DESTRUCTION OF DOCUMENTS BEFORE PROCEEDINGS COMMENCE: WHAT IS A COURT TO DO?

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[The effective performance by courts of their adjudicative role depends on the availability of relevant evidence. In civil proceedings, the discovery process aims to ensure that such evidence is available. If documents that would be relevant evidence in a trial are destroyed, a fair adjudication is made difficult, if not impossible. This is so whether the destruction of documents occurs before or after proceedings commence. This article asks what a trial judge should do in a situation where relevant evidence is unavailable because one of the parties has destroyed documents before the proceedings commenced but anticipating that such proceedings were highly likely, if not certain, to occur. The authors argue that the criminal test of attempting to pervert the course of justice (or contempt of court), as laid down in the recent case of BAT v Cowell, is not the appropriate test because it focuses on the lawfulness of the destruction rather than on the effect of the destruction on the other party’s ability to obtain a fair trial. The authors explain what the proper test should be — whether the destruction of documents has made a fair trial impossible — and identify the factors that should influence a trial judge’s exercise of discretion in a case where documents have been destroyed.]

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I \hspace{1em} \textbf{I N T R O D U C T I O N}

Courts adjudicate disputes. The essential features of the adjudication process are determining the facts and applying the law to those facts. The aim of this judicial process in any given case is to do justice between the parties by finding the facts and resolving a specific dispute according to law. In order to discharge their fact-finding and decision-making functions effectively and fairly, courts need evidence. One of the principal ways in which this evidence is obtained in the civil litigation process is through the discovery of documents.

Discovery has a long history in common law systems, and the significance and centrality of the discovery process to the fact-finding and decision-making processes have long been recognised. The primary aim of discovery is to ensure that litigants disclose to each other all relevant, non-privileged documents, whether that disclosure helps or hurts their respective cases, so that they will know the case they have to meet and judges will have the evidence they need to do their job effectively. If the process of discovery is subverted by a failure to provide relevant documents, then the truth-seeking and fact-finding judicial functions are also subverted — and perhaps rendered impossible. This subversion can occur as a result of conduct, such as the destruction of documents, that takes place either before or after proceedings are commenced.

The recent Victorian Court of Appeal decision in \textit{British American Tobacco Australia Services Ltd v Cowell (as Representing the Estate of Rolah Ann McCabe, Deceased)}\(^{1}\) has, in determining how courts should respond to the destruction of documents that occurs prior to the commencement of proceedings, made new law. The Court of Appeal stated that the pre-proceedings destruction of documents could attract the court’s intervention (beyond the drawing of adverse inferences) only if the destruction amounted to an attempt to pervert the course of justice or contempt of court. The Court of Appeal thus borrowed

\(^{1}\) [2002] VSCA 197 (Unreported, Phillips, Batt and Buchanan JJA, 6 December 2002) (\textit{‘BAT v Cowell’\textsuperscript{,}}). The Court delivered a joint judgment.
directly from the criminal law, except to the limited extent that the burden of proof on the party complaining about the pre-proceedings destruction of documents would be to establish the required intent on the balance of probabilities rather than beyond reasonable doubt.

In the authors’ view, the Court of Appeal erred by characterising the issue of pre-proceedings destruction of documents in civil proceedings as one about sanctions for destruction. The pre-proceedings destruction of documents should be viewed, in civil proceedings, not from the perspective of the state of mind of the person destroying the documents, or the legality of their conduct, but from the perspective of the impact of the document destruction on the fact-finding, truth-seeking and decision-making functions of the court, and on the capacity of litigants to have their specific dispute determined.

Part II of this article begins with a description of the judicial decision-making function in civil proceedings. It then analyses the nature of discovery and describes how civil discovery facilitates the judicial fact-finding and decision-making process. The authors explain how the fundamental principles of civil discovery can shed light on issues raised by the pre-proceedings destruction of documents. Part III analyses how these issues arose in \textit{BAT v Cowell}. The authors argue that the Court of Appeal mistakenly focused on the lawfulness of the defendant’s conduct and the right of the defendant to deal with its documents, rather than on what the consequences of the pre-proceedings destruction of documents should be. In Part IV, the authors analyse the criminal test of attempting to pervert the course of justice (or contempt of court) and explain why that offence is inappropriate and unsuited to determining what the consequences of the pre-proceedings destruction of documents should be in civil proceedings. The authors argue that such a test focuses, incorrectly, on whether the destruction was lawful rather than on its impact on the fairness of the trial.

Part V consists of a detailed analysis of cases in which courts have considered what the consequences should be where relevant documents are destroyed or otherwise made unavailable. The authors argue that while these cases dealt with documents destroyed or otherwise made unavailable in the post-commencement stage, the test adopted in those cases — whether the destruction or unavailability of the documents has made a fair trial impossible — is also the test that should be applied where relevant documents are destroyed in the pre-commencement stage. Finally, in Part VI, the authors reiterate the correct question, set out what they consider to be the appropriate test — whether the destruction of the documents has made a fair trial impossible — and state the factors that should influence a court’s exercise of discretion in applying that test.

II THE RELATIONSHIP BETWEEN ADJUDICATION AND DISCOVERY

A The Essential Elements of Adjudication: Finding Facts and Making Decisions

Judicial power has been defined as ‘the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between
itself and its subjects, whether the rights relate to life, liberty or property. The quintessential example of the exercise of this power is the ‘adjudication of disputes about rights and obligations arising from the operation of the law upon past events or conduct’. Thus courts both determine matters of fact — ‘past events or conduct’ — and law, and then apply the law to the facts. The determination of facts is thus an essential part of the judicial process of ‘deciding controversies’ between litigating parties.

B The ‘First Principles’ of Discovery

In civil disputes, the discovery process assists courts to perform this adjudicative function. Discovery makes available to parties the relevant, non-privileged documents in the possession, custody or power of an opponent. Without the assistance of discovery, parties and courts would not have access to this relevant information, thus greatly restricting the ability of the court to determine ‘past events or conduct’ (that is, the facts), to apply the appropriate law to those facts and to reach a decision. A consideration of the history and development of the law and procedure regarding discovery confirms that one of its fundamental aims is to facilitate the fact-finding and decision-making role of the court.

Discovery in Equity

While the origins of discovery can be traced to the civilian courts, it came into its own in the Court of Chancery. Discovery could be used in Chancery for the examination of witnesses and to order parties to produce documents, either in a suit in Chancery or to assist a common law action. The frequent use of discovery in Chancery to assist a common law action was a result of evidence-gathering deficiencies in the common law courts. These included a prohibition against parties giving evidence and the inability of the common law courts to

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2 Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330, 357 (Griffith CJ).
4 ‘[T]he process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined’: R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1976) 123 CLR 361, 374 (Kitto J).
5 The term ‘documents’, when used in this article, picks up the broad definition that is now commonly used in courts. Section 38 of the Interpretation of Legislation Act 1984 (Vic) defines ‘document’, for the purposes of all Victorian statutes and subordinate legislation, to include not only a document in writing but also any book, map, plan, graph, drawing, photograph, descriptive label, and any disc, tape, soundtrack, film or other device from which data can be reproduced.
6 See, eg, Supreme Court (General Civil Procedure) Rules 1996 (Vic) O 29.
7 Precision Data Holdings Ltd v Wills (1991) 173 CLR 167, 188.
8 Paul Matthews and Hodge Malek, Discovery (1992) 6.
10 Matthews and Malek, above n 8, 6–7; Jones, above n 9, 455–7. Jones notes that discovery, along with recovery and restraint, accounted for the largest and one of the most important sections of Chancery business: at 455.
Destruction of Documents before Proceedings Commence

The common law courts possessed only very limited rights of discovery; it was only by resort to the Court of Chancery that a party could obtain any general right of discovery. The result of this robust assistance jurisdiction and the willingness of Chancery to use it was an extensive survey of the evidence. It was acknowledged that the main purpose and benefit of this evidence-gathering function of discovery was to reveal the truth:

According to the general rule which has always prevailed in this Court, every Defendant is bound to discover all the facts within his knowledge, and to produce all documents in his possession which are material to the case of the Plaintiff … The Plaintiff being subject to the like obligation, on the requisition of the Defendant in a cross-bill, the greatest security which the nature of the case is supposed to admit of is afforded, for the discovery of all relevant truth, and by means of such discovery, this Court, notwithstanding its imperfect mode of examining witnesses, has, at all times, proved to be of transcendent utility in the administration of justice. It need not be observed, what risks must attend all attempts to administer justice, in cases where relevant truth is concealed, and how important it must be to diminish those risks …

That this Chancery process of discovery was known as ‘scraping the defendant’s conscience’ confirms its primary function as a way to do justice between the parties by revealing the true facts of the case.

2 Modern Discovery

The truth-seeking purposes of discovery in the Court of Chancery continue to be a cornerstone of the modern discovery process. In addition to this truth-seeking function, early commentaries and cases show that parties were entitled to discovery in order to avoid the expense and delay that would result if they had to look for the documents themselves. Inclusion of discovery in the post-Judicature Acts rules of civil procedure was intended to reflect and advance the

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13 Jones, above n 9, 455.
14 Flight v Robinson (1844) 8 Beav 22, 37; 50 ER 9, 15 (Lord Langdale MR) (emphasis added). The issue in dispute was whether various classes of documents were protected by legal professional privilege. The Court decided that some were so entitled, but ordered the defendant to disclose the remaining classes of documents to the plaintiff.
16 Birrell describes the process of ‘scraping the defendant’s conscience’ by requiring a party to answer interrogatories on oath ‘and such answer admitted … some of your alleged facts and disputed others, and thus threw light on the real truth of the case’: ibid. Blackstone refers to the circumstances in which ‘a court of equity applies itself to [a party’s] conscience, and purges him upon oath with regard to the truth of the transaction’: Sir William Blackstone, Commentaries on the Laws of England (15th ed, 1809) vol 3, 436–7.
17 Bray, above n 12, 1–2. Bray’s survey of cases reminds us that one of the chief purposes of discovery is to obtain admissions from parties of the case against them. This has both a truth-seeking and a time-saving function.
18 Supreme Court of Judicature Act 1873 (Imp) 36 & 37 Vict, c 66; Supreme Court of Judicature Act (Imp) 38 & 39 Vict, c 77.
philosophy behind the *Judicature Acts*, especially to simplify procedure, to avoid trial by ambush and to increase the prospect of a court deciding a matter on the merits rather than on a technicality. Among the potentially beneficial attributes of the modern common law discovery process are: it assists the parties to prepare for trial; it facilitates settlement; it can (but often does not) reduce time and expense and provide relief for overcrowded court dockets; it may result in narrowing the issues in dispute; and it ‘may prevent a party being taken by surprise at trial and enable the dispute to be determined upon its merits rather than by mere tactics’.

