PARTIES:	NORTH AUSTRALIAN ABORIGINAL LEGAL AID SERVICE INCORPORATED v LIDDLE, Michael
TITLE OF COURT:	COURT OF APPEAL
JURISDICTION:	APPELLATE
FILE NO:	AP 15 OF 1993
DELIVERED:	8 SEPTEMBER 1994
HEARING DATES:	19.5.94, 20.5.94
JUDGMENT OF:	MARTIN CJ., ANGEL & MILDREN JJ.

CATCHWORDS:

Procedure - Defence not filed - Interlocutory judgment - Application to set aside judgment refused - party on notice of issue of contributory negligence - Raising of contributory negligence during trial for damages in the course of cross-examination -

Procedure - Judgment in default of defence - Final as to plaintiff's right to recover damages - Interlocutory as to amount of damages -

Supreme Court Rules, r21.03(1)(b)

Gamble v Killingsworth and McLean Publishing Co Pty Ltd [1970] VR 161 at 172, applied.

Wickham v Tacey (1985) 36 NTR 47, applied.

Procedure - Judgment in default of defence - Estoppel - Nature and extent of estoppel by way of judgment in default of defence -

Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] AC 993 at 1010 - 1012, applied.

Effem Foods Pty Ltd v Trawl Industries of Australia *Pty Ltd* (1993) 115 ALR 377, applied.

Procedure - Judgment in default of defence - Estoppel by way of judgment in default of defence - Effect of Master's decision dismissing application to set judgment aside - Issues on such an application - Whether or not applicant has shown possible defence without which setting aside judgment would serve no useful purpose - Contributory negligence not a defence -

Gamble v Killingsworth and McLean Publishing Co Pty Ltd [1970] VR 161 at 172, applied.

Access Finance Corporation Pty Ltd v Golubovic & Anor (1991) A.S.C. 56 - 089, distinguished.

Negligence - Contributory negligence - Apportionment of responsibility and damages - reform legislation enacted to overcome common law complete defence - Pleadings - Adducing evidence of contributory negligence when not pleaded – No requirement to plead when counsel are on notice throughout the trial of issue -

Benjamin v Currie [1958] VR 259, distinguished.
James v McCarthy (1985) Queensland Law Reporter 52, distinguished.
Fookes v Slaytor [1979] 1 All ER 137, distinguished.
Taylor v Simon Carves Ltd [1958] SLT (Sh Ct) 23, distinguished.
Brown v Heathcote County Council (No.2) [1982] 2 NZLR 618, distinguished.
Christie v Bridgestone Australia Pty Ltd (1983) 33 SASR 377 at 380, 381, 387-389, 393, 394, applied.

Procedure - Pleadings - Notice of -

Supreme Court Act, s19 -
Supreme Court Rules, r1.09, 1.10, 13.07, 13.02 & r14.04

Halsbury's Laws of England, 3rd Ed, 1958, Vol 30 at p2; 4th Ed, 1976, Vol 36 at p3 referred to

Procedure - Application to file defence raising issue of contributory negligence - General principles applicable to amendment -

Supreme Court Act, s80 -
Supreme Court Rules, r1.10, 3.02

Schafer v Blyth [1920] 3 KB 143, applied.
Saunders v Pawley [1885] 14 QBD 234 at 237, applied.
Atwood v Chichester [1878] 3 QBD 722 at 723, applied.
Eaton v Storer (1883) 22 Ch D 91, applied.
Clough and Rogers v Frog (1974) 4 ALR 615 at 618, applied.
Cropper v Smith (1884) 26 Ch D 700 at 710-711, applied.

Procedure - Application to file defence - Case flow management and late applications -

Supreme Court Rules, 0.48, 0.63.21

Ketteman v Hansel Properties Ltd & Ors [1987] 1 AC 189 at 204, 220, referred to.
Commissioner of Taxation v Brambles Holdings Ltd (1991) 28 FCR 451 at 456, referred to.

United Motors Retail Ltd v Australian Guarantee Corporation Ltd (1991) 58 SASR 156 & 159, referred to.
State Pollution Control Commission v Australian Iron & Steel (1992) 75 LGRA 325, referred to.
Grljusich v Grljusich (Supreme Court WA, Seaman J., unreported, 6 May 1993) referred to.
Mehta v Commonwealth Bank of Australia (1990) ATPR 41-026, referred to.
Sali v SPC Limited & Anor (1993) 67 ALJR 841 at 843-844, 849, referred to.

Negligence - Negligence of particular parties and as between parties in particular relationships - Professional negligence - Solicitor client - Failing to institute proceedings in time - Two or more tortfeasors - Date from which loss should be assessed - Date upon which cause of action became statute barred - Court should determine plaintiff's loss of some right of value -

Nikolaou v Papasavas, Phillips & Co (1989) 166 CLR 394 at 403-404, referred to.
Johnson v Perez (1988) 166 CLR 351 at 363, 366-367, 389, applied.
Kitchen v Royal Airforce Association [1958] 1 WLR 563 at 575, referred to.

REPRESENTATION:

Counsel*:*

Appellant: Mr Waters
Respondent: Mr Hiley QC

Solicitors*:*

Appellant: Ward Keller
Respondent: Cridlands

Judgment category classification: B
Judgment ID Number: mar94009
Number of pages: 33

mar94009

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. AP 15 of 1993

BETWEEN:

NORTH AUSTRALIAN ABORIGINAL
LEGAL AID SERVICE INCORPORATED
Appellant

AND:

MICHAEL LIDDLE
Respondent

CORAM: MARTIN CJ, ANGEL & MILDREN JJ.

