IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2012-470-000977
[2015] NZHC 1876

IN THE MATTER	of the Judicature Act 1908
BETWEEN	JOHN MORGAN MACKENZIE Applicant
AND	THE ATTORNEY-GENERAL Respondent

Hearing: 29 July 2015

Appearances: Mr Mackenzie (Applicant) in person
I Clarke for the Respondent

Judgment: 11 August 2015

(RESERVED) JUDGMENT OF ANDREWS J

This judgment was delivered by me on 11 August 2015 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: …………………………….

Solicitors: Crown Law Office, Wellington

Introduction

[1] Mr Mackenzie has applied for judicial review of the decision of Associate Judge Bell, delivered on 17 February 2015, in which his Honour struck out Mr Mackenzie's claim against the Crown Health Financing Agency ("CHFA").[1]

[2] Mr Mackenzie has applied for judicial review of two findings by Associate Judge Bell:

(a) That the Attorney-General is the appropriate defendant;[2] and

(b) That Mr Mackenzie's claim is time-barred under the Limitation Act 1950, as it was filed outside the times fixed under that Act.[3]

[3] On 1 October 1987, Mr Mackenzie's son Kenneth suffered severe head injuries in a motorbike accident. He was admitted to Tauranga Hospital but died early in the morning of 2 October 1987, after his life support was withdrawn. Kenneth was 21 when he died. What happened thereafter has clearly caused extreme distress to Mr Mackenzie, compounding the grief arising from his son's sudden and tragic death.

[4] Kenneth's heart was removed from his body either shortly after his death (which Mr Mackenzie believes to be the case) or during a post-mortem carried out 12 hours after his death. Documentary evidence before me tends to show that this was done without the consent of Kenneth's family; indeed after they had been asked, but refused, to give consent. Kenneth's heart was sent to the Greenlane Hospital Heart Valve Laboratory. The aortic valves were surgically removed and later implanted into a teenage girl.

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1 *Mackenzie v Crown Health Financing Agency* [2015] NZHC 191 ("the Associate Judge's decision").

2 At [18].

3 At [93]. The Limitation Act 1950 applies in this case: see ss 59 and 61of the Limitation Act 2010.

[5] Mr Mackenzie says that Kenneth's body was mutilated, and his heart stolen. In about 2002, he began making inquiries as to what had occurred.[4] In a letter dated 21 March 2005, the National Transplant Donor Co-ordination Office told Mr Mackenzie that the heart valve bank had retrieved the aortic valves from Kenneth's heart and implanted them into the teenage girl.

[6] Mr Mackenzie then corresponded with the Bay of Plenty Health Board, the pathologist who carried out the post-mortem, the CHFA, Cabinet Ministers, and Members of Parliament, seeking redress. On 24 November 2006, the CHFA wrote to Mr Mackenzie saying that, having taken legal advice, it was not satisfied that he had a claim against CHFA, and therefore it could not offer him compensation.

[7] Mr Mackenzie filed a statement of claim on 23 November 2012, naming the CHFA as defendant. He alleged that the CHFA owed him a duty under which it was "legally required to agree with the evidence provided and offer acceptable compensation claimed and agree to libel damages for the obstruction to the Justice I have sought over many years at great cost to me."

[8] Mr Mackenzie set out the particulars of his claim as being:

(a) Consent was sought by a doctor to take Kenneth's heart but refused. The doctor then terminated life support and Kenneth died, and Kenneth's heart was taken illegally.

(b) After many years of seeking explanations, it was disclosed to Mr Mackenzie that Kenneth's heart had been illegally removed and the heart valve implanted into another person.

(c) Mr Mackenzie was shocked to discover this, as permission was never granted to remove Kenneth's heart, let alone use any part of Kenneth's organs.

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4 Mr Mackenzie says that until then he believed a statement made to him by a Police Officer, around the time of Kenneth's death, that as he did not have lawful possession of the body, he had no right to inquire.

[9] Mr Mackenzie claimed relief by way of an apology, an admission of liability by the Crown, and compensation.