In *Davies v Eli Lilly & Co.*, Lord Donaldson MR gave what has become one of the most oft-quoted descriptions of the modern common law process of civil discovery. He said:

> The right [to discovery] is peculiar to the common law jurisdictions. In plain language, litigation in this country is conducted ‘cards face up on the table’. Some people from other lands regard this as incomprehensible. ‘Why’, they ask, ‘should I be expected to provide my opponent with the means of defeating me?’ The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object.

These comments confirm that the attempt of the Court of Chancery to ‘scrape the defendant’s conscience’ so as to do justice between the parties by ensuring that they, and the court, have access to all relevant information, has survived as a cornerstone of the modern process of discovery.

### C. Adjudication, Discovery and the Pre-Proceedings Destruction of Documents

Though the process of discovery of documents does not begin until after proceedings have been commenced, their destruction prior to the commencement of proceedings can have just as damaging an effect on the courts’ powers to adjudicate disputes as their destruction after those proceedings have been commenced. Rare is the case in which a party that has acted unlawfully, or breached a legal obligation, will have no inkling that proceedings may, at some stage, be filed against it. It would greatly undermine the purpose of discovery, and the crucial function it serves in the adjudication of disputes, if the time prior to the commencement of proceedings were seen as a window of opportunity to destroy documents that would be required to be discovered once proceedings had been filed. One might therefore expect courts to take a strong stance in cases where the pre-proceedings destruction of documents has impaired their capacity.

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20 There are many (some would say too many) examples of cases in which interlocutory discovery skirmishes have greatly increased the cost of litigation and delayed a consideration of the real issues in dispute. For a striking example, see *B T (Australasia) Pty Ltd v New South Wales* [1997] FCA 1553 (Unreported, Sackville J, 24 December 1997).
22 [1987] 1 All ER 801.
23 Ibid 804 (emphasis in original).
to exercise their powers. The preservation of the integrity of court proceedings depends substantially on their so doing.

III HOW THESE ISSUES AROSE IN BAT v COWELL

A Introduction

These issues arose for consideration last year in the Supreme Court of Victoria in McCabe v British American Tobacco Australia Services Ltd. The plaintiff, Rolah Ann McCabe, a 51 year old woman dying of lung cancer had sued the defendant tobacco manufacturer ("BAT") in negligence. On 22 March 2002, the trial judge, Eames J, struck out BAT's defence to the proceeding and ordered judgment for Mrs McCabe, after finding that 'the process of discovery in this case was subverted by the defendant and its solicitor … with the deliberate intention of denying a fair trial to the plaintiff, and the strategy to achieve that outcome was successful.' His Honour found that it was an outcome that could not 'now be cured so as to permit the trial to proceed on the question of liability.' The subversion of the process of discovery had, according to Eames J, involved the deliberate destruction of thousands of relevant documents to keep them from prospective plaintiffs such as Mrs McCabe; misleading the court about what had become of the missing documents; and the ongoing 'warehousing' of documents to keep them from the court. Eames J sent the case to trial before a jury solely on the issue of quantum of damages. On 11 April 2002, the jury awarded Mrs McCabe $700 000.

BAT appealed against Eames J’s decision, and the Court of Appeal (Phillips, Batt and Buchanan JJA) unanimously allowed its appeal. In its decision, the Court overturned a number of Eames J’s major findings of fact and conclusions. The plaintiff’s daughter, representing her estate, has filed an application for special leave to appeal to the High Court against the Court of Appeal’s decision. That application will be heard on 3 October 2003.

25 The plaintiff’s allegations included that the defendant ‘knew that cigarettes were addictive and dangerous to health, and by its advertising targeted children to become consumers’ and, ‘knowing the dangers of addiction and to health of consumers, took no reasonable steps to reduce or eliminate the risk of addiction or the health risks, and ignored or publicly disparaged research results which indicated the dangers to health of smoking’: ibid [7], adopted by the Court of Appeal in BAT v Cowell [2002] VSCA 197 (Unreported, Phillips, Batt and Buchanan JJA, 6 December 2002) [20].
27 Ibid.
28 Ibid [324]. Eames J described ‘warehousing’ as the tactic of having third parties hold documents relevant to issues in the trial so that those documents would be available to be called on to rebut the plaintiff’s witnesses or to be used by the defendant’s witnesses, whilst not being required to be discovered by the defendant because they would be said not to be under its possession, custody or power.
30 Ibid [12], [192]. The decision was handed down approximately six weeks after the plaintiff passed away.
31 On 25 July 2003, the Victorian Attorney-General, Rob Hulls, announced that he would seek leave to intervene in the plaintiff’s special leave application. The announcement followed alle-
B The Undisputed Facts in McCabe v BAT

While numerous factual issues remain in dispute between the parties, these are essentially irrelevant to a consideration of the issues of legal principle explored in this article. The facts relevant to these issues of legal principle are undisputed. They are as follows.

1 Anticipation of Litigation

At all times between November 1990 and March 1998, litigation against the defendant concerning smoking-related disease was underway in at least one Australian jurisdiction. While such litigation was on foot, the defendant imposed what it called 'hold orders', preventing the destruction of documents under the defendant’s internal policies which regulated the retention and destruction of documents. In March 1998, the final hold order was revoked in consequence of the end of the then current litigation in Australia. It was not disputed before the Court of Appeal that, at this time, ‘litigation could still be anticipated of the sort now brought by the plaintiff in this instance, litigation, that is, by a smoker complaining that her ill health was a direct result of misconduct on the part of one tobacco company or another.’ Eames J had put the matter somewhat higher: ‘the defendant considered that further proceedings were not merely likely, but a near certainty’.

This article does not deal with the other major issues dealt with by the Court of Appeal, including whether the defendant had impliedly waived privilege over certain documents and what should follow from the defendant’s specific failures to comply with orders for discovery. The approach adopted by the Court of Appeal treated questions relating to the pre-proceedings destruction of documents as independent of these other issues. Eames J had been careful to base his striking out of the defence on grounds that included — but were not limited to — the destruction of documents. However, after the Court of Appeal had overturned a number of his Honour’s findings and conclusions relating to these other grounds, it considered the pre-proceedings destruction of documents as a discrete issue. This approach conveniently isolated and identified a fundamental issue of principle requiring resolution. In particular, the Court’s articulation of the relevant principles was not affected by the question whether particular documents ought to have been admissible over the defendant’s claim of privilege.

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2 Destruction of Documents

Upon the lifting of the hold order in 1998, thousands of documents were destroyed by the defendant. Eames J found that in March 1998, at the conclusion of litigation brought by Phyllis Cremona, another negligence proceeding in which BAT was a defendant, it destroyed thousands of documents which had been discovered as relevant in that case. He also found that this destruction was performed ‘as a matter of urgency.’ These findings were not disturbed on appeal. The Court of Appeal stated:

Perhaps the best example of what happened in March–April 1998 was the destruction of documents which had been discovered in the Cremona litigation, a step which obviously impressed itself upon the judge. In that litigation, general discovery had been required and, as already described by reference to Mr Maher’s [a former in-house counsel at BAT] affidavit, the task of discovery for the defendant was enormous, very costly and in the end not very productive for the plaintiff … [A]n image of some 30,000 documents was placed on computer discs and, in addition, documents were indexed and in most instances summarised for easier retrieval … [T]he documents had also been rated on the scale of 1 to 5, according to how damaging each was likely to be to the defendant in any litigation, or how beneficial. All records of the summaries and rating of the documents had, however, been destroyed before the commencement of the present litigation and it was this which impressed the judge. … Not only were the documents discovered in the Cremona litigation destroyed, at least in the main, so too was the database, denying the defendant the ability to describe the documents in question.

Thus, there is no dispute that in March and April of 1998:

(a) BAT destroyed thousands of documents — both hard copy and electronic — that were, or may have been, relevant to Mrs McCabe’s proceeding, as well as records of such documents; and

(b) BAT destroyed such documents at a time when it anticipated that proceedings such as those ultimately commenced by Mrs McCabe would be brought against it.

C Destruction of Documents when Litigation Is Anticipated: The Court of Appeal ‘Test’

These undisputed facts gave rise to the following issue: in what circumstances, and in what ways, may a court intervene in a civil proceeding that has been affected by the pre-proceedings destruction of documents? The Court of Appeal held that ‘intervention’ by the court, otherwise than by the drawing of adverse inferences from the fact of destruction, in circumstances where there has been destruction of documents by the defendant, prior to the filing of the proceeding.
by the plaintiff, at a time when the defendant anticipated litigation of the kind brought by the plaintiff, and where that destruction of documents has caused prejudice in the proceeding to the plaintiff, could only be justified where the plaintiff established that the destruction of documents constituted the criminal offence of an attempt to pervert the course of justice or a contempt of court, to be proved to the civil standard of proof.40

Accordingly, there being no authority directly in point, we consider that this court should state plainly that where one party alleges against the other the destruction of documents before the commencement of the proceeding to the prejudice of the party complaining, the criterion for the court’s intervention (otherwise than by the drawing of adverse inferences, and particularly if the sanction sought is the striking out of the pleading) is whether that conduct of the other party amounted to an attempt to pervert the course of justice or, if open, contempt of court occurring before the litigation was on foot.41

D The Correct Question

Sitting as a trial judge in a negligence proceeding, Eames J had to determine how, in the proceeding before him, to deal with the defendant’s destruction of relevant material prior to the commencement of the anticipated proceedings. As the trial judge, his task was (with the assistance of a jury, which had been requested by the defendant) to adjudicate a ‘dispute about rights and obligations arising from the operation of the law upon past events or conduct’.42 That task was made more difficult by the destruction of a large volume of material by the defendant. That difficulty was relevant because it affected his capacity, and that of the jury, to do their jobs in the particular case. While he chose as his criterion for intervention (beyond drawing adverse inferences) his capacity to do justice between the parties, the Court of Appeal chose as the criterion for the court’s

40 The defendant argued that the only consequence which might follow in the proceeding from the destruction of documents in these circumstances was the drawing of adverse inferences against it. That is to say that inferences might be drawn, in appropriate circumstances, to the effect that the documents that had been destroyed would not have been helpful to the defendant’s case. Because Eames J had struck the defence out, the issue before the Court of Appeal related to the correctness of the striking out. Accordingly, the question relevant to the Court of Appeal related to intervention ‘beyond the drawing of adverse inferences’, as the Court described it: ibid [175].