REASONS FOR JUDGMENT

(Delivered 8 September 1994)

MARTIN CJ.

These are the reasons for the order made by the Court, at the conclusion of the argument on the appeal, that there be a retrial. It is to be hoped that what occurred at the commencement of the trial, and which caused it to miscarry, will, under the system of caseflow management and pre-trial conferences instituted of recent times, not occur again.

The respondent alleges that he was injured in a motor vehicle accident at Alice Springs on 23 January 1975, and that he instructed the Central Australian Aboriginal Legal Aid Service (CAALAS) in March of that year in relation to it.

No proceedings were instituted by it within the then limitation period. He says that in October 1982 he instructed the present appellant to act on his behalf in relation to his personal injury claim and alleged negligence of CAALAS, but it is alleged that no steps were taken by the appellant either to pursue whatever remedies he may have had, within the period of limitation. The limitation period in each case was six years plus an additional period brought about by operation of the *Cyclone Disaster Emergency Act*.

In March 1990 the respondent instituted the proceedings against the appellant. The appellant not having served a defence within the time limited, interlocutory judgment was entered against it for damages to be assessed (r21.03(b)) in August 1991. In the following month the Master refused to set aside the judgment (r21.07). When that application was made, the respondent was on notice that the appellant wished to raise the issue of contributory negligence on his part in relation to the motor vehicle accident. In an affidavit sworn in relation to that application, the solicitor for the appellant stated that he had been unable to contact either of the other two drivers involved in the accident in 1975, but that it was hoped the police file might give information as to their identities and other information which may aid in locating them. There was other material indicating that the respondent had been convicted of the offence of driving without due care arising from the accident.

The respondent's written outline opposing the application to set aside the judgment included a submission that even if there was a properly founded claim that the respondent had been guilty of contributory negligence that was not a defence and was insufficient to have the judgment set aside. In his list of documents filed earlier, 12 July 1991, the respondent referred to an accident report received by CAALAS in September 1978 and a copy letter from CAALAS to David Howard Mortimer, a witness to that accident whom, it was shown in evidence before this Court, is still residing in Alice Springs. In September 1992 the assessment of damages was set down for hearing to commence on 28 June 1993.

At the commencement of the trial the question arose as to whether the appellant could then properly raise the issue of contributory negligence on the part of the respondent in the course of cross-examination. There was handed to the learned trial Judge by counsel for the appellant a document in the following form:

> "*CONTRIBUTORY NEGLIGENCE*
>
> In prayer that the Court do exercise its power pursuant to Section 16(1) of the Law Reform (Miscellaneous Provisions) Act the defendant alleges and gives notice of its intention to claim on the assessment of damages that such damages should be reduced to such extent as the Court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage. The defendant alleges that the plaintiff contributed to its own damage by:
>
> (1) Driving at an excessive speed shortly prior to the collision with Mr Hannay's vehicle on 23 January 1975.

(2) That the plaintiff was affected by alcohol at the time of the accident.

(3) That the plaintiff drove at a speed dangerous and without due care immediately prior to the accident.

(4) That the plaintiff attempted to overtake in circumstances where it was not safe to do so and failed to keep a proper lookout immediately prior to the accident.

(5) In respect of the prosecution of these proceedings against the unknown driver and Mr Hannay and also in respect of the prosecution of this (sic) proceedings against CAALAS the plaintiff failed to diligently pursue his claim such as to significantly reduce his prospects of success in that he failed to keep in touch with his solicitors and to make appropriate enquiry and failed to require his solicitors to pursue the claim or to transfer the claim to alternte (sic) solicitors when the delay became demonstrable."

Her Honour ruled that these issues could not be canvassed. Application to set aside the default judgment was foreshadowed and made the following day. The application was refused. It was then foreshadowed that an appeal would be lodged against that decision and a further application seeking an extension of time to appeal against the Master's decision refusing to set aside the judgment would be made. The next day formal application was made for such an extension of time, and that was also refused. In the meantime, the trial was progressing, the plaintiff's case closing on Thursday 1 July, and evidence taken in the defendant's case.

Counsel for the appellant did cross-examine the respondent as to his contact with the legal services, but that

was permitted only on the basis that it went to the question of the seriousness of the injuries he had suffered in the accident. It was sought to show that he did not press either of the legal services to get on with his claims because his damage was not significant. Her Honour rejected submissions made on that basis.

The appellant complains that her Honour erred in refusing to permit it to raise all of the issues of contributory negligence which it had outlined in its notice. (There were additional points on appeal and by way of cross-appeal relating to the assessment of damages, but this Court proceeded to deal with the procedural questions and left those matters until it was seen that it was necessary to deal with them).

As to the application to extend the time in which to appeal against the Master's decision refusing to set aside the judgment, her Honour gave two reasons, firstly that it had only been served on those representing the respondent a few moments before Court commenced, and, secondly, that she did not consider it should take precedence over the substantive hearing which was then proceeding. That application was adjourned *sine die* at the request of counsel for the appellant, but it was not pursued further.

