53/08; [2008] VSC 532

SUPREME COURT OF VICTORIA

McCONVILLE v WASON

Coghlan J

5 March, 1 December 2008

ACCIDENT COMPENSATION – PERSON LODGED CLAIM WITH RESPECT TO A BACK INJURY – PERSON TREATED BY LOCAL GENERAL PRACTITIONER AND OBTAINED WORKCOVER CERTIFICATES FROM DOCTOR TO DEMONSTRATE HIS CURRENT MEDICAL CONDITION AND CAPACITY FOR WORK – PERSON OBTAINED PAYMENTS – PERSON'S WIFE SET UP BUSINESS SIMILAR TO THAT OF EMPLOYER – PERSON ACTIVELY INVOLVED WITH BUSINESS – PERSON FAILED TO PROVIDE FULL AND PROPER INFORMATION TO DOCTOR – PERSON CHARGED WITH FRAUDULENTLY OBTAINING PAYMENTS – CHARGES FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *ACCIDENT COMPENSATION ACT* 1985, S249(1).

1. Where a person was actively involved in a business set up by his wife whilst receiving payments under the *Accident Compensation Act* 1985, the person was obliged to provide full and proper information to his doctor so as to enable the doctor to certify with certainty what the person's capacity for work was.

2. Whilst the person may have acted honestly, that is he did not set out to deceive the doctor, it was open to the magistrate in finding the charges proved to find that the person did not act reasonably in not appreciating the importance of full disclosure to the doctor of what he was doing with the business since it was patent that the doctor was required to certify his work capacity, which she said was "nil".

COGHLAN J:

1. The appellant has appealed against the finding of guilt on three charges pursuant to s92 of the *Magistrates' Court Act* 1989. The relevant provision is:

> **"92. Appeal to Supreme Court on a question of law**
> (1) A party to a criminal proceeding (other than a committal proceeding) in the Court may appeal to the Supreme Court on a question of law, from a final order of the Court in that proceeding."

2. There are ten questions of law, (a) to (j), posed for consideration by the Court. The second of the questions, (b), involves sub-questions (b)(i) and (ii). The ten questions of law are accompanied by seventeen grounds of appeal. The questions of law and the grounds are set out in Appendix One.

3. As the nature of the proceedings would indicate, the appellant is a person who, on 16 September 2003, lodged a claim under the *Accident Compensation Act* 1985 ("the Act") with respect to a back injury. That injury occurred in June 2003 and was in fact an aggravation of an existing injury. Nothing turns on the distinction. The appellant worked as an industrial refrigerator mechanic for Price Air Conditioning Pty Ltd.

4. After the claim was made, it was accepted by the authorised WorkCare insurer, Allianz, on 16 October 2003, and the appellant received weekly payments until April 2004. From September until December 2003, when his employment was terminated, the appellant was on light duties.

5. The appellant was being treated by his local general practitioner, Dr Jillian Thompson.

6. To maintain the payment of weekly payments, the appellant was required to obtain WorkCover medical certificates to demonstrate his current medical condition and hence his capacity to work.

7. At some time in 2003, the appellant's wife had set up a business called B-Wright

Refrigeration ("B-Wright"). B-Wright was in the business of industrial air conditioning and was a competitor for Price Air Conditioning Pty Ltd. The appellant became involved with the business. The extent of that involvement and the dates of it will be an important consideration on this appeal.

8. The appellant was charged with a total of 17 charges. The first 14 of those each alleged that he had fraudulently obtained payment under the Act. The conduct was alleged to have occurred between 21 January 2004 until 31 March 2004. The appellant was acquitted of those charges. They are only relevant for present purposes as part of the narrative and because they are linked in part to the reasoning of the presiding Magistrate.

The offence

9. The offence is created by s249 of the Act as it then was:

> "**249. False information**
> (1) A person must not provide orally or in writing or by electronic transmission any false or misleading information under this Act or the ***Accident Compensation (WorkCover Insurance) Act*** **1993.**
> Penalty: 20 penalty units or imprisonment for one month."