[10] Mr Mackenzie sought legal aid for his proceedings, but that was denied. He appealed against the refusal to grant legal aid, without success.[5] He has therefore been without legal representation in the proceeding.

The Associate Judge's decision

[11] On 31 January 2013, the Attorney-General, on behalf of the Ministry of Health, filed an application to strike out Mr Mackenzie's statement of claim. The application to strike out noted that the Crown had assumed the liabilities of the CHFA, which had been statutorily disestablished. The application to strike out was on two grounds:

(a) That the statement of claim did not plead a reasonably arguable cause of action; and

(b) That all conceivable causes of action were time-barred under the provisions of the Limitation Act 1950.

[12] The Associate Judge first considered whether Mr Mackenzie had sued the correct defendant. His Honour noted that whereas it was proposed by the Crown that the Attorney-General be substituted as defendant under s 14(2) of the Crown Proceedings Act 1950, Mr Mackenzie had suggested that Crown Law Office was the appropriate defendant. His Honour traced through the legislation restructuring the health sector over the period after 1987, culminating in the disestablishment of the CHFA pursuant to s 27 of the New Zealand Public Health and Disability Amendment Act 2012. His Honour referred to s 28 of that Act, under which the property and liabilities of the CHFA vested in the Crown, and proceedings by or against the CHFA could be continued against the Crown.[6]

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5 See *Re CE (Civil)* [2012] NZLAT 023, *Mackenzie v Legal Services Commissioner* [2012] NZHC 3098, [2013] NZHC 511, [2013] NZCA 326, [2013] NZSC 140, [2014] NZSC 23, and [2014] NZSC 49.

6 Associate Judge's decision at [10]–[16].

[13] The Associate Judge held:[7]

> [17] As there is no government department or officer able to be sued in their own names for any liability in this case, under s 14(2)(c) of the Crown Proceedings Act the correct defendant is the Attorney-General. Mr Mackenzie says, however, that Crown Law Office should be the defendant. He blames it for having given poor advice to the Crown Health Financing Agency. I do not understand Crown Law Office to be a government department able to be sued in its own name. Besides, I see no basis for suing it. It acts as the Government's legal adviser and represents it in court. It owes its duty to its client, the Government. This is not a case where a non-client has a cause of action against the lawyer for the other side.
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> [18] Accordingly, under r 4.56 of the High Court Rules 2008, I strike out the Crown Health Financing Agency as the defendant and substitute the Attorney-General. He is in a sense the personification of the government for the purpose of this proceeding.

[14] The Associate Judge then considered the Crown's submission that Mr Mackenzie's statement of claim did not disclose an arguable cause of action.[8] He concluded that, at the strike-out stage, Mr Mackenzie had an arguable case that as Kenneth's personal representative he could sue in tort for the unauthorised removal of the aortic valve from his body for use in a transplant operation.[9] That conclusion has not been challenged by the Crown.

[15] The final issue considered by the Associate Judge was whether Mr Mackenzie's claim was statute-barred on the grounds that the statement of claim was not filed within the time fixed pursuant to s 4 of the Limitation Act 1950, or pursuant to s 28(b) of that Act, which provides for a postponed start to the limitation period in cases of alleged fraud.

[16] The Associate Judge adopted the approach set out by the Supreme Court in *Murray v Morel & Co Ltd*:[10]

> [32] … the onus is on the defendant to show that a claim, or at least part of it, is statute-barred, unless the plaintiff is able to rely on some extension of the ordinary limitation period or some postponement of the commencement of that period. The question which arises in this case concerns what the plaintiff must do to resist the striking out of a claim

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7 At [17]–[18].
8 At [19]–[77].
9 See at [58] and [75]. The Associate Judge cited the judgment of the Supreme Court in *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733, in support.
10 *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721 at [32]–[34].