Her Honour took the view, in relation to the contributory negligence issue, that the respondent would

suffer an injustice, if the trial was delayed thereby, which could not be compensated for by an order for costs, bearing in mind the extraordinary length of time which had elapsed since he was injured and the hearing of his case. Her Honour also held that the issue of contributory negligence should have been pleaded, and the opportunity for doing that was lost when the appellant's application to set aside the judgment entered in default of filing a defence was refused by the Master, no appeal having been made from that decision. The issue of contributory negligence not being properly before the Court, her Honour held that she had no jurisdiction to consider it as provided for in s16(1) of the *Law Reform (Miscellaneous Provisions) Act,* as follows:

> "Subject to this section, where a person suffers damage as the result of his own fault and partly of the fault of another person or other persons, a claim in respect of that damage is not liable to be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect of the damage shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

Her Honour also reasoned that the appellant was estopped from raising the question of contributory negligence because of the default judgment entered against it.

It is unfortunate that in her understandable desire to see the respondent's claim proceed without further delay, her Honour had little time to fully consider all of the issues

which were raised by the appellant at the commencement of the trial. The position became particularly difficult, bearing in mind the successive applications made on behalf of the appellant on little or no notice, in its endeavours to have the Court deal with the issue. Her Honour's views may have been influenced more by the lapse of time since the accident, for which the appellant was not responsible, than that which had elapsed since the respondent instituted proceedings against it.

What was the effect of the judgment in default of defence?

Where a plaintiff claims damages and the defendant defaults in filing an appearance or serving a defence, the plaintiff may under r21.03(1)(b) enter interlocutory judgment against the defendant for the damages to be assessed. A judgment entered under this rule is final as to the right of the plaintiff to recover the damages to be assessed from the defendant, but interlocutory only as to the amount of those damages (see *Gamble v Killingsworth and McLean Publishing Co Pty Ltd* [1970] VR 161 at 172). In *Wickham v Tacey* (1985) 36 NTR 47, O'Leary CJ., affirmed that the effect of signing interlocutory judgment for damages to be assessed:

> "[i]s that the facts pleaded in the Statement of Claim, not having been denied or put in issue by the defendant, are deemed to have been admitted, and the plaintiff's right to recover damages in accordance with the facts alleged as giving rise to a liability to pay damages, and as pleaded in the Statement of Claim is finally determined."

In *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 the Privy Council said at 1010-12:

> "a default judgment is capable of giving rise to an estoppel per rem judicatum. The question is not whether there can be such an estoppel, but rather what the judgment prayed in aid should be treated as concluding and for what conclusion it is to stand. For, while from one point of view a default judgment can be looked upon as only another form of a judgment by consent (see *In Re South American & Mexican Co; Ex parte Bank of England* [1895] 1 Ch 37 at 45) and, as such, capable of giving rise to all the consequences of a judgment obtained in a contested action or with the consent or acquiescence of the parties, from another a judgment by default speaks for nothing but the fact that a defendant, for unascertained reasons, negligence, ignorance or indifference, has suffered judgment to go against him in the particular suit in question. There is obvious and, indeed, grave danger in permitting such a judgment to preclude the parties from ever reopening before the court on another occasion, perhaps of very different significance, whatever issues can be discerned as having been involved in the judgment so obtained by default ... default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and ... they can estop only for what 'must necessarily and with complete precision' have been thereby determined." (Quoting Lord Maugham LC., in *New Brunswick Railway Co v British and French Trust Corporation Ltd*, [1939] AC 1 at p21).

See also *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd* (1993) 115 ALR 377.

Here there is not just the judgment in default of defence, but as well the Master's decision dismissing the application to set that judgment aside. That application was contested. One of the issues on such an application is whether or not the applicant defendant has shown a possible defence,

without which setting aside the judgment would serve no useful purpose (*Gamble v Killingsworth and McLean Publishing Co Pty Ltd* (supra at 170)). Here, the appellant did not attempt to put forward any defence to the respondent's claim as set forth in his Statement of Claim. All it sought to do was to raise the issue of contributory negligence, and although there are no copies of the Master's reasons to be found on the Court file, it would have been quite open to him to reject the application to set the default judgment aside because, as counsel for the respondent put it in his written submissions, contributory negligence is no longer a defence to a claim based on negligence. There was no decision by the Master on the merits of any defence to the matters raised in the Statement of Claim. That distinguishes this case from *Access Finance Corporation Pty Ltd v Golubovic & Anor* (1991) ASC 56-089.

There was no *res judicata* or estoppel operating against the appellant arising from the default judgment or the failure of its application to set it aside such as would prohibit it from raising the issue of contributory negligence.

Should contributory negligence have been pleaded?

The appellant argues that it is not necessary to plead contributory negligence especially if, as here, the respondent had been on notice prior to trial that that was an issue which would be raised.

It is important to note that the contributory negligence, of which the respondent had notice prior to trial, was directed towards a claim that he was partly responsible for his own damage arising from the accident in 1975. There is nothing on the Court record which would indicate that the question of any fault of his, in relation to the claims which he made in respect of the alleged negligence of CAALAS and the appellant, had ever been raised prior to the commencement of the trial.

The Territory legislation in relation to apportionment of liability came into operation on 28 June 1956. Similar provisions had been introduced in Victoria some years earlier. Provisions such as those were enacted to overcome the common law that contributory negligence was a complete defence to a claim for negligence. Section 16 expressly provides that:

> "where a person suffers damage as a result of his own fault and partly of the fault of another person or other persons, a claim in respect of that damage is not liable to be defeated by reason of the fault of the person suffering the damage, ..."