41 Ibid (emphasis in original). See also the Court’s statement, in similar terms (at [173]) (citations omitted):

As indicated at the outset, it seems to us that there must be some balance struck between the right of any company to manage its own documents, whether by retaining them or destroying them, and the right of the litigant to have resort to the documents of the other side. The balance can be struck, we think, if it be accepted that the destruction of documents, before the commencement of litigation, may attract a sanction (other than the drawing of adverse inferences) if that conduct amounts to an attempt to pervert the course of justice or (if open) contempt of court, meaning criminal contempt (inasmuch as civil contempt comprises willful disobedience of a court order and will ordinarily be irrelevant prior to the commencement of proceedings). … Certainly, there can be an attempt to pervert the course of justice before a proceeding is on foot, as R v Rogerson demonstrates, and that, we think, provides a satisfactory criterion in the present instance. The standard of proof is the civil rather than the criminal standard, bearing in mind also the seriousness of the allegation as required by Dixon J in Briginshaw v Briginshaw.

42 Precision Data Holdings Ltd v Wills (1991) 173 CLR 167, 188. See the earlier discussion of judicial power in Part I.
intervention whether the documents were destroyed in an attempt to pervert the course of justice or in criminal contempt of court. Eames J’s approach related the issues raised by the destruction of documents directly to the exercise of judicial power which he was called upon to perform in the case before him. The Court of Appeal’s approach did not.

In the authors’ view, the legal question properly before the Court of Appeal was this:

What consequences should, or may, follow, in a civil proceeding, from the destruction of documents by the defendant, prior to the filing of the proceeding by the plaintiff, at a time when the defendant anticipated litigation of the kind brought by the plaintiff, and where that destruction of documents has caused prejudice in the proceeding to the plaintiff? And, in particular, can such destruction of documents justify an order striking out the defendant’s defence, or parts of the defendant’s defence?

The fundamental difference between this question and the question asked by the Court of Appeal is that the Court of Appeal focused on the lawfulness of the defendant’s conduct rather than on the effect of the document destruction on the court’s ability to exercise judicial power by finding the facts, applying the law to those facts and reaching a just decision. That the Court of Appeal saw its task in very different terms can be seen as early as the first paragraph of the section of the Court’s judgment dealing with the pre-proceedings destruction of documents, where the Court, in introducing what it saw as the issues before it, said:

Next, we turn to the vexed question of the obligation, if any, imposed upon a company in the position of the defendant with respect to the retention of documents before the proceeding to which it is made party has been commenced but at a time when such a proceeding can reasonably be anticipated.43

However, the ‘vexed question’ for the Court was not primarily one about the obligation of a party ‘with respect to the retention of documents’ prior to the commencement of proceedings. Rather, it was about what should, or may, follow, in the present case (and similar cases), from the fact that the defendant had destroyed relevant documents prior to the commencement of proceedings. The issue was not primarily about breach of an obligation with respect to the retention of documents by the defendant. Rather, it was about doing justice between the parties in the specific case before the Court.

The dispute was one about personal injury allegedly caused by the defendant’s negligence. It would therefore have been proper to speak of breaches by the defendant of obligations or duties owed to the plaintiff, such as the duty to take reasonable care for her safety. Indeed, it was the dispute about such obligations (and their corresponding rights) that Eames J was called upon to adjudicate. But the hearing before the Court of Appeal concerned only issues relating to the evidence that was relevant, or potentially relevant, in the proceeding. This was because, by the time the case reached the Court of Appeal, Eames J had ordered judgment for the plaintiff without a trial on the substantive issues, and it was this

decision that was before the Court of Appeal. The primary proceeding had receded somewhat into the background when the issues were argued on appeal, and this may have influenced the way in which the Court viewed the dispute before it.

In the authors’ view, the Court of Appeal’s failure to keep in mind the nature of the real controversy that was before Eames J, and before the Court of Appeal itself — the dispute about rights and obligations that was required to be adjudicated in a negligence proceeding between a plaintiff and a defendant — led it to misconceive the nature of the task with which it was faced and to view the primary question as ‘what was the obligation of the defendant with respect to its documents?’, rather than the real question, ‘what should happen in the proceeding between the plaintiff and the defendant, given that documents had been destroyed by the defendant?’ This is much more than a technical or semantic distinction. In the authors’ view, it goes to the heart of the Court of Appeal’s error in this case.

E. The Court’s Use of the Terms ‘Obligation’, ‘Sanction’ and ‘Right’

1 The Court’s Use of the Term ‘Obligation’

‘Obligation’ is defined as ‘a binding requirement as to action; duty’.44 A ‘requirement’ is ‘that which is required; a thing demanded or obligatory’.45 If the court were dealing with a charge of attempting to pervert the course of justice, or contempt of court, it would have been appropriate to speak of a party’s ‘obligation’ with respect to the retention of documents. But that was not the case before the Court. The issue was what should, or could, have been the consequences of the destruction of documents, given its impact on the case before the Court.

The fact that consequences adverse to the defendant’s interests, such as the striking out of its defence, or parts of its defence, may follow in a civil proceeding from the pre-proceedings destruction of documents does not necessarily mean that the defendant has an obligation to retain the documents. If adverse consequences may follow from certain conduct, a party may have an incentive or a reason not to engage in that conduct. But that is quite different from saying that it has an obligation not to engage in that conduct. It may also have an obligation not to engage in the conduct, but that obligation does not arise from the fact that adverse consequences may follow in the civil proceeding. It can arise only out of a law or rule which imposes such an obligation.46

46 That the Court viewed the issue as one of obligation is confirmed by further statements in BAT v Cowell [2002] VSCA 197 (Unreported, Phillips, Batt and Buchanan JJA, 6 December 2002): ‘for the moment we are dealing only with whether a company, in the position of the defendant, is obliged to retain documents when litigation is not on foot but can be anticipated’: at [141]; ‘we turn to the critical question, whether there is any obligation on the defendant, before the commencement of proceedings, not to destroy documents which might well be relevant in future litigation when such litigation can reasonably be anticipated’: at [142]; and in its conclusion: ‘Nor, in our view, was the defendant shown to be in breach of any relevant obligation not to destroy documents before the commencement of the proceeding, given that the plaintiff did not rest her case on either an attempt to pervert the course of justice or contempt of court: at [191].
2 The Court’s Use of the Term ‘Sanction’

The Court’s approach is also apparent in its imprecise use of the word ‘sanction’ to describe the consequences (beyond the drawing of adverse inferences) that may follow from the pre-proceedings destruction of documents. The Court said:

The balance can be struck, we think, if it be accepted that the destruction of documents, before the commencement of litigation, may attract a sanction … if that conduct amounts to an attempt to pervert the course of justice or (if open) contempt of court.47

‘Sanction’ is defined as ‘a provision of a law enacting a penalty for disobedience.’48 This is a term better suited to a criminal proceeding in which a party is charged with attempting to pervert the course of justice or contempt of court by destroying documents in anticipation of proceedings than it is to a civil proceeding between two parties in relation to personal injury, where one party has destroyed documents in a way that makes it harder, if not impossible, for the other party to prove its case. The former is a case in which a law prohibiting certain conduct — attempting to pervert the course of justice or contempt of court — is applied. The sanction which gives practical effect to the law is the punishment of the offender and is imposed if the charge is proved. The latter is a case in which justice should be done between two parties; it is not concerned with imposing sanctions upon either of the parties. Consequences are not the same as sanctions. And the fact that they may be consequences which fall against a party’s interests does not make one into the other.

3 The Court’s Use of the Term ‘Right’

The Court’s approach is also evident in its framing of the issue as one of striking a balance between competing rights to manage and to have access to documents.49 Undoubtedly, the Court is correct; such a balance must be struck. But again, the idea of that balance being struck is more appropriately dealt with in the context of criminal offences relating to the pre-proceedings destruction of documents than it is in the context of a civil proceeding for personal injury. Deciding what consequences should follow in a civil proceeding from a party’s pre-proceedings destruction of documents is not primarily about striking a balance between the right of one party to manage its own documents and the

47 Ibid [173]. The Court later stated (at [175]) (italics in original, underlining added):

Accordingly, there being no authority directly in point, we consider that this court should state plainly that where one party alleges against the other the destruction of documents before the commencement of the proceeding to the prejudice of the party complaining, the criterion for the court’s intervention (otherwise than by the drawing of adverse inferences, and particularly if the sanction sought is the striking out of the pleading) is whether that conduct of the other party amounted to an attempt to pervert the course of justice or, if open, contempt of court occurring before the litigation was on foot.

48 Delbridge et al, above n 44, 1672.

49 The Court said in BAT v Cowell [2002] VSCA 197 (Unreported, Phillips, Batt and Buchanan JJA, 6 December 2002) that ‘there must be some balance struck between the right of any company to manage its own documents, whether by retaining them or destroying them, and the right of the litigant to have resort to the documents of the other side’: at [173].
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right of the other to have resort to them. It is about doing justice between the parties in the specific case before the court.

The word ‘right’ is defined as ‘a just claim or title, whether legal, prescriptive, or moral.’ Again, this is an appropriate word in the context of sanctions (a provision of a law enacting a penalty for disobedience), but not where the issue is what consequences should follow from the pre-proceedings destruction of documents. The fact that adverse consequences, such as the striking out of the defence, may follow in a civil proceeding from the destruction of documents by a party does not mean that the party did not have a ‘right’ to manage its own documents.

This distinction is best illustrated by example. A party may anticipate that one of the consequences of destroying documents prior to the commencement of anticipated proceedings may be the striking out of all, or parts, of its defence. It may calculate that to be a bad outcome, but may nevertheless choose to take its chances. It may want the documents never to see the light of day for both legal and public relations reasons; it may expect to settle the case for an outcome more favourable than if the documents had been available; or it may estimate the possibility of being sued, or of the defence being struck out in the event of litigation, as low enough to take its chances; and so on. If the litigation does eventuate, and the court finds that the plaintiff is, because of the destruction of documents, unable to prove all or part of its case, and the court does strike out the defence or parts of the defence in order to do justice between the parties, it cannot sensibly be said that the party did not have the ‘right’ to manage its documents as it wanted or even that its ‘right’ to do so was restricted. Rather, it chose to do certain things with its documents and certain consequences followed.

In the example just given, the defendant has effectively gambled and lost. But one can imagine a case in which the consequences that follow from the destruction of documents may not even be adverse to the defendant in the defendant’s own calculation. If the plaintiff’s claim is a small one, say for $10 000, and the defendant estimates the adverse publicity likely to follow from public disclosure of the contents of the documents as likely to cause $500 000 damage to its business, it may be perfectly happy with its decision to destroy the documents. It exercised its ‘right’ to manage its documents by destroying them, certain consequences followed, and the defendant is pleased with its decision. Equally, it could have exercised its ‘right’ to manage the documents by retaining them, but it calculated their destruction to be to its advantage.