> which, subject to matters of postponement and extension, is clearly statute-barred.
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> [33] I consider the proper approach … is that in order to succeed in striking out a cause of action as statute-barred, the defendant must satisfy the Court that the plaintiff's cause of action is so clearly statute-barred that the plaintiff's claim can properly be regarded as frivolous, vexatious or an abuse of process. If the defendant demonstrates that the plaintiff's proceeding was commenced after the period allowed for the particular cause of action by the Limitation Act, the defendant will be entitled to an order striking out that cause of action unless the plaintiff shows that there is an arguable case for an extension or postponement which would bring the claim back within time.
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> [34] In the end the Judge must assess whether, in such a case, the plaintiff has presented enough by way of pleadings and particulars (and evidence, if the plaintiff elects to produce evidence), to persuade the Court that what might have looked like a claim which was clearly subject to a statute-bar is not, after all, to be viewed in that way, because of a fairly arguable claim for extension or postponement. If the plaintiff demonstrates that to be so, the Court cannot say that the plaintiff's claim is frivolous, vexatious or an abuse of process. The plaintiff must, however, produce something by way of pleadings, particulars and, if so advised, evidence, in order to give an air of reality to the contention that the plaintiff is entitled to an extension or postponement which will bring the claim back within time. A plaintiff cannot, as in this case, simply make an unsupported assertion in submissions that s 28 applies.

[17] The Associate Judge held that the cause of action for Mr Mackenzie's claim in tort arose on 2 October 1987, when Kenneth's heart was removed from his body. Under s 4 of the Limitation Act, a statement of claim must be filed within six years from when the cause of action arose. The limitation period therefore expired on 2 October 1993.[11]

[18] The Associate Judge then considered whether Mr Mackenzie could contend that the fact that the aortic valve had been removed from Kenneth's body had been fraudulently concealed from him. If that argument succeeded, then pursuant to s 28(b) of the Limitation Act, the limitation period (six years) would not begin to run until Mr Mackenzie had discovered the fraud, or could with reasonable diligence have discovered it.

[19] The Associate Judge held that the letter of 21 March 2005 told Mr Mackenzie that the aortic valve had been retrieved from Kenneth's body, and this was the latest

[11] Associate Judge's decision, above n 1 at [86]. The references to "22 October 1987" and "21 October 1993" are clearly typographical errors; the references should be to 2 October 1987" and "2 October 1993".

point at which the limitation period could begin. The limitation period thus expired on 20 March 2011 (some 20 months before the statement of claim was filed). His Honour rejected Mr Mackenzie's argument that the limitation period should not start until 24 November 2006, which is when the CHFA told him that it could not offer him compensation.[12]

[20] The Associate Judge concluded:[13]

> While Mr Mackenzie has an arguable cause of action for the removal of the aortic valve from Kenneth's body for use in a transplant operation, I am satisfied that his claim is statute-barred as it is outside the time to bring a proceeding, even taking into account the postponement under s 28(b) of the Limitation Act 1950. It is now too late for Mr Mackenzie to bring a claim that would require an inquiry into events of some 27 years ago. It is quite unlikely that the defendant would be able to find witnesses who could give reliable accounts of what happened in Tauranga Hospital on [2 October 1987]. The law has limitation periods to avoid just that sort of prejudice. His statement of claim is to be struck out as frivolous and vexatious.

Applicable judicial review principles

[21] An application for review of an Associate Judge's decision may be made pursuant to s 26P(1) of the Judicature Act 1908 which provides:

> **26P Review of, or appeals against, decisions of Associate Judges**
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> (1) Any party to any proceedings who is affected by an order or decision made by an Associate Judge in chambers may apply to the court to review that order or decision and, where a party so applies in accordance with the High Court Rules, the court—
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> (a) must review the order or decision in accordance with the High Court Rules; and
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> (b) may make such order as may be just.

[22] Rule 2.3 of the High Court Rules sets out rules relating to applications for review. The application must be by way of an interlocutory application fully stating the grounds of review, and must be served on other parties to the proceeding. Pursuant to r 2.3(4), where the decision being reviewed was made following a defended hearing and is supported by documented reasons (as is the case here) the review proceeds as a rehearing.

