territory, and the latter, at least as to part, in a Queensland, court. In 47 of 03 the cause of action is in tort, and the application for exhumation and reautopsy is an important interlocutory matter (from the plaintiffs' point of view). In 14 of 04, the cause of action, to call it that, or claim, to speak more generally, is that the plaintiffs are entitled to have the verdict of the coroner set aside and in that claim also the application for exhumation and reautopsy

is an important interlocutory matter (from the plaintiffs' point of view). Conflicting findings could be made in the two interlocutory applications.

[168] Turning to the other matter mentioned in the above citation, whether the two proceedings could have been joined in one proceeding, I do not see any reason why not. To have done so in earlier times might have led to a claim of multifariousness, but in these days it would be a matter for the discretion of the court whether the joinder would be permitted to continue.

[169] It seems legitimate to me also to take into account how the question appears, on a broad view. An objective observer, whether lay or professional lawyer, looking at the proceedings from a little distance, would be likely, in my opinion, to think, these proceedings are both parts of the one overall case.

[170] While recognising that the question is closely balanced, I have come to the conclusion that the better view is that it should be answered by saying the two proceedings before the court are part of one justiciable controversy.

[171] On this basis I would answer the referred questions:

(1) Yes;

(2) Notwithstanding that the answer to (1) is yes, Yes;

(3) Yes.