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50 Delbridge et al, above n 44, 1625.
51 See, eg, the discussion of the Ford Pinto case in David Luban, Lawyers and Justice: An Ethical Study (1988) 206–10.
52 In the absence, that is, of independent proceedings brought to punish the defendant for the destruction.
53 It may be that the consequences resulting from the destruction of documents are likely to be more adverse to the defendant in McCabe v BAT than to the hypothesised defendant here — eg, because there is likely to be more than one plaintiff and/or damages are likely to be large in amount. But numbers of prospective plaintiffs or amounts of likely damages cannot make any substantive difference to matters of principle. These simply define the consequences of the
In the authors’ view, the Court’s failure to appreciate this distinction demonstrates its misconception of the questions before it. Both Eames J and the Court of Appeal ought only to have been concerned with doing justice between the plaintiff and defendant in the negligence proceeding — not examining issues concerning the defendant’s ‘right’ to deal at will, free from criminal sanction, with documents relevant to anticipated litigation. The resolution of the former was the matter that attracted the court’s jurisdiction; the resolution of the latter would only occur in the event that criminal proceedings were instituted against the defendant for an attempt to pervert the course of justice or contempt of court.

IV THE CRIMINAL OFFENCES OF ATTEMPTING TO PERVERT THE COURSE OF JUSTICE AND CONTEMPT OF COURT

A The Nature of the Offences

That the Court of Appeal in *BAT v Cowell* saw the facts as giving rise to serious issues concerning the sanctions that could be imposed upon those who had destroyed documents is hardly surprising. It is undisputed that the defendant destroyed documents knowing that many of those documents would be relevant in proceedings such as *McCabe v BAT* and would be evidence in any trial of the issues. Evidence is essential to the exercise by judges of judicial power, that is, their fact-finding and decision-making functions. Its destruction is therefore a serious matter. The criminal offence of attempting to pervert the course of justice was created to punish conduct which impairs the capacity of courts to perform the role for which they exist. In Victoria, attempting to pervert the course of justice is a level two offence, carrying the penalties of imprisonment for up to 25 years or a fine of up to $300,000.

Though the Court of Appeal spoke of both attempt to pervert the course of justice and contempt of court as criteria for intervention, it suffices here to focus on the former. To the extent that the two offences may both apply to the destruction of documents, there appears to be no substantial distinction between them. In *R v Rogerson*, McHugh J noted Archbold’s view that ‘the offence of perverting the course of justice is merely contempt under another name’. In *Meissner v The Queen*, Dawson J described the offence of attempting to pervert the course of justice as ‘a form of contempt under another name’.59

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54 See above Parts I and II(A).  
55 *Crimes Act 1958* (Vic) s 320.  
56 Level two offences carry a maximum penalty of 3000 penalty units, where one penalty unit equates to $100: *Sentencing Act 1991* (Vic) ss 109(2), 110.  
57 (1992) 174 CLR 268 (‘Rogerson’).  
60 (1995) 184 CLR 132 (‘Meissner’).  
It is beyond controversy that the offence of attempting to pervert the course of justice may apply to the destruction of documents prior to the commencement of civil proceedings. First, it is clear that the offence applies to conduct engaged in where no proceedings are yet on foot. Second, the accepted formulations of the offence would apply to the destruction of evidence or of material that may otherwise become evidence in a proceeding. The offence consists of doing an act that has a tendency, and is intended, to pervert the course of justice or the administration of public justice, whether in relation to criminal or civil proceedings.

See also *R v McLachlan* [1998] 2 VR 55, in which Byrne J explained both the actus reus (at 59) and the mens rea (at 67) of the offence of criminal contempt in terms used for an attempt to pervert the course of justice; *DPP v Johnson* [2002] VSC 583 (Unreported, Osborn J, 20 December 2002) [9].

It might be argued that the offence of attempting to pervert the course of justice requires an intent that is not required for contempt: see *Lane v Registrar of Supreme Court of New South Wales* (1981) 148 CLR 245, 258 (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ); *Hinch v A-G (Vic)* (1987) 164 CLR 15, 46–7 (Deane J), 69–70 (Toohey J), 85 (Gaudron J); *A-G (NSW)* v *Dean* (1990) 20 NSWLR 650, 655–6 (Gleeson CJ, Kirby P and Priestley JA). The better view seems to be that whether or not a particular intent is required for contempt of court will depend on the type of contempt. In cases of publication by the media of material that has a tendency to interfere with the administration of justice by impairing the capacity of a party to obtain a fair trial, ordinarily it will not need to be shown that the publisher intended to interfere with the administration of justice: see, eg, *Hinch v A-G (Vic)* (1987) 164 CLR 15; *A-G (NSW)* v *Dean* (1990) 20 NSWLR 650. But for other types of contempt, such as contact between a party and a witness or potential witness, an intention to interfere with the administration of justice may be required. In *R v McLachlan* [1998] 2 VR 55, Byrne J held that the prosecution in such a case ‘must establish to the criminal standard that the alleged contemnor had at the relevant time, an intention to pervert the course of justice’: at 67. His Honour drew (at 67–8) on *Meissner and Rogerson* — cases in which the accused were charged with attempting to pervert the course of justice, in relation to which the relevant intent is clearly required — to explain the nature of the mens rea required for the conviction of the accused in the case before him on the charge of contempt of court. In a subsequent case, *A-G (Vic) v Rich* [1998] VSC 41 (Unreported, Byrne J, 21 August 1998), his Honour doubted whether the court ‘should be concerned with an inquiry as to what was the actual purpose of the contemnor’, though he found it unnecessary to express a concluded view on the controversy: at [16]. See also *A-G v Butterworth* [1963] 1 QB 606, 723 (Sedgwicck MR); *Deen, Decentius v Stronghearts Pty Ltd* (1998) 8 Tas R 432 (Slicer J), *Prothoanony v Hirata* [2000] NSWSC 106 (Unreported, James J, 10 March 2000).

Where conduct is of the kind described here (ie, destruction of relevant material) and both offences would appear to apply, and where the offence of attempting to pervert the course of justice would require an intent to interfere with the administration of justice, the arguments in favour of requiring such an intention for contempt of court will be strong. Otherwise, the offence of attempting to pervert the course of justice would be redundant in relation to the very sort of conduct to which one would expect it typically to apply.

62 In *Rogerson* (1992) 174 CLR 268, 277, Mason CJ said:

> It is well established at common law and under cognate statutory provisions that the offence of attempting or conspiring to pervert the course of justice at a time when no curial proceedings are on foot can be committed. That is because action taken before curial or tribunal proceedings commence may have a tendency and be intended to frustrate or deflect the course of curial or tribunal proceedings which are imminent, probable or even possible.

See also at 281 (Brennan and Toohey JJ), 305 (McHugh J).

Note that the Court of Appeal expressed some doubt as to whether contempt of court could apply before proceedings have been instituted but found the issue unnecessary to examine. Their Honours stated that “[c]ertainly, there can be an attempt to pervert the course of justice before a proceeding is on foot, as *R v Rogerson* demonstrates, and that, we think, provides a satisfactory criterion in the present instance’: *BAT v Cowell* [2002] VSCA 197 (Unreported, Phillips, Batt and Buchanan JA, 6 December 2002) [173] (citations omitted).

63 See below n 71 and accompanying text.
In Rogerson, Mason CJ, speaking in relation to criminal proceedings, said that an act which deflects the police ‘from adducing evidence of the true facts’ would, if done with the requisite intent, constitute an attempt to pervert the course of justice. Brennan and Toohey JJ referred specifically to ‘denying [a court] knowledge of the relevant law or of the true circumstances of the case’. In the most comprehensive Australian judicial statement of the nature of the offence, Brennan and Toohey JJ said:

Justice, as the law understands it, consists in the enjoyment of rights and the suffering of liabilities by persons who are subject to the law to an extent and in a manner which accords with the law applicable to the actual circumstances of the case. The course of justice consists in the due exercise by a court or competent judicial authority of its jurisdiction to enforce, adjust or declare the rights and liabilities of persons subject to the law in accordance with the law and the actual circumstances of the case. The course of justice is perverted (or obstructed) by impairing (or preventing the exercise of) the capacity of a court or competent judicial authority to do justice. The ways in which a court or competent judicial authority may be impaired in (or prevented from exercising) its capacity to do justice are various. Those ways comprehend, in our opinion, erosion of the integrity of the court or competent judicial authority, hindering of access to it, deflecting applications that would be made to it, denying it knowledge of the relevant law or of the true circumstances of the case, and impeding the free exercise of its jurisdiction and powers including the powers of executing its decisions.

Later their Honours said that ‘[t]he gravamen of the offence of an attempt to pervert the course of justice is an interference with the due exercise of jurisdiction by courts and other competent judicial authorities.’

B The Criminal Offence Is an Inappropriate Criterion for Intervention: Tendency, Not Effect

That the Court of Appeal, in the authors’ view, misconceived the nature of the questions before it is further evidenced by the fact that, while it held an attempt to pervert the course of justice (or contempt of court) to be ‘the criterion’ for intervention beyond the drawing of adverse inferences, it did not consider the nature or elements of the offence of attempting to pervert the course of justice (or contempt of court). If the Court had considered what the offence of attempting to pervert the course of justice (or contempt of court) is, it may have recognised its inappropriateness as the criterion for the court’s intervention. Other than to say that ‘[c]ertainly, there can be an attempt to pervert the course of justice before a proceeding is on foot, as R v Rogerson demonstrates’, the Court of

64 (1992) 174 CLR 268, 278.
65 Ibid 280.
66 Ibid (emphasis added).
67 Ibid 284. Where a party’s dealings with its documents may interfere with ‘the due exercise of jurisdiction by courts’, its ‘right’ to manage its documents is restricted by the law, and a criminal sanction is imposed for contravention.
Appeal did not once mention that case (the primary Australian authority on attempting to pervert the course of justice) or any other case on attempting to pervert the course of justice (or contempt of court).69

The substance of the offence of attempting to pervert the course of justice is made clear in Rogerson.70 Mason CJ said that ‘[a]n attempt [to] pervert the course of justice consists in the doing of some act which has a tendency and is intended to pervert the administration of public justice’.71 The offence has two elements: that the act have a ‘tendency’ to pervert the course of justice, and be done with an ‘intent’ to pervert the course of justice. What is clear is that, in order for the offence to be committed, it need not be shown that the act did, in fact, pervert the course of justice; only that it had a ‘tendency’ to do so. That a tendency to pervert the course of justice is the criterion for the criminal offence is understandable. If a person intends to pervert the course of justice and their conduct has a ‘tendency’ to achieve that end, that ought to be punishable without also proving that the conduct actually did achieve that result. It is the conduct (and the requisite intent) that merit punishment. Whether the conduct does or does not ultimately pervert the course of justice may well be entirely beyond the control of the actor.72

A similar point may be made with respect to intention. One can readily understand why intention might be an element of the criminal offence. But why should it be a criterion for intervention by the court in a civil proceeding? If, for example, a party’s recklessness or negligence creates a situation where a fair trial is impossible, such that intervention by the court is necessary to protect the integrity of the civil proceeding, surely the court can intervene in an appropriate manner, even though intention to pervert the course of justice cannot be established.73