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12 At [89]–[90].

13 At [93].

[23] On an application for review, the applicant has the burden of persuading the High Court that the Associate Judge's decision was wrong; that is, that it was made on the basis of unsupportable findings of fact, and/or applied wrong principles of law.[14] The High Court's jurisdiction in an application for judicial review of an Associate Judge's decision is, in essence, appellate.

[24] Where, as in the present case, the Associate Judge's decision involves the exercise of a discretion,[15] the applicant must show that the Associate Judge acted on a wrong principle, failed to take into account some relevant matter, or took into account an irrelevant matter.

[25] I turn to consider the two matters in respect of which Mr Mackenzie applied for judicial review.

Was the Associate Judge wrong to hold that the Attorney-General was the appropriate defendant?

Submissions

[26] Mr Mackenzie accepted that, as the CHFA has been disestablished by statute, a defendant must be named. However, he submitted that the Crown Law Office is the appropriate defendant, and the Associate Judge was wrong to hold that the defendant should be the Attorney-General, rather than the Crown Law Office.

[27] In his written submissions, Mr Mackenzie submitted that the Crown Law Office is now "entirely and only responsible for the fact that this long-running acrimonious case was not resolved amicably in 2006 when the CHFA, after advice from Crown Law, ignored the evidence [Mr Mackenzie] provided to refuse compensation." Mr Mackenzie referred to correspondence from Cabinet Ministers in which he was told that the CHFA "together with Crown Law" was managing pre-1993 claims; that the CHFA would be referring his request for compensation to its

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[14] See *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* (2002) 16 PRNZ 107 (HC) at [13].

[15] The decision to strike out was made pursuant to r 15.1(1) which provides that "the court may strike out all or part of a pleading".

lawyer, Crown Law Office, for advice, and that (after receiving advice) the CHFA was not satisfied that he had a claim against it, so could not offer compensation.

[28] In his oral submissions, Mr Mackenzie said that his whole case revolves around the Crown Law Office advising, and CHFA denying him compensation on that advice. He submitted that by advising the CHFA, the Crown Law Office had precipitated a breach of statutory duty or a duty of care (in the CHFA's letter of 24 November 2006), then perpetuated that breach by continuing to advise the CHFA not to settle.

[29] Mr Mackenzie submitted that s 14(2)(a) of the Crown Proceedings Act 1950 provides the Crown Law Office with the requisite status as a Crown entity, and thus the ability to sue or be sued in its own name.

[30] Ms Clarke submitted for the Attorney-General that s 14(2)(a) of the Crown Proceedings Act does not enable the Crown Law Office to be sued in its own name. Rather, s 14(2)(a) explicitly provides that the ability for a government department to be sued must be located outside of s 14 itself. She submitted that Mr Mackenzie had not identified any provision which indicated that the Crown Law Office can be sued in its own name.

Discussion

[31] Mr Mackenzie's submission is misconceived. Section 14(2)(a) of the Crown Proceedings Act provides:

> **14 Method of making Crown a party to proceedings**
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> …
>
> (2) Subject to the provisions of this Act and any other Act, civil proceedings under this Act against the Crown shall be instituted against—
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> (a) the appropriate government department in its own name if the department may be sued apart from this section; or
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> (b) the appropriate officer of the Crown in the name in which he or she may be sued on behalf of the Crown or of any government department if the officer may be sued on behalf of the Crown or of any government Department apart from this section; or

(c) the Attorney-General if there is no such appropriate department or officer or if the person instituting the proceedings has any reasonable doubt whether any and, if so, which department or officer is appropriate; or

(d) any two or more of them jointly.

[32] Mr Mackenzie did not point to any statutory provision to the effect that the Crown Law Office may sue or be sued in its own name. I accept Ms Clarke's submission that s 14.2(a) does not provide that the Crown Law Office may be sued, as there is no provision, independent of s 14.2(a), that allows that to occur.

[33] I do not accept that the Associate Judge erred in holding that the Attorney-General was the appropriate defendant. The Associate Judge correctly held that the Attorney-General is the personification of the government for the purposes of the proceeding.