Prior to the reform legislation contributory negligence was required to be pleaded (see later). In *Benjamin v Currie* [1958] VR 259, the Full Court of the Supreme Court of Victoria, taking into consideration the reform legislation,

questioned whether it was any longer necessary to plead contributory negligence when it was not relied upon as a defence (as in the common law), but only as a fact in reduction of damages (under the reform legislation). The Court observed that a defendant was not required to plead to damages, but went on to say that in its opinion it was not only common practice so to plead, but that the surprise rule required it to be pleaded (supra, at p263). The issue was not before the Court because the defendant had included in his defence an allegation that there was contributory negligence on the part of the plaintiff. That decision was made on 19 December 1957, and it does not appear that Wanstall J. had the benefit of that expression of opinion when considering *James v McCarthy* (1985) *Queensland Law Reporter* 52 in the Supreme Court of Queensland. His Honour there observed that it was a well established rule of practice that contributory negligence must be pleaded, but expressed the view that the remedy provided by the reform statute was not intended to depend upon the state of pleadings in an action, but upon the state of the facts proved. His Honour thought that upon its proper construction the Queensland equivalent of s16 of the Territory legislation required the Court to apportion liability justly and equitably between a negligent plaintiff and a negligent defendant whether contributory negligence was pleaded or not.

Twenty years later the matter came before the Court of Appeal in *Fookes v Slaytor* [1979] 1 All ER 137. At p138,

Sir David Cairns, having cited the equivalent English provision, posed the question as to whether the Court could only make a finding of contributory negligence if there was a plea to that effect. Reference was made to the Scottish decision in *Taylor v Simon Carves Ltd* [1958] SLT (Sh Ct) 23 (supra, p139) in which the sheriff-substitute noted the contention that the provision was peremptory and meant that if in any case it was found that a person suffered damage as a result of joint fault the damages recoverable must be apportioned, but rejected it if contributory negligence was not in issue between the parties. In those circumstances the *Act* could not apply and concluded that: "The claim is not a claim in respect of damages resulting from joint fault" (ibid) meaning, that the claim on foot before the Court was simply the plaintiff's claim that the defendant was negligent. Sir David Cairns concluded that it was not right to treat the matter before the learned trial Judge as having enabled him to make an apportionment under the provision where contributory negligence had not been pleaded:

> "The opposite view would mean that a plaintiff in any case where contributory negligence might possibly arise, even though it was not pleaded, would have to come to court armed with evidence that might be available to him to rebut any allegation of contributory negligence raised at the trial. It is true that in the ordinary case it would not be likely to involve anything beyond the evidence he would be giving to establish negligence on the part of the defendant, but circumstances are reasonably conceivable in which it might be" (supra at p140).

Orr LJ. and Stamps LJ. agreed, the latter adding that the action: "was not an action for damages resulting from the negligence of both parties, but an action for damages resulting from the negligence of the defendant" (supra, at p141). In Practice Note (1978) 52 ALJ 522 the author questioned whether *Fookes v Slaytor,* (supra) would necessarily be followed in Australia. It was observed that:

> "[i]n normal circumstances in an Australian court upon the evidence revealing a degree of contributory negligence upon the part of the plaintiff, the defendant, if he had not pleaded such a defence, would, subject to questions of costs and the granting, if applied for, of any necessary adjournment, be given leave to amend his pleading so as to raise a defence" (supra at p522).

A question that arises, however, is whether evidence revealing a degree of contributory negligence should be permitted to be given where contributory negligence has not been pleaded. That is what confronted her Honour in this case, and she declined to permit the evidence to be sought out. The author of the Practice Note (supra) also suggested that in the Australian context it was arguable that the relevant apportionment of liability legislation casts a mandatory responsibility on the court to reduce the plaintiff's damages where it emerges from the evidence that the plaintiff was guilty of contributory negligence, irrespective of whether contributory negligence was or was not pleaded, and referred to the decision of Wanstall J. in *James v McCarthy* (supra) for that contention. But the thrust of the article assumes

evidence revealing contributory negligence having been given in the case, and that is not the position which confronts this Court. In New Zealand, *Fookes v Slaytor* (supra), was applied by Hardie Boys J. in the High Court in *Brown v Heathcote County Council (No.2)* [1982] 2 NZLR 618. In that case the plaintiffs had built a house which became prone to flooding. They brought proceedings against a County Council and a Drainage Board claiming damages. The question of contributory negligence had been pleaded and argued by the Council, but not by the Board. In his closing submissions, counsel for the Board had discussed the position of the plaintiffs as negligent owner/builders in the context of the Board's duty of care. At that stage counsel for the plaintiffs had no further right to address the court, but submitted that contributory negligence must be expressly pleaded, and that it was too late to allow an amendment to the Board's Statement of Defence. Counsel for the Board had, by his cross-examination of the plaintiffs, set out to lay the groundwork for the Judge's finding of fault on their part. Counsel argued it would be unjust if it were not then possible for the Judge to give effect to his findings: "for that would mean that the Board would have to pay in full for the damage sustained by the plaintiffs notwithstanding that they were substantially responsible for it themselves" (supra, at p620). Counsel argued that his Honour was enjoined by the New Zealand equivalent of the provisions in the Territory to do so, irrespective of the pleadings. At p621, his Honour said that if a plaintiff's

own conduct is to be called into question then he must clearly have notice on what, and of the respects in which, it is alleged he has been at fault. At p623 he held that if the Board was to be entitled to raise contributory negligence it might do so only by obtaining an amendment to its Statement of Defence.