Neither of these criteria — tendency or intention — serves as a useful prerequisite for intervention where the issue is what ought to follow, in a civil proceeding, from the destruction of evidence. The issue for the court in a civil proceeding is what is, in fact, the effect in the instant proceeding of the destruction of evidence. The ‘tendency’ of the destruction to affect the civil proceeding is not the issue. The role of the court in a civil proceeding is to do justice

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71 Ibid 275–6. See also 279 (Brennan and Toohey JJ); Meissner (1995) 184 CLR 132, 141 (Brennan, Toohey and McHugh JJ), 156–7 (Dawson J).
72 ‘It is the tendency of the conduct which is decisive and it is irrelevant whether the conduct did or did not bring about a miscarriage of justice’: Rogerson (1992) 174 CLR 268, 298 (McHugh J). See also Meissner (1995) 184 CLR 132, 156–7 (Dawson J).
73 The focus on tendency rather than actual effect also applies in the case of contempt by publication of matter that may interfere with a trial: see, eg, Hinch v A-G (Vic) (1987) 164 CLR 15, 34 (Wilson J) where his Honour said that contempt of court will be made out ‘only if it is made quite clear to the court that the matter published has, as a matter of practical reality, a tendency to interfere with the due course of justice. The impugned material must exhibit a real and definite tendency to prejudice or embarrass pending proceedings.’ See also Deane J’s use of the phrases “‘clear tendency’ to interfere adversely with the due administration of justice’ and ‘as a matter of practical reality’: at 47.
74 See discussion in above n 61.
between the parties in the case before it. The court must be concerned only with the actual effect of the destruction of documents; how has the destruction affected the court’s capacity to adjudicate a dispute ‘about rights and obligations arising from the operation of the law upon past events or conduct.’\(^\text{74}\) If, for example, a party destroyed all relevant documents, thinking they were the only copies of such documents, but a copy of each document had surreptitiously been made by an employee and was available to the other party and to the court, what relevance could that destruction possibly have in the civil proceeding between the two parties? It may yet be punishable as an attempt to pervert the course of justice, but that is another thing entirely. The same may be said of an unsuccessful attempt to intimidate a witness, or to bribe a judge or juror, or to destroy a judge’s notes of proceedings. Clearly, these all have a ‘tendency’ to pervert the course of justice and are punishable, but if they are unsuccessful, what relevance can they have to the civil proceeding between the parties?

Had the Court of Appeal in \textit{BAT v Cowell} considered the elements of the offence of attempting to pervert the course of justice (or contempt of court), it may have seen its inappropriateness as ‘a criterion’ for intervention, let alone as the criterion for intervention. Its failure to do so further underlines that it saw the case before it as one about sanctions to be imposed against a party, rather than doing justice between the two parties to the civil proceeding. If the case had been about sanctions, the Court would have been justified in simply referring to the offence, as it did, and saying, as it said, that because the argument had not been made below, the Court would not express a view on whether the conduct did or did not constitute an offence.\(^\text{75}\) But in a negligence proceeding, in which the Court was required to find the facts and do justice between the parties, such an approach was, in the authors’ view, erroneous. It led to a result in which the ‘test’ for the Court’s intervention in a civil proceeding was not even informed by the question of whether a trial of the issues could be fair in the circumstances, in the absence of that intervention. This is despite the Court of Appeal’s recognition elsewhere in its judgment that, ‘[o]f course what is a ‘fair trial’ must inform any test which is adopted’, though it could not ‘stand in place of one.’\(^\text{76}\) The Court of Appeal’s approach may be contrasted with the judgment of Eames J, for whom the possibility (or impossibility) of fairness of a trial was crucial. His Honour said:

\begin{quote}
Once it is concluded, as I have concluded, that the plaintiff has been denied a fair trial, in circumstances which cannot be adequately redressed, then in my opinion there is no point in attempting to quantify the extent of the unfairness. A trial is either fair or it is not. Unless all unfairness which the defendant has
\end{quote}

\(^{74}\) \textit{Precision Data Holdings Ltd v Wills} (1991) 173 CLR 167, 188. See the discussion in above Part I. The fact that the court should be concerned only with the effect of the destruction of documents in the case it is adjudicating does not mean that it must turn a blind eye to conduct it considers worthy of investigation or punishment. For example, the court may instruct the Prothonotary to bring proceedings for contempt (see \textit{Supreme Court (General Civil Procedure) Rules 1996 (Vic) r 75.07}) or refer matters that come to its notice to the Director of Public Prosecutions.

\(^{75}\) \textit{BAT v Cowell} [2002] VSCA 197 (Unreported, Phillips, Batt and Buchanan JJA, 6 December 2002) [174], [191].

\(^{76}\) Ibid [172].
created can now be removed then a verdict by the jury in favour of the plaintiff would not demonstrate that the unfairness in the trial had been eliminated, but merely that the plaintiff had succeeded despite the unfairness of her trial. If it is necessary for me to be satisfied that there would remain a substantial risk of injustice to the plaintiff if the trial proceeds, even after further orders are made in an attempt to alleviate her disadvantage, then I am so satisfied.77

C Plaintiff Should Not Be Required to Prove the Commission of a Criminal Offence

Ordinarily, allegations of criminal conduct are pursued by the police and Directors of Public Prosecutions, who have the resources to investigate and prosecute such allegations. Why should plaintiffs be required to take on this role in order to obtain a just outcome in a civil proceeding which is essentially about other issues (for example, negligence or loss) and to devote their limited resources towards doing so? A plaintiff’s concern is to have his or her claim heard, and for the court to intervene appropriately where the destruction of documents by the defendant has prejudiced the plaintiff’s capacity to prove his or her case.

V Pre-Proceedings Destruction and the Possibility of a Fair Trial

A Introduction

McCabe v BAT proceeded at both the trial and appeal levels on the basis that there was no case authority directly on point. The parties referred to and relied on various English cases,78 but in those cases the conduct that gave rise to the failure to comply with discovery obligations or to produce relevant documents occurred after, not before, proceedings had commenced. Notwithstanding this factual difference, however, one fundamental principle resonates in those English authorities that can also shed light on issues raised by the pre-proceedings

77 McCabe v BAT [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [377].

See also Eames J’s other references to the issues of fairness of the trial: ‘I have concluded that the defendant’s actions have caused prejudice to the plaintiff and denied her a fair trial’: at [372]; at [378]:

I do not consider that prejudice could have been removed entirely were the trial to proceed and were I [to] make attempts, as discussed above, to ameliorate the prejudice suffered by the plaintiff. That being so, I have concluded that it would be an inappropriate course to adopt, to permit the trial to proceed, whether or not such a trial was by jury or by judge alone.

And at [379]:

The fact that the plaintiff might well overcome the prejudice to a fair trial which the defendant has created is no answer, in my opinion, to this application. Success under those circumstances would merely demonstrate that the plaintiff’s claim had merit. The defendant’s decision to destroy documents was predicated on the fact that a claim brought by a plaintiff at a later time might well have merit and could succeed unless steps were taken to deny a fair trial to the plaintiff. Failure of a claim where a plaintiff had been denied a fair trial, could never be shown to be a just result.

78 American authorities were also discussed, mainly in the context of the tort of spoliation. That tort was rejected as having no relevance in Australia and the cases were not relied on. Those authorities are therefore not discussed in this article.
destruction of documents — the crucial connection between the possibility (or impossibility) of a fair trial and the courts’ intervention.

B The English Cases

In Coleman v Dunlop Ltd,79 the plaintiff sued for damages for repetitive strain injury allegedly sustained during the course of his employment at the defendant’s factory. The trial judge struck out the defence on liability and entered judgment for the plaintiff because the defendants had failed to provide proper discovery of documents relevant to liability. The trial judge asked whether it would be possible for there to be a fair trial notwithstanding the absence of the documents, and concluded that it would not be possible because the missing documents went to the core of the plaintiff’s case.80 The decision was affirmed by the English Court of Appeal. Judge LJ stated:

The judge of course reminded herself of the relevant principles and, in particular, that the order being sought was not to be made merely to strike out a defence as a matter of punishment, but constantly to bear in mind that what she was deciding objectively is whether it would be possible to conduct a fair trial of the liability issue, which — of course it may now have been forgotten — was about the speed and weight at which the plaintiff was required to perform repetitive movements.81

It is true, as the Court of Appeal in BAT v Cowell observed, that this ‘case says nothing about documents destroyed prior to the commencement of the proceeding, let alone the deliberate destruction of documents with a view to prejudicing a prospective plaintiff.’82 But Coleman v Dunlop Ltd did say something important about — in fact, appears to have turned upon — the impossibility of a fair trial. This point was not lost on the Court of Appeal in BAT v Cowell; it acknowledged that the reason for the strike out in Coleman v Dunlop Ltd was that a fair trial was not possible. Yet the possibility (or impossibility) of a fair trial does not inform the Court of Appeal’s ‘test’ for intervention.

The possibility of a fair trial was also identified as the appropriate criterion of intervention in Logicrose Ltd v Southend United Football Club Ltd [No 1].83 In that case, the defendant alleged that the plaintiff’s principal director and shareholder, and also its principal witness, had failed to disclose the existence of a crucial document in his possession or power and, having obtained it during the course of the trial, had deliberately concealed its existence from the defendant and the court.84 The trial judge, Millett J, was not satisfied that the allegation was established. His Lordship said:

79 (Unreported, English Court of Appeal, Judge LJ and Lord Lloyd, 20 October 1999).
80 Ibid 3.
81 Ibid 2 (emphasis added). See also Judge LJ’s comment (at 3): ‘She [the trial judge] decided that the missing documents went to the core of the plaintiff’s case and that the deficiencies in discovery could not now be made good. Therefore she held that a fair trial was not possible’.
82 [2002] VSCA 197 (Unreported, Phillips, Batt and Buchanan JJA, 6 December 2002) [149].
83 (Unreported, English High Court of Justice, Millett J, 5 February 1988) (’Logicrose’).
84 Ibid 1.
Deliberate disobedience of a peremptory order for discovery is no doubt a contempt and, if proved in accordance with the criminal standard of proof, may, in theory at least, be visited with a fine or imprisonment. But to debar the offender from all further part in the proceedings and to give judgment against him accordingly is not an appropriate response by the Court to contempt.

It may, however, be an appropriate response to a failure to comply with the rules relating to discovery, even in the absence of a specific order of the Court, and so in the absence of any contempt, not because that conduct is deserving of punishment but because the failure has rendered it impossible to conduct a fair trial or would make any judgment in favour of the offender unsafe.