Was the Associate Judge wrong to hold that Mr Mackenzie's claim is statute-barred?

Submissions

[34] Mr Mackenzie submitted that the Associate Judge was wrong to hold that the limitation period began when Kenneth's heart was removed from his body or, at the latest (if Mr Mackenzie could establish that the removal was fraudulently concealed from him) on 21 March 2005, when he was told that the heart valve bank at Greenlane Hospital had retrieved the aortic valve from Kenneth's heart.

[35] He submitted that 21 March 2005 was the earliest he could have filed a statement of claim. He further submitted that the proper date for the limitation period to start was 24 November 2006, when the CHFA denied his claim for compensation.

[36] Mr Mackenzie submitted that he was advised in the CHFA's letter of 24 November 2006 that he could commence legal proceedings if he disagreed with the CHFA's denial of his claim for compensation, and was given the same advice in a letter from the then Attorney-General in a letter dated 12 February 2007, and in a letter from the present Attorney-General dated 4 March 2009. He submitted that he

could not have filed a claim in any form before 21 March 2005, but then filed a claim within six years of his being denied compensation in the CHFA's letter of 24 November 2006.

[37] Mr Mackenzie further submitted that the CHFA's letter of 24 November 2006 was evidence of a breach of statutory duty or a breach of a duty of care which re-started the six year limitation period. He accepted that his statement of claim does not allege any breach of statutory duty or breach of a duty of care, and that he did not make a submission to the Associate Judge to the effect that the CHFA's letter of 24 November 2006 was in and of itself a breach of statutory duty or a breach of a duty of care. However, he submitted 24 November 2006 should be taken as the date on which the six year limitation period began.

[38] Mr Mackenzie referred me to a newspaper report dated 7 December 2008, referring to the settlement by the CHFA of claims brought by 42 parents of dead babies and children, from whom hearts and other organs had been taken over a period of around 50 years up to 2001. He submitted that the circumstances of those cases were almost the same as the present case, although the removal of his son's heart without consent was possibly more serious.

[39] Ms Clarke submitted that the Associate Judge was not wrong to hold that Mr Mackenzie's statement of claim is statute-barred.

[40] Ms Clarke submitted that it was made clear by the Supreme Court in *Murray v Morel* that the accrual of a cause of action is "occurrence-based", not "knowledge-based";[16] thus the limitation period started from the date Kenneth's heart was taken. At that date, she submitted, all events needed for a cause of action had occurred.

[41] She further submitted that the very latest date the cause of action could have accrued and the limitation period could have started is 21 March 2005, the date of the letter from the National Transport Donor Co-ordination office. Even if the start of the limitation could be postponed to that date, Mr Mackenzie's statement of claim was clearly filed out of time.

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[16] *Murray v Morel*, above n 10.

[42] In response to Mr Mackenzie's submission that the CHFA's letter of 24 November 2006 is an independent breach of statutory duty or breach of a duty of care, and thus the start of a new limitation period, Ms Clarke submitted that Mr Mackenzie had not identified any source for a statutory duty which could be alleged to have been breached, and he had not established any basis for a claim of breach of a duty of care. Ms Clarke further submitted that Mr Mackenzie had not pleaded any such breach of duty in his statement of claim, and could not now amend his claim to include such a pleading, as it would be more than six years after the date of the letter, so out of time.

Discussion

[43] I do not accept Mr Mackenzie's submission that the Associate Judge was wrong to find that the limitation period started on 2 October 1987 or (at the latest) 21 March 2005. As Tipping J said in *Murray v Morel*:[17]

> [64] It is clear … that the long-established meaning of accrual relates to the occurrence of all material facts rather than knowledge of them. …
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> …
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> [69] In my view the numerous references in the Limitation Act to accrual of a cause of action can only be construed as references to the point of time at which everything has happened entitling the plaintiff to the judgment of the Court on the cause of action asserted. Save when the Limitation Act itself makes knowledge or reasonable discoverability relevant, the plaintiff's state of knowledge has no bearing on limitation issues. Accrual is an occurrence-based, not a knowledge-based, concept. The Limitation Act as a whole is structured around that fundamental starting point. The periods of time selected for various purposes must have been chosen on that understanding. The circumstances of postponement and extension have themselves been similarly framed.