The question was comprehensively examined in the Full Court of the Supreme Court of South Australia in *Christie v Bridgestone Australia Pty Ltd* (1983) 33 SASR 377. The appellant workman had been injured in an industrial accident and sued the respondent employer for damages in negligence. The employer denied liability, but did not plead contributory negligence on the part of the workman. On that point it is on all fours with the case here, but there were further complications in that there the question of contributory negligence was not specifically raised during the hearing of the action, either in the examination of witnesses or in address from counsel, but the trial Judge found that both parties had been negligent and apportioned liability equally between them. Commencing at p380 Acting Chief Justice Mitchell considered the cases and other material referred to above, and at the foot of p381 voiced agreement with the proposition that the plea of contributory negligence would only be available if it was pleaded. White J. at p387 agreed with Mitchell ACJ., that the trial Judge was not required by statute to reduce assessed damages regardless of the conduct of the parties before and at the trial, and observed that when Parliament

had enacted the reform statute in South Australia:

> "it did so with full knowledge of the practice and procedure of the courts, including pleadings and inferences from conduct at the trial in the adversarial system. If the Parliament intended that a judge should of his own motion, cut across the established rules of practice and procedure, it would have to say so in clear words" (supra, at p388).

However, at p389, White J. said:

> "[s]ome judges take the view that it is not competent for the parties to adduce evidence of contributory negligence or to address argument on the point unless contributory negligence has been pleaded and a contribution notice served. I prefer the view that it is competent for the parties, by virtue of the force of the section, to examine and cross-examine with respect to contributory negligence and to contend at the end of the trial that there is evidence thereof without any pleading or notice, provided both counsel are on notice throughout the trial that it is an issue in the case. Notice that contribution is a live issue prevents injustice to the other side. Naturally it is desirable to raise the issue on the pleadings so as to give early and express notice to the plaintiff. Without pleadings, the defendant should advise the plaintiff that it is an issue in time for him to examine, cross-examine and address before the opportunity is lost."

In his reasons at p393, Legoe J. referred to the need to plead contributory negligence when relied upon as a defence:

> "At common law contributory negligence provided a complete defence. Bullen and Leake's *Precedents of Pleading*, 5th ed [1897] (Bullen, Dodd and Clifford, editors) at pp. 928-929, state in footnote (b) to the form of defence provided above:

> "If contributory negligence on the part of the plaintiff is relied on as a defence, it must be specifically pleaded (see *Wakelin v L & S W Rly Co.*, [(1886) 12 AC 41]), and particulars should be given, where practicable, of the matters constituting such negligence.""

He held at p394 that the learned trial Judge was not entitled to make a finding of contributory negligence and apportion the blame when "such partial defence had not been pleaded, and the whole case and examination of witnesses had been conducted without any reference to the plaintiff's lack of care for his own safety."

A "pleading" denotes a document in which a party to the proceedings in a court of first instance is required by law to formulate in writing his case, or part of his case, in preparation for the hearing (*Halsbury's Laws of England* 3rd Ed, 1958, Vol 30, at p2; 4th Ed, 1976, Vol 36, at p3). The non-exhaustive definition in r1.09 of the *Supreme Court Rules* does not change that. Rule 13.07 places upon a defendant an obligation to specifically plead a fact or matter which, inter alia, if not pleaded specifically might take the plaintiff by surprise, and r13.02 requires that a pleading shall, inter alia, "where a claim, defence, or answer of the party arises by or under an Act identify the specific provision relied on;". Rule 14.04 requires that in a proceeding commenced by writ a defendant who files an appearance shall serve a "defence". That word is not defined, but given the contents of the general rules as to pleading, it is clear that such a document ought not to be limited to admissions or

denials, but must include every ground upon which the defendant wishes to rely to defeat or partially defeat the plaintiff's claim.

A defendant wishing to rely upon the reform statute must comply with the *Rules* as to pleading (including as to particulars). Failure to do so may well mean that all issues between the parties are not sufficiently defined as early as may be in the course of the proceedings so as to enable the *Rules* to be employed in such a way as to assist the Court in ensuring that all questions in the proceedings are effectively, completely, promptly and economically determined (r1.10 and s19 of the *Supreme Court Act*). The particular rules to be borne in mind are those relating to discovery and inspection, interrogatories and admissions, and, perhaps less commonly, those relating to medical examinations and service of medical and other expert reports. That is not to deny that there may be occasions when the parties by free and open exchange between themselves prior to trial are able to achieve the desired ends without resort to the *Rules*, but, at least when the trial commences, the trial Judge should be immediately put in the position of understanding what the issues are between the parties, if it has not already been done, by enabling a defence (or amended defence as the case may be) and any necessary subsequent pleading in response, to be filed. Absent such a formal record, difficulties may arise upon appeal as to the issues which were really before the trial Judge. Trial Judges

should insist that before matters which go to a defence are permitted they be reduced to writing, in the form of a pleading, served and filed.

Ought the appellant have been enabled to file a defence raising the issue of contributory negligence?