In my view a litigant is not to be deprived of his right to a proper trial as a penalty for his contempt or his defiance of the Court, but only if his conduct has amounted to an abuse of the process of the Court which would render any further proceedings unsatisfactory and prevent the Court from doing justice. Before the Court takes that serious step, it needs to be satisfied that there is a real risk of this happening.

Millett J was clearly making the point that consequences in a civil proceeding — such as debarring a party from further participation in the proceeding — could only be imposed by reference to the possibility or impossibility of the trial being fair, and not to punish the default. His Lordship’s reliance on fairness as the relevant criterion, and concomitant rejection of punishment, was certainly not lost on the Court of Appeal in *BAT v Cowell*. In its discussion of *Logicose*, the Court stated:

But his Lordship [Millett J in *Logicose*] added that he ‘would in any event, have refused to accede to this application once the missing document had been produced’, because the object of Order 24 Rule 16 is ‘not to punish the offender for his conduct but to secure the fair trial of the action in accordance with the due process of the Court’. Millett J was satisfied that there was no risk of injustice if the trial was allowed to continue. He said:

The deliberate and successful suppression of the material document is a serious abuse of the process of the court and may well merit the exclusion of the offender from all other participation in the trial. The reason is that it makes the fair trial of the action impossible to achieve and any judgment in favour of the offender unsafe. But if the threat of such exclusion produces the missing document, then the object of Order 24 Rule 16 is achieved.

The Court of Appeal dismissed the plaintiff’s reliance on the above quote because Millett J ‘was speaking in the context of a document allegedly coming to hand in the course of the trial, and, indeed, during cross examination’, rather than ‘the suppression of documents before the commencement of the proceeding.’

The important aspect of what Millett J was saying, however, was his use of the

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85 Ibid 1–2.
86 *BAT v Cowell* [2002] VSCA 197 (Unreported, Phillips, Batt and Buchanan JJA, 6 December 2002) [150].
87 Ibid [151].
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criterion of fairness of the trial to determine what the consequences of a failure to produce documents should be in a particular case.88

A similar case is Landauer Ltd v Comins & Co.89 In that case, the plaintiffs had breached their discovery obligations because a number of relevant documents that were not at first listed by the plaintiffs as part of discovery were subsequently destroyed.90 The plaintiffs did not knowingly destroy the documents; they destroyed files in which the documents were kept without first having checked if the documents were relevant in the proceedings already on foot. The trial judge struck out the plaintiffs’ claim for failure to comply with discovery requirements. The defendants had relied on r 24.16(1) of the Rules of the Supreme Court 1965 (UK) which, upon default in compliance with the requirements for discovery, authorised the court to ‘make such order as it thinks just, including, in particular, an order that the action be dismissed or … that the defence be struck out and judgment be entered accordingly.’ The plaintiff’s appeal on the ground that the trial judge’s exercise of discretion had miscarried was dismissed. Lloyd LJ stated: ‘It was common ground that the question [the trial judge] had to ask himself was whether there was a real or substantial or serious risk that a fair trial was no longer possible’.91 Here, again, the centrality of the fairness of the trial is evident.

The Court of Appeal in BAT v Cowell distinguished this case, as it did Logicrose and Coleman v Dunlop Ltd, on the basis that the case was not concerned with pre-proceedings destruction of documents. It stated:

Thus again, the case says nothing about the destruction of documents before the commencement of proceedings. It raises an interesting question about the proper test where essential documents are destroyed in consequence of which a fair trial may no longer be possible, particularly if that conduct is not deliberate but inadvertent (or as in Coleman accidental) and it suggests that the test of fair trial may not always be helpful.92

In the authors’ view, this last sentence reflects a misunderstanding of what Lloyd LJ said. His Lordship, as the Court of Appeal quoted, said:

There was, however, some discussion in argument before us as to what would have been the position if the documents had been destroyed in knowing disre-
gard of the plaintiffs’ obligation as to discovery. I find some difficulty in seeing how, if the sole question is whether a fair trial can still be held, the conduct of the plaintiffs in destroying the documents, whether it was merely inadvertent or whether it was in knowing disregard of their obligation as to discovery and therefore more blameworthy, can be fitted into the equation. But the question does not arise in the present case. It will need careful consideration when it does arise.93

Lloyd LJ’s comments did not, as the Court of Appeal in BAT v Cowell thought, suggest ‘that the test of fair trial may not always be helpful.’94 Rather, it questioned how the blameworthiness (deliberateness or inadvertence) was relevant to the central question of the fairness of the trial. Arrow Nominees Inc v Blackledge95 is another instructive case. The respondents applied for an order striking out a petition because of an attempt by one Mr Tobias, who controlled one of the petitioners, to pervert the course of justice by the production on discovery of documents that he knew to be forged. The petition was struck out because there was a substantial risk that the allegations were incapable of a fair trial as a result of the production on discovery of forged documents. Chadwick LJ stated

that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules, even if such disobedience amounts to contempt for or defiance of the court, if that object is ultimately secured, by (for example) the late production of a document which has been withheld.96

His Lordship continued:

But where a litigant’s conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled, indeed I would hold bound, to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court’s function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke.97

95 [2000] 2 BCLC 167 (‘Arrow Nominees’).
96 Ibid 193.
Chadwick LJ concluded:

In my view, having heard and disbelieved the evidence of Nigel Tobias as to the extent of his fraudulent conduct, and having reached the conclusion (as he did) that Nigel Tobias was persisting in his object of frustrating a fair trial, the judge ought to have considered whether it was fair to the respondents, and in the interests of the administration of justice generally, to allow the trial to continue. If he had considered that question, then, as it seems to me, he should have come to the conclusion that it must be answered in the negative.98

Again, the fairness of the trial lay at the heart of \textit{Arrow Nominees}. And again, the case was distinguished by the Court of Appeal in \textit{BAT v Cowell} on the ground that it ‘says nothing directly about conduct, such as the destruction of documents, before the commencement of the proceeding.’99 Yet again, the importance of fairness of the trial was overlooked by the Court of Appeal and is absent from its test for intervention. This may be contrasted with Chadwick LJ’s comment, not reproduced in the Court of Appeal’s decision, that:

To suggest that the basis on which the court acts, when deciding to strike out a petition on the ground that there is a substantial risk that a fair trial has become impossible as the result of a petitioner’s conduct, is founded upon the court’s determination that a petitioner of whose conduct it disapproves should be denied discretionary relief is to misunderstand the position in a fundamental respect. The court does not strike out the petition because it disapproves of the petitioner’s conduct; it strikes out the petition because it is satisfied that the petitioner’s conduct has led to an unacceptable risk that any judgment in his favour will be unsafe.100

Though the concept of a fair trial was central in these English authorities, the Court’s treatment of the concept of fair trial in \textit{BAT v Cowell} occupies only the following paragraph:

The judge here was disposed to accept a ‘fair trial’ as constituting the relevant criterion, but when documents are destroyed before the commencement of a proceeding, that test is less than helpful. After all, what is a ‘fair trial’? According to the defendant, there is a fair trial if, according to the rules of court and the obligations of the parties to the court, the court adjudicates upon the documents put in evidence and the oral testimony of the witnesses during the hearing. Of course what is a ‘fair trial’ must inform any test which is adopted, but it cannot stand in place of one.101

While the treatment of this central issue is surprisingly sparse — essentially, it consists of one rhetorical question and the setting out of one submission by the defendant — the Court did say that what is a fair trial must inform any test which is adopted, even if it cannot stand in place of such a test. Indeed, it is difficult to conclude otherwise than that what is a fair trial must inform any test which is

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98 Ibid 194.
100 \textit{Arrow Nominees} [2000] 2 BCLC 167, 195.
adopted. However, what is a fair trial did not at all inform the test ultimately adopted by the Court of Appeal.102

C Application of These Principles to Pre-Proceedings Destruction of Documents

A trial judge faced with the destruction of documents in a particular case has to determine what the consequences of the documents’ destruction should be. If the appropriate test of the court’s intervention in a situation of post-commencement destruction is whether a fair trial is still possible, it is also an appropriate test where the destruction occurred in the pre-proceedings phase. Considered in the light of the nature of the judicial function in a civil proceeding,103 and the fundamental purpose of discovery,104 the possibility of a fair trial should also be the criterion for judicial intervention when documents are destroyed prior to the commencement of litigation.

VI THE CORRECT QUESTION AND THE CORRECT ANSWER

A The Relationship between Fairness and a Court’s Inherent Jurisdiction

The question that courts ought to ask when relevant documents have been destroyed at a time when litigation was anticipated (and which has already been stated above) is this:

What consequences should, or may, follow, in a civil proceeding, from the destruction of documents by the defendant, prior to the filing of the proceeding by the plaintiff, at a time when the defendant anticipated litigation of the kind brought by the plaintiff, and where that destruction of documents has caused prejudice in the proceeding to the plaintiff? And, in particular, can such destruction of documents justify an order striking out the defendant’s defence, or parts of the defendant’s defence?

The answer to that question, as the authors have said, must lie in a consideration of the effect of the destruction of documents on the court’s capacity to exercise judicial power: to find the facts, to apply the law to those facts, and to do justice between the parties.105 The central concerns at issue here may be

102 The Court’s approach was made complete when it concluded that none of the prejudice suffered by the plaintiff as a result of the destruction of documents mattered at all unless the defendant had been shown to have breached an ‘obligation’ with respect to those documents. The Court referred to Eames J’s view that the prejudice from the destruction of documents was ‘very considerable’, and then listed a number of aspects of prejudice that his Honour had identified: ‘the prejudice to the plaintiff might be immense by virtue of the deliberate destruction of just one document, which might have been decisive in her case’; it would ‘be interesting to know … how many of the Cremona documents had been rated 5 (a “knockout” blow for the plaintiff) and how many of those had been discovered in this case’; and ‘the plaintiff’s anxiety that she may have been denied at least one “knockout” document, if not many’: McCabe v BAT [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [309]. The Court said ‘[t]hese comments lose significance if, as already concluded, the defendant was not shown to have been in breach of any obligation in destroying documents before the commencement of this proceeding — or, more accurately, any relevant obligation as the matter was argued’: BAT v Cowell [2002] VSCA 197 (Unreported, Phillips, Batt and Buchanan JJA, 6 December 2002) [185].