[44] The statement of claim focuses on the removal of Kenneth's heart, without permission, from his body. The starting point for consideration of the limitation period in the present case is that Kenneth's heart was removed from his body on 2 October 1987. Unless Mr Mackenzie could establish a basis for postponing the limitation period, it started on that date.

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[17] *Murray v Morel*, above n 10 at [64] and [69] (Blanchard, McGrath and Henry JJ concurring).

[45] Mr Mackenzie's attempts to be paid compensation are not grounds for postponing the start of the limitation period. The only basis on which the limitation period could be postponed is if s 28 of the Limitation Act applies; in particular, under s 28(b):

> **28 Postponement of limitation period in case of fraud or mistake**
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> Where, in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake,—
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

[46] The fact that Kenneth's heart had been taken was made clear in the letter of 21 March 2005. I am not persuaded that the Associate Judge was wrong to hold that the latest date on which the limitation period could have started was 21 March 2005. Even adopting that date, the statement of claim was filed some 20 months out of time. The Judge did not err in holding that it was statute-barred.

[47] Mr Mackenzie now submits that the CHFA's letter of 24 November 2006 is in and of itself a breach of statutory duty and a breach of duty of care, and that the limitation period is re-started from that date. That submission does not assist him. His statement of claim does not allege any breach of statutory duty or negligence. To plead it now would require an amended statement of claim, with a fresh cause, or causes, of action.

[48] However, pursuant to r 7.77(2) of the High Court Rules, an amended pleading may only introduce a fresh cause of action if that cause of action is not statute-barred. The fresh cause of action must be within time as at the date it is introduced into the amended pleading. Mr Mackenzie could not now introduce a cause of action alleging a breach of statutory duty, or a breach of a duty of care, based on the CHFA's letter of 24 November 2006. That is because the limitation

period for such a cause of action would have expired six years after the date of the letter; that is, on 23 November 2012. An amended pleading filed now would be nearly three years out of time, and therefore statute-barred under the Limitation Act.

[49] Further, I accept Ms Clarke's submission that Mr Mackenzie has not pointed to any particular statutory duty alleged to have been breached, nor has he established any basis on which a claim for breach of a duty of care could succeed.

Conclusion

[50] Mr Mackenzie has not established that the Associate Judge erred in holding that the Attorney-General is the appropriate defendant in this proceeding, and that the proceeding must be struck out because it is statute-barred under the Limitation Act.

[51] The application for judicial review is, therefore, dismissed.

Costs

[52] Ms Clarke sought an order for costs on a 2B basis. Mr Mackenzie asked that I take the approach taken by Dobson J in a judgment related to Mr Mackenzie's application for legal aid. This was to invite the respondent (in that case the Legal Services Commissioner) to reflect on whether it would be appropriate not to enforce an order for costs against Mr Mackenzie.[18]

[53] I commend that approach to the Attorney-General. I have no reason to doubt that Mr Mackenzie filed the proceeding genuinely believing that the taking of his son's heart, without consent, and seen by him as mutilation of his son's body, demanded redress in the form of an acknowledgement, an apology, and compensation.

[54] While there can be no room for doubt that the proceeding is statute-barred, it may well be, as Mr Mackenzie submitted, that a resolution could have been reached many years ago.

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18 See *Mackenzie v Legal Services Commissioner* [2012] NZHC 3098 at [36].

[55] I accept that Mr Mackenzie has limited means. He has a very strong feeling that pursuing this proceeding is necessary in order that he does not let his son down. In all the circumstances, while the Attorney-General is entitled to an order for costs on a 2B basis, I invite the Attorney-General to consider the propriety of not enforcing the order.

Andrews J