There is nothing raised in this case which takes it beyond the general principles, well understood for a long time and consistently applied, in relation to amendment. There is nothing in principle to distinguish a proposed amendment to raise a new defence, and the filing of a defence out of time pursuant to r3.02. Rule 1.10 applies to both as does s80 *Supreme Court Act* (see also *Schafer v Blyth* [1920] 3 KB 143; *Sauders v Pawley* [1885] 14 QBD 234 at p237; *Atwood v Chichester* [1878] 3 QBD 722 at p723; *Eaton v Storer* (1883) 22 ChD 91). The pleading envisaged should have been allowed unless it appeared that injustice would thereby have been occasioned to the plaintiff, there being nothing to suggest fraud or improper concealment of the defence on the part of the defendant. At trial, the respondent elected not to delay matters by seeking instructions and placing material before the learned trial Judge in relation to prejudice, unless her Honour indicated that it was likely the amendments would otherwise be allowed. In the events which occurred no such evidence was called for. However, as indicated above, there was material before this Court upon which the question of possible prejudice to the respondent could be assessed. The

objections raised at trial went to delay and, of course, irregularity, but those matters are relevant to costs and do not constitute an injustice to a person in the position of the respondent (*Clough and Rogers v Frog* (1974) 4 ALR 615 at p618). There the High Court (ibid) affirmed the principle according to which the power is to be exercised as that stated by Bowen LJ. in *Cropper v Smith* (1884) 26 ChD 700 at pp710 - 711:

> "..... the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases .... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party ...."

The appellant taking the view, as put forcefully to her Honour and in this Court, that it was not necessary to plead contributory negligence, the issue was not before the learned trial Judge until the commencement of the trial. The respondent was aware of that issue in relation to the accident when the appellant applied to set aside the default judgment in September 1991, 18 months after he instituted the proceedings and about 21 months prior to trial. The appellant should not have been deprived of the opportunity to raise that issue simply because it was raised 18 years after the accident. It had not been a party to proceedings in which such an issue could be raised until the action taken against it a little over 15 years after that time. Further, the appellant was in no position to raise the issues relating to the respondent's

contributory negligence in regard to the legal services negligence, until the appellant had been sued. The respondent does not complain that the contents of the document handed up by counsel for the appellant at the commencement of the trial, set out above, were insufficient to raise the issues of contributory negligence upon which the appellant sought to rely for the purposes of the statutory provision.

Had the respondent placed before her Honour matters of prospective prejudice to him should a pleading of the type in question have been allowed, then, for the reasons given, it would have been proper for the appellant to be given the opportunity to file a defence at the commencement of the trial, upon condition that it pay the costs of the application and the respondent's costs thrown away, should an adjournment have been necessary on the respondent's application.

Given the effort and diligence of counsel for the respondent in placing before this Court a series of cases having to do with late applications to amend in days of caseflow management, it is desirable that something be said about that issue, although it is not relevant in this case. In *Ketteman v Hansel Properties Ltd & Ors* [1987] 1 AC 189 at p220, Lord Griffiths said:

> "We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall

> upon their own heads rather than by allowing an amendment at a very late stage of the proceedings".

In that case it was during the course of the plaintiff's final speech that an application was made on behalf of some of the defendants to amend defences and raise a plea that the claims were time barred pursuant to the statue of limitations. Lord Keith of Kinkel at p204 expressed the view that if the proposed amendments had been brought forward at any time up to the start of the trial, it was clear that they could not reasonably have been refused leave to amend, but when the amendments were actually proffered, during the closing speeches towards the end of the trial, "it was a matter for very careful consideration whether allowance of them would result in any prejudice to the plaintiffs beyond what could be compensated by an award of expenses". Lord Griffiths at p220 had indicated that to allow an amendment before a trial began was quite different from allowing it at the end of the trial: "to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence". That case is thus distinguishable upon its facts from that under consideration here, but nevertheless there are indications of a change of sentiment on the part of that court by taking into account not only the conduct of the parties to the litigation, but the interests of the community in seeing that the business of the courts be conducted efficiently (a matter for which it relies in great measure upon the conduct of the legal representatives of the parties litigating in

them). The remarks of Lord Griffiths in *Ketteman v Hansel Properties Ltd & Others* (supra) were part of the consideration in *Commissioner of Taxation v Brambles Holdings Ltd* (1991) 28 FCR 451. Sheppard J. adopted what his Lordship had to say about the strain that litigation imposes on litigants, anxiety occasioned by the need to face new issues and the legitimate expectation that the trial will determine the issues which have been raised by the pleadings when the hearing commences, and also adopted his remarks concerning the pressure on courts caused by the great increase in litigation and the public interest that there was in the business of the courts and of the legal profession being conducted efficiently. His Honour pointed to the public costs of maintaining the system of courts and said that those:

> "who are privileged to practise before the courts should understand that the days when careless work will usually be overlooked are over [....] The day has come when failure to discharge professional obligations efficiently will not be to the account of the community or of the parties but to the account of the profession itself" (supra, at p456).

This Court is not to be thought to be holding that those representing the appellant had necessarily been negligent in the conduct of these proceedings prior to trial. That proposition has not been tested, but what needs to be noted is that should such cases clearly emerge, this Court might well need to consider adopting and implementing other concerns raised in other places in that regard. The provisions

of r63.21 regarding the personal liability of solicitors for costs incurred improperly or without reasonable cause, or wasted by undue delay or negligence, or other misconduct or default, is but an indication of the breadth of the Court's potential powers in such matters. For example, in South Australia the Rules of Court provide that no orders of an interlocutory nature or for an adjournment of the hearing of an action can be made during a stipulated period prior to the date fixed for trial. Speaking of that rule, King CJ. in *United Motors Retail Limited v Australian Guarantee Corporation Ltd* (1991) 58 SASR 156 at p159 said that: "it manifests a clear policy on the part of the court that cases should be ready for trial and that no amendment or postponement of trial be granted after [the time fixed]", and went on to speak of the rules and the policies relating to caseflow management which underlies them. This Court has gone a considerable way in recent years in relation to implementing principles of caseflow management and incorporating some of them into its *Rules* (see for example the recently implemented and improved O.48). Whether circumstances will arise for the Judges to consider making rules of the kind in force in South Australia (and elsewhere) is a matter which will be kept under constant review.