103 See above Part I.

104 See above Part II.

105 See above Part I.
expressed in different ways: ‘whether it would be possible to conduct a fair trial’; 106 whether a ‘fair trial of the action [is] impossible to achieve and any judgment in favour of the offender unsafe’; 107 whether it is ‘impossible to conduct a fair trial’ or any judgment in favour of the ‘offending’ party would be ‘unsafe’; 108 whether further proceedings would be ‘unsatisfactory and the conduct prevent[s] the Court from doing justice’; 109 whether there is a ‘real or substantial or serious risk that a fair trial [is] no longer possible’; 110 whether there is an ‘unacceptable risk’ that a judgment ‘will be unsafe’; 111 or whether ‘the fairness of the trial [has been put] in jeopardy’. 112 The possibility or impossibility of a fair trial (and the corresponding risk of an unsafe outcome) is central. 113

106 Coleman v Dunlop Ltd (Unreported, English Court of Appeal, Judge LJ and Lord Lloyd, 20 October 1999) 2 (Judge LJ).

107 Logicrose Ltd (Unreported, English High Court of Justice, Millett J, 5 February 1988) 10.

108 Ibid 1.

109 Ibid 2.


112 Ibid 194.

113 The Court of Appeal expressed concerns about the use of ‘fair trial’ as a criterion for intervention. In doing so, it drew on the comments of McHugh J in Perre v Apand Pty Ltd (1999) 198 CLR 180, 211–12 and Mann v Carnell (1999) 201 CLR 1, 40–1: ‘McHugh J has been very critical, more than once, of the concept of ‘fairness’ standing as a criterion … The concept of ‘fair trial’, particularly when divorced from the way in which a current proceeding is being conducted, is surely capable of attracting like criticism’: BAT v Cowell [2002] VSCA 197 (Unreported, Phillips, Batt and Buchanan JJA, 6 December 2002) fn 210. However, when McHugh J’s comments in these two cases are considered, in neither case do they provide support for the Court of Appeal’s concerns. In Perre v Apand Pty Ltd (1999) 198 CLR 180, McHugh J was cautioning against the use of such notions as fairness, justice and morality as criteria for imposing a duty of care in a negligence context as this would not help the negligence doctrine ‘escape the charge of being riddled with indeterminacy’: at 212. But the idea of fairness here is a far cry from what it means in the context of a ‘fair trial’. In the former, the concern is of the indeterminate notion of fairness being used as a criterion according to which the outcome is to be determined. In the latter, fairness is as to the nature of the processes to be followed, and is essentially used in a procedural sense: and, of course, the notion of procedural fairness is well-known to the law. In Mann v Carnell (1999) 201 CLR 1, McHugh J was not, in fact, critical of fairness as a criterion in all circumstances. His Honour, dealing with the issue of waiver of privilege, distinguished between two categories of waiver: implied waiver, where it may be ‘unfair’ for a party to partially disclose privileged material and mislead by removing that material from its context and waiver by disclosure of material to a third party. His Honour thought that the notion of fairness was relevant to the former category of waiver (‘In such a case, there is a clear potential for unfairness arising out of the capacity of disclosed material — which is part of an undisclosed whole — to mislead by reason of it being removed from its context’: at 34) but not to the latter. His Honour was not critical of the concept of fairness being used as a criterion per se, but of it being used in a particular context in which it was irrelevant. His Honour explained (at 35–9) why he thought that a fairness test of waiver ‘in the context of determining whether voluntary disclosure by A to B entitles A to assert privilege in the disclosed material as against C’ is contrary to, or not supported by, the rationales of legal professional privilege: at 35 (emphasis added), but immediately distinguished this category of case from that of partial disclosure. Where documents have been destroyed by a party in anticipation of litigation, in such a manner as to prejudice the capacity of the other party to obtain a fair trial, the situation is much more closely analogous to a partial disclosure case. After all, the inevitable impact is a trial (if it proceeds) in which only part of the ‘undisclosed whole’ is made available to the other party and to the court. It is not a case of ‘general’ concepts of unfairness as between the parties in dispute, but the specific unfairness of a trial in which only part of the relevant evidence is available. In
Such an approach is consistent with superior courts’ inherent power to control their own procedures and to ensure that their processes are not used to achieve injustice, and generally to prevent abuse of the process of the court. This power is not derived from any written law or statute, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called inherent. One of the classic statements of the inherent jurisdiction of a superior court is that of Lord Diplock, who described it as a court’s general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. Every civilized system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant … So, it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute.

It is clear that Australian courts have the power to control and supervise proceedings, and that this power includes the power to take appropriate action to prevent injustice. In Walton v Gardiner, Mason CJ, Deane and Dawson JJ referred to

the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.
B Factors Influencing the Discretion to Intervene

If the court’s power to intervene where documents have been destroyed or are otherwise unavailable is predicated on the need to prevent injustice arising from the impossibility of a fair trial, as the authors have argued, the factors relevant to the exercise of the discretion to intervene, and the nature of the intervention, can be articulated. These factors would apply in a broadly similar manner regardless of whether the destruction occurred in the pre-commencement or post-commencement stages. In a sense, the court’s task, once it has been established that a fair trial cannot proceed because relevant material is unavailable, is to apportion between the parties the consequences of the impossibility of a fair trial. This will, in many cases, be a difficult task, but it is not one from which the court can shy away. In performing this task, the court must be guided by notions of fairness. At one end of the spectrum will be cases in which neither party is responsible for the circumstances which have made a fair trial impossible, such as where relevant material has been lost through accident. Cases like these will be particularly difficult. At the other end of the spectrum will be cases in which one party has deliberately brought those circumstances about, such as through the deliberate destruction of relevant material. The consequences dictated by considerations of fairness will, no doubt, be clearer in these types of cases.

In determining where along this spectrum a particular case falls, the court will examine why the relevant material is unavailable. There are essentially four issues that will be relevant here:

1. Whether the relevant materials are unavailable because of circumstances for which one of the parties is responsible, either because:
   (a) the documents have been deliberately destroyed by one of the parties. The concept of ‘deliberateness’ used here is as to the act of destruction, rather than its intention or motive. That is, was the act of destruction an intentional act, regardless of why it was engaged in? or
   (b) the documents have been destroyed as a result of the recklessness or negligence of one of the parties.

2. If the materials were deliberately destroyed by one of the parties, or destroyed as a result of the recklessness or negligence of one of the parties, whether the deliberate destruction or recklessness or negligence occurred at a
time at which proceedings of the kind ultimately brought were, or could reasonably have been, anticipated.

3 If the materials were deliberately destroyed by one of the parties, whether they were destroyed for the purpose of preventing their use by the other party in litigation of the kind ultimately brought.

4 Where the materials are unavailable because of circumstances for which one party is responsible, whether records of the now unavailable materials are also unavailable, and whether they are unavailable for the same or similar reasons.

Though each of these factors will be important, the last may weigh particularly heavily in the exercise of the discretion, at least where the destruction of both the materials and the records of those materials was deliberate, and at a time when proceedings were or might reasonably have been anticipated, because of the requirements of r 29.04 of the Supreme Court (General Civil Procedure) Rules 1996 (Vic). That rule requires that an affidavit of documents ‘for the purposes of making discovery of documents’ shall (emphasis added):

(a) identify the documents which are or have been in the possession of the party making the affidavit;

(b) enumerate the documents in convenient order and … describe each document or, in the case of a group of documents of the same nature, shall describe the group, sufficiently to enable the document or group to be identified; and

(c) distinguish those documents which are in the possession of the party making the affidavit from those that have been but are no longer in his possession, and shall as to any document which has been but is no longer in the possession of the party, state when he parted with the document and his belief as to what has become of it.

In such a case, a party has deliberately placed itself in a position where it will be unable to comply with orders for discovery once the anticipated proceedings eventuate.120

120 In such cases, the court may intervene not only by way of its inherent jurisdiction, but also under r 24.02 of the Supreme Court (General Civil Procedure) Rules 1996 (Vic), which provides that the court may dismiss a pleading or strike out a defence where a party fails to comply with an order for the discovery of documents.

The Court of Appeal’s apparent lack of regard for the fact that not only had documents been destroyed, but also records of the documents destroyed, is especially surprising in light of the requirements of Supreme Court (General Civil Procedure) Rules 1996 (Vic) r 29.04. The Court referred to Eames J’s finding that ‘[n]o record was kept, and deliberately so, as to what documents had been destroyed’: BAT v Cowell [2002] VSCA 197 (Unreported, Phillips, Batt and Buchanan JJA, 6 December 2002) [106], citing McCabe v BAT [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [289]. The Court thought that ‘such conduct was surely no more than a reflection of the warning given in the manual in use at the conference at Kuala Lumpur [on records management]’: at [106]. That warning was that there was ‘no point in disposing of a paper record only to find that the same record is still being kept on a computer file or word processing disc’: at [103]. The Court said (at [103]):

So much was surely self-evident and unexceptionable. The sting, for the judge, lay in the tail [of the warning]: ‘especially if you have a discovery order served on your Company by a court’. But given that the discovery for any large business organisation was likely to be a most onerous task and one not lightly to be encouraged, the sting is no sting at all. It is self-evident.
The context in which a weighing up of the above factors must occur includes consideration of what materials are unavailable (as far as this can be determined), and how important the unavailable materials appear to be to the issues in dispute between the parties. A decision to exercise the court’s inherent powers to protect its processes and prevent injustice by striking out a defence, or parts of a defence, can be justified by reference to factors such as those identified above, considered in the context of the relevance and importance (as far as these can be determined) of the unavailable materials to the issues in dispute between the parties.121

Finally, it should be emphasised that although the factors the authors have identified relate to a party’s responsibility for the unavailability of the relevant

It does not bespeak illegitimate purpose, although it plainly demonstrates an awareness of the problem.

See also the Court’s response to Eames J’s findings that not only had hard copies of documents been destroyed, but also CD-ROMs on which some 30,000 documents had been imaged before destruction. The Court said (at [109]) (emphasis added) (citations omitted) that

this may be seen to reflect, yet again, the warning mentioned in paragraph [103], that there is not much point in destroying the hard document only to keep a record on computer if, as we think was the case, one at least of the problems facing the defendant in litigation was the magnitude, expense and complexity of meeting any notice for general discovery. As will be seen shortly, the Cremona litigation had demonstrated the difficulties and it was surely not surprising that, given that experience, the defendant, when destroying documents in March 1998, was at pains to destroy also the computer imaging of the documents being destroyed. But again the point is peripheral on this appeal; for while it is a question whether the destruction of documents generally constitutes a breach of a defendant’s obligations though litigation is yet to be commenced, the answer to that question is not affected by the failure to keep a record of what is destroyed. It adds nothing save emphasis to the breach, if such it be; and if it be not a breach it adds nothing at all.

Though the authors have argued throughout this article that the issue is not to be framed in terms of ‘a defendant’s obligations’ with respect to the retention or destruction of documents, the deliberate destruction also of the records of the documents destroyed must be a highly relevant factor under any approach, given the requirements of Supreme Court (General Civil Procedure) Rules 1996 (Vic) r 29.04. See BAT v Cowell [2002] VSCA 197 (Unreported, Phillips, Batt and Buchanan JJA, 6 December 2002) [139] where the Court, early in the section of its judgment dealing with the destruction of documents, assumed, for the purposes of its reasoning, that no record was kept of what was destroyed in the ‘period of frantic activity’ following the lifting of the hold order in March 1998.

121 The Court of Appeal in BAT v Cowell [2002] VSCA 197 (Unreported, Phillips, Batt and Buchanan JJA, 6 December 2002) [186]–[190] criticised Eames J on the ground that his Honour had failed to sufficiently relate the destruction of documents in question to the issues raised in the proceeding before him. The Court identified certain issues which it said the plaintiff should not have been relieved of the burden of having to prove, including that she smoked cigarettes, and that she smoked the defendant’s cigarettes. The Court said (at [188]):

The remedy should have been related more directly to the prejudice seen to have been suffered. With respect, the remedy adopted was out of proportion to the wrong, even if the judge’s criticisms of the defendant’s conduct, both in relation to the order for discovery and the destruction of documents more generally, were to be accepted.

In the authors’ view, such an exercise (ie, relating the remedy to the prejudice) ought to be performed by a court deciding these matters. Eames J performed such an exercise: McCabe v BAT [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [290]–[322], [370]–[379]. See, in particular, his Honour’s conclusion at [378]:

I do not consider that prejudice could have been removed entirely were the trial to proceed and were I [to] make attempts, as discussed above, to ameliorate the prejudice suffered by the plaintiff. That being so, I have concluded that it would be an inappropriate course to adopt, to permit the trial to proceed, whether or not such a trial was by jury or by judge alone.

If the Court’s view was that Eames J had gone too far, it ought to have carefully considered how far he ought to have gone, rather than evading the question entirely on the ground that the commission of a criminal offence had not been proved.
materials, and inevitably overlap with considerations relevant to the punishment of a party for an attempt to pervert the course of justice or contempt of court, they are not relevant in this context on the basis that they justify the punishment of the party. Rather they are relevant because they are legitimate factors to guide the exercise of discretion that seeks to apportion fairly between the parties the consequences of the unavailability of the documents. Under the Court of Appeal’s approach, the power to intervene (beyond the drawing of adverse inferences) is enlivened only by proof of conduct deserving punishment. Under the approach the authors have proposed, responsibility for the unavailability of the documents may go to the exercise of discretion as to whether and how to intervene. The power to intervene, however, is much broader, and is one to be understood as it relates to the nature and rationale of the exercise of judicial power.122

In the authors’ view, the approach suggested here is to be preferred to that applied by the Court of Appeal in BAT v Cowell not only for the reasons of principle explained in this article, but also because it is likely to produce preferable outcomes in practice. First, there may be cases where a party deliberately destroys documents, although it cannot be proved that it did so with an intent to interfere with the administration of justice. In such cases, intervention by the court, which may be desirable, would not be justified under the Court of Appeal’s approach because the charge of attempting to pervert the course of justice (or contempt of court) could not be made out. Second, the authors have argued for a much broader and more flexible approach in which a court could consider all the circumstances relevant to the unavailability of the documents and would not need to fit these circumstances within the narrow confines dictated by the task of proving the elements of specific criminal offences. The criminal test is thus inappropriate not only for the reasons explained in this article, but also because it is an unjustifiable fetter on the court’s inherent power to control its own process and to ensure that its process is used to achieve justice between the parties.

122 Though the authors have spoken throughout this article of the court’s capacity to strike out a defence, or parts of a defence, in the circumstances we have described, we do not mean to foreclose the possibility of courts adopting other, perhaps more creative, means of intervention. One possibility is that a court may reverse the onus of proof in relation to specific allegations to which the unavailable material is relevant. While we have not found authority for such an approach, we note the statement of Lord Maugham in Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd [1941] 2 All ER 165, 179 (emphasis added):

the burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule which applies is El qui affirmat non ei qui negat incumbit probatio (the burden of proof lies on him who affirms, not on him who denies). It is an ancient rule founded on considerations of good sense and should ... not be departed from without strong reasons. Perhaps the destruction of relevant material by a defendant in anticipation of litigation provides ‘strong reasons’ for a court to depart from the traditional approach in an effort to do justice between the parties whose ‘controversies’ in relation to ‘rights relating to life, liberty or property’ it is charged with deciding. Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330, 357 (Griffith CJ).
C Why Adverse Inferences Are Not Enough

The authors have proposed an approach that allows courts to intervene, in circumstances where documents have been destroyed, in a way that takes account of, and seeks to respond to, the effect of the destruction of documents on the capacity of courts to exercise judicial power. This broad approach is to be preferred, for two reasons, to approaches such as those suggested by the defendant in McCabe v BAT, which seek to limit the intervention of courts to the drawing of adverse inferences against the party that has destroyed the documents.

First, if the possibility of fairness of the trial is the essential criterion, as the authors have argued it should be, then approaches that would allow only the drawing of adverse inferences suffer from one of the central flaws of the Court of Appeal’s test. Such approaches focus on the state of mind of the party that destroys the documents, rather than on the difficulties caused by the destruction for the exercise of judicial power. Adverse inferences can only be drawn from the destruction of documents where a party is held to have destroyed the documents for the purpose of preventing their use in proceedings. No adverse inferences may be drawn against a party where such a purpose is not found; yet the prejudice suffered by the other party, and the impact on the court’s capacity to do justice between the parties, is the same, independent of the state of mind of the destroying party. In such a case the party prejudiced by the other party’s destruction would be made to suffer, on its own, the consequences of the destruction. There would be no way to apportion between the parties the consequences of the unavailability of the documents.

Second, there will be cases where the documents destroyed would have been so damaging to the interests of the party destroying them that the power of adverse inferences will inevitably fall a long way short of the power that the documents themselves would have had in the proceedings. In McCabe v BAT, Eames J addressed such a problem. He held that it had to be assumed that the defendant, in destroying the documents in the face of advice that adverse inferences might be drawn against it, ‘regarded the damage which the defence would suffer if the inferences were drawn against it, as being outweighed by the extent of the damage which it would suffer if the plaintiff had access to the documents.’

His Honour held that ‘[p]ermitting the trial to proceed in [such] circumstances could not remove the prejudice suffered by the plaintiff.’ Indeed, under approaches that limit intervention to the drawing of adverse inferences, a perverse dynamic is established: the more damaging the documents, the greater the prejudice to the other party arising from their destruction, the greater the damage to the court’s capacity to exercise judicial power, and the greater the advantage to the party destroying them.

123 McCabe v BAT [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [376].
124 Ibid.
125 In criminal law, the destruction of evidence by an accused may, in certain circumstances, lead to an inference of ‘consciousness of guilt’, and the ‘guilty mind’ lead to an inference of guilt of the offence charged: see Andrew Palmer, ‘Guilt and the Consciousness of Guilt: The Use of Lies, Flight and Other “Guilty Behaviour” in the Investigation and Prosecution of Crime’ (1997) 21
VII Conclusion

Evidence is essential to the effective exercise by courts of their fact-finding and decision-making functions. In the absence of evidence, why bother with courts? The process of discovery is one of the ways in which evidence is made available in the civil litigation process. When relevant evidence is lost or destroyed, the fact-finding process is compromised. Inevitably, so too is the ability of the court to reach a just outcome.

Judges who find themselves in such a situation must decide how to deal with the unavailability of relevant evidence. The authors have argued in this article that the test which should be applied in such circumstances should focus on whether a fair trial of the issues is still possible, notwithstanding the destruction or loss of evidence. The authors have argued that such a criterion is entirely consistent with the exercise of courts’ inherent powers to take appropriate action to prevent injustice.

The authors have identified some of the key factors that should guide courts in determining whether, and how, to intervene (such as by striking out a pleading or parts of a pleading) in such cases. The reasons for the unavailability of the evidence will be crucial. These include whether evidence has been deliberately destroyed by a party, when and for what reason. The relevance of these factors is not that they justify the punishment of a party for its conduct, but that they guide the court in its attempt to apportion fairly between the parties the consequences of the unavailability of the evidence.

The criterion of fairness is equally relevant to the destruction of evidence both before and after the commencement of proceedings. That is because the role of a court is to do justice between the parties in the case it is adjudicating, and that

Melbourne University Law Review 95. In such a context, inferences are drawn from the destruction of evidence, rather than the accused person’s defence to the prosecution, or parts of the defence, being struck out.

The rationale for the difference in approach lies in the fundamental difference between civil and criminal proceedings. In criminal proceedings, the court is charged with deciding whether the prosecution, representing the state, has established, beyond reasonable doubt, that the accused is guilty of the offence charged, with punishment to follow from a finding of guilt. The finding of guilt, and its consequences (including the potential deprivation of liberty) are such grave matters that they may be imposed only where commission of the offence charged is proved. The destruction of evidence may be suggestive of guilt (and care must be taken in so finding in a particular case), but it cannot be used to supplant the need to prove guilt. A civil proceeding, however, does not look at whether a party has committed an offence against the state (and the community as a whole) that is worthy of punishment, but at the resolution of controversies between parties in relation to their rights and obligations. The notion of doing justice varies with the essence of the proceedings. Where one party destroys evidence in a civil proceeding, care must be taken to ensure that the prejudiced party is not left without an adequate remedy. Further, in the case of a criminal prosecution, the state will ordinarily be in a strong position to take action against the accused in relation to the destruction of evidence, such as through a prosecution for the very serious offence of attempting to pervert the course of justice. Any ‘loss’ suffered by the state as a result of the destruction of evidence of an accused is different in nature from the loss suffered by a party to a civil proceeding where the other destroys evidence. Where loss is different in nature, the appropriate remedy will ordinarily be different, too.

Chris Haan has reminded us that, in the criminal context, destruction of evidence by the prosecution may well lead to the staying of proceedings. The staying of criminal proceedings is perhaps analogous to the striking out of a pleading in civil proceedings. Without engaging in a detailed discussion of the different, as well as common, issues that are involved, the important point to make is that the appropriate response varies in accordance with the task the court is performing and the various public interests at stake.
role may be prejudiced equally by the destruction of evidence before commencement as after. This is not to say that the deliberate destruction of evidence either in anticipation of or during proceedings is not a serious matter worthy of punishment. Indeed, it is. It represents a fundamental attack on the role and rationale of courts. However, its punishment ought to occur through the criminal offences of attempting to pervert the course of justice and contempt of court, rather than in the civil proceeding (or proceedings) it has prejudiced. In *BAT v Cowell*, the Court of Appeal erroneously focused on the lawfulness or unlawfulness of the destruction of documents (an issue which had not been argued at trial) and lost sight of the primary issue, namely the extent to which the destruction of evidence had affected the plaintiff’s capacity to obtain a fair trial of her allegations.

In *Arrow Nominees*, Chadwick LJ remarked that:

> [It] is no part of the court’s function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice.\(^\text{126}\)

This is the central consideration that should guide courts as they seek to resolve the issues created by the unavailability of relevant evidence.