Another recent case having to do with the requirements of the efficient dispatch of the business of the court is *State Pollution Control Commission v Australian Iron and Steel* (1992) 75 LGRA 327, a decision of the Court of Criminal

Appeal of New South Wales in which reference was made to *Ketteman v Hansel Properties,* (supra) and *United Motors Retail Ltd v AGC* (supra), and see also the comments of Seaman J. in the Supreme Court of Western Australia in *Grljusich v Grljusich* (Seaman J., unreported 6 May 1993) as to late amendments in the context of the Rules of that Court dealing with case management. In similar vein, there have been recent indications of change of view in relation to applications for an adjournment of trials, for example *Mehta v Commonwealth Bank of Australia* (1990) ATPR 41 - 026 and *Sali v SPC Limited & Anor* (1993) 67 ALJR 841 where Brennan, Deane and McHugh JJ. said at p843 - 844 that in determining whether to grant an adjournment: "The judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties". Toohey and Gaudron JJ. noted at p849 that the modern approach to court administration has introduced another consideration onto the scales weighing up the competing interests on an application for adjournment:

> "The view that the conduct of litigation is not merely a matter for the parties but is also one for the court and the need to avoid disruptions in the court's lists with consequent inconvenience to the court and prejudice to the interests of other litigants waiting to be heard are pressing concerns to which a court may have regard."

Their Honours went on to acknowledge that considerations such as that are singularly within the knowledge of the court to which an application for adjournment is made.

That is enough to dispose of the questions on appeal which gave rise to the order that there be a retrial. The questions of contributory negligence raised in the notice set out above are to be allowed by way of a proper defence which should be served within 14 days from today. This matter is to be placed in the Master's list for review at a date to be fixed by the Registrar not less than one month from today.

It is inappropriate to deal with the other grounds of appeal going to her Honour's findings of fact and assessment of damages. However, there is one live issue which should be dealt with now.

What is the date at which the respondent's loss should be assessed?

The respondent's action against the appellant lies in a claim for professional negligence for its failure to institute proceedings in time against CAALAS for its professional negligence in failing to institute proceedings in time against those whom he says occasioned him personal injury by their negligence in the motor vehicle accident in 1975.

Her Honour held that the appropriate date for assessment of the loss was 31 March 1981, being the date when the plaintiff's claim against CAALAS crystallized, as she put it. She referred to *Nikolaou v Papasavas, Phillips & Co* (1989) 166 CLR 394. The appellant had contended that the relevant date for the assessment was 31 March 1987, being the date when the respondent's claim against it crystallized consequent upon the expiry of the limitation period for the institution of proceedings against CAALAS (plus the statutory extension).

The respondent's claim now being litigated is against the appellant, and neither CAALAS nor the alleged original tortfeasors are parties. If the appellant was negligent, then the respondent's loss in his claim against it must be assessed having regard to the value of the right of action against CAALAS which had been instructed to pursue the alleged original tortfeasors and, the value of that right of action depends in part upon the value of the respondent's right of action against those alleged original tortfeasors. There must be two trials within the trial, the first concerning the value of the respondent's lost chance of pursuing the alleged original tortfeasors, and the second as to the value of the respondent's lost chance of pursuing CAALAS for its negligence in failure to sue the alleged original tortfeasors within the limitation period.

Though the circumstances of this case are

distinguishable, the law to be applied has been authoratively stated by the High Court in the successively reported cases of *Johnson v Perez* (1988) 166 CLR 351 and *Nikolaou v Papasavas, Phillips & Co* (supra). In the first case, the plaintiff's action was against his former negligent solicitor in allowing the dismissal of his claim against the defendant for want of prosecution, and it was held that his loss crystallized as at the date of that dismissal. The latter case, more akin to this, involved the loss of the plaintiff's cause of action for damages for personal injuries by being statute-barred through the negligence of former solicitors. His right of action in negligence against those solicitors arose at the time when his action for damages became statute-barred and damages are to be assessed at the time when the claim for damages became statute-barred. At p363 Wilson, Toohey and Gaudron JJ. drew attention to what Lord Evershed M.R. said in *Kitchen v Royal Air Force Association* [1958] 1 WLR 563 at p575 concerning a plaintiff's claim in an action against his solicitor for negligence:

> "In my judgment, what the court has to do (assuming that the plaintiff has established negligence) in such a case as the present, is to determine what the plaintiff has by that negligence lost. The question is, has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case, it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can".

In its application to this case, what is required

is a determination of what the respondent has lost by the negligence of the appellant. That is the ultimate question (assuming negligence is established), and notwithstanding that, as part of that determination, consideration will have to be given to what the plaintiff lost as a result of the negligence of CAALAS.

Having reviewed some of the competing authorities in these State Courts their Honour's went on at p366 - 367 as follows:

> "When an action has been dismissed for want of prosecution due to the negligent conduct of a solicitor, the client has lost the opportunity to bring that claim to trial and recover damages in respect thereof. As already indicated, in some cases it may be appropriate to describe the loss as the loss of a chance for there may be various contingencies bearing on the likelihood that the plaintiff would have recovered judgment against the defendant and further that any such judgment would have been met. When those contingencies have been foreclosed by agreement or by the decision of the primary judge in the trial of the claim against the solicitor, the way is open for the judge to proceed to the assessment of damages for the loss flowing to the plaintiff by reason of the negligence of the solicitor. The first component in that assessment is the amount of damages likely to have been awarded by the court before whom the action against the employer (as in this case) would have come. That loss crystallizes when the action is dismissed for want of prosecution and is then capable of assessment. The process of assessment may well require a broad brush approach in determining when, in the absence of negligence, the action would have come to trial and the evidence bearing on the quantum of damages that would or should have been available for tender to the court. Undue emphasis should not be placed on the difficulties surrounding the selection of a notional trial date of the original action. In the majority of cases some variation in this regard will be immaterial; it will only be in those cases where a new and material fact emerges

> for the first time after the earliest notional trial date or where the relevant principles of law governing the assessment of damages are undergoing a process of change that it may be necessary to identify with some precision when the earlier action would probably have been determined. We return to this aspect of the matter later in these reasons.
>
> The starting point is that "a plaintiff who has been injured by the negligence of the defendant should be awarded such a sum of money as will, as nearly as possible, put him in the same position as if he had not sustained the injuries": *Todorovic v. Waller* (1981) 150 CLR, at p412; see also *Livingstone v. Rawyards Coal Co.* (1880) 5 App Cas 25 at p39. In each of the present cases the respondent would, but for the negligence of his solicitor, have recovered damages for personal injuries against his employer. It is that loss for which he is to be compensated; he is not to be compensated as if his claim against his solicitor was a claim for damages for personal injuries.
>
> As a general rule, "damages for tort or for breach of contract are assessed as at the date of the breach" (Lord Wilberforce in *Miliangos v. Frank (Textiles) Ltd* [1976] AC 443 at p468). The rule will yield if, in the particular circumstances, some other date is necessary to provide adequate compensation: see, for example, *Wenham v. Ella* (1972) 127 CLR 454; *Dodd Properties Ltd. v. Canterbury County Council* [1980] 1 WLR 433; *County Personnel Ltd. v. Alan R. Pulver & Co.* [1987] 1 WLR 916. But, in the circumstances of the present appeals, there is no reason why an assessment of damages as at the date each action was dismissed for want of prosecution will not compensate the respondent adequately."

Their Honours go on to discuss various matters that may arise upon the trial of particular actions, including events occurring since the time the action was dismissed.

At p389 Dawson J. put the matter this way:

> "In the present cases, the respondent's loss crystallized at the time his actions against his solicitors were dismissed for want of prosecution.

> Each action had a value at that time which was lost to the respondent and that value could only be measured by the respondent's chances of success at that point. The actions by the respondent against his solicitors are not actions for damages for personal injuries. They are actions for damages for failure to exercise due care; it matters not for present purposes whether they be regarded as actions for breach of contract or tort or both. The loss caused by the negligence does not cover events extending over a period of time. It occurred once and for all in each case when the respondent lost his right to prosecute his claim. The quantification of the loss must necessarily take place at that time because it is not referable to an extended condition as is the loss for which compensation is sought in a personal injury claim".

In the latter case, Wilson, Dawson, Toohey and Gaudron JJ. all combined, and towards the foot of p403, made it clear that the plaintiff's claim in that case, arising from the negligence of his former solicitors, crystallized at the date when the cause of action against the solicitor arose, that is, the date upon which the plaintiff's cause of action became statute-barred, and at p404 set out the steps that should have been followed by the trial judge, in the circumstances of that case, in order to arrive at a figure representing the plaintiff's loss when his action against the negligent solicitor was dismissed:

> "For reasons which are set out in some detail in *Johnson v. Perez,* his Honour should first have focused on Mr. Nikolaou's situation when his claim for damages for personal injuries became statute-barred. He should have assessed damages by reference to the loss at that date of the right to claim damages. That loss would ordinarily be quantified by the trial judge taking a broad brush approach to the several matters that in a particular case may require to be resolved - the likely date when in the absence of the negligence of the solicitor the action would have come to trial, the

> evidence that would or should have been available to the plaintiff at that time, the relevant principles of law then governing the assessment of damages, the question of contributory negligence, and (an issue which would not be a problem in the present case) the prospects of any judgment given in favour of the plaintiff being satisfied - in order to arrive at a figure representing the loss suffered by the plaintiff when his action against the defendant was dismissed."

The same process should be undertaken in this matter, but in the two stages already indicated.

It is the respondent's claim against the appellant that is in issue in this case and it is necessary ultimately to arrive at a figure representing the loss suffered by the respondent when his action against CAALAS became statute-barred.

ANGEL J.

I agree that in the circumstances the appellant should have been permitted to raise and to contest as an issue upon the assessment of damages, whether or not contributory negligence on the part of the respondent contributed to the respondent's damages. I agree that the default judgment does not preclude that course.

As to whether it is always necessary to plead contributory negligence, I generally agree with the judgment of White J in *Christie v Bridgestone Australia Pty Ltd* (1983)

33 SASR 377 at 389.

As to the appropriate date for the assessment of the respondent's loss I agree with the learned Chief Justice.

I do not wish to say anything concerning either late applications to amend or case flow management.

MILDREN J.

I agree with the judgment of the Chief Justice which I have had the advantage of reading, and have nothing to add.