10. These proceedings are only concerned with consideration of the Act and reference to other Acts will be omitted for convenience.

11. Section 249(1) prohibits the provision of any false or misleading information under the Act. Such information is not limited to information in connection with any claim, application, certificate or notice under the Act. (See s249(1A)).

12. What information is it that the worker is obliged to provide under the Act?

13. The payment of weekly payments is dependent upon the worker providing a certificate from a medical practitioner dealing with the worker's capacity to work. (Section 111(1) and (2) and s105 of the Act). The medical practitioner is required to certify that, otherwise, there will be no weekly payment. The certificate is dependent upon a number of matters dependent, in part, on the information provided by the patient.

14. The allegation of the Crown is that the appellant failed to inform Dr Thompson the full extent of his activities in connection with the business B-Wright.

15. Such disclosure was relevant "under the *Accident Compensation Act*" because it would be used by Dr Thompson to determine whether or not she would certify that the appellant was "fit for alternative duties", as she had done in the certificate dated 7 January 2004 (Exhibit PJM5) or "unfit for any work duties", as she had done in certificate dated 10 February 2004, 23 February 2004 and 22 March 2004 (Exhibits PJM6, 7 and 8 respectively).

16. The extent of work engaged in by the appellant and found by the Magistrate was –

- Supervision of his son
- Attending at worksites on a regular basis
- Helping his wife occasionally with quotations
- Performing limited work himself for B-Wright.

17. Dr Thompson's evidence is set out in detail later in this judgment.

18. In argument, it emerged that not all of the points of law and grounds were relied upon.

19. The appeal is argued on five grounds.

> (i) that discussions between doctor and patient in consultation were not "information" within the meaning of s249(1);
>
> (ii) that there was insufficient evidence to determine what had been said to Dr Thompson. In particular, insufficient evidence to show what information was given to Dr Thompson as a client on the specific dates, namely, 10 February 2004, 23 February 2004 and 22 March 2004 to support the proposition

that she had been misled;
(iii) that it was not open for the learned Magistrate to find that the honest belief of the appellant was not reasonable. That is, that on the findings of the Magistrate, he could not have rejected the *Proudman v Dayman*[1] defence;

(iv) even if the "information" was "information" under the Act, then such "information" could only be misleading if it was not known to the insurer. The fact that he provided the information to other agents of the employer means he discharged that obligation or that matter would have to be taken into account when dealing with the reasonableness of the appellant's belief;

(v) the finding of guilt arose in circumstances outside and in a way other than the way the case was put by the respondent.

20. The principal question is whether or not the appellant was frank with Dr Thompson about his involvement in the B-Wright business. Dr Thompson knew of the existence of the business and knew that his son was employed by it as an apprentice. She knew that the appellant was responsible for his son's supervision. She assumed from what she was told by the appellant's wife, Tracey, that the supervision was largely over the telephone. Whether that material is strictly admissible against the accused may not be particularly relevant at the end of the day. It is information which the doctor did not have which is the crux of the matter. It is indicative of the proposition that she had not been told much by the appellant of what work he was performing. In any event, the appellant appears to have accepted in his record of interview that Dr Thompson had been told what is suggested above.

21. Before being found guilty, it would be necessary for the prosecution to show that on 1 and 23 February 2004 and 22 March 2004, the appellant attended on Dr Thompson for a consultation and he failed to communicate the details of the work which he was performing.

22. It was common ground that on 10 February 2004, 23 February 2004 and 22 March 2004 the appellant attended Dr Thompson and was provided with a document titled "WorkCover Certificate of Capacity". Dr Thompson signed each of the certificates and certified –

> "... that I clinically examined this patient. The information and medical opinion obtained in this Certificate One, to the best of my knowledge is true and correct."

23. Under the heading "Capacity of worker", on each occasion Dr Thompson had entered dates against the printed entry "Unfit for any work duties" (see Exhibits PJM6, PJM7 and PJM8 on the appeal).

24. The certificates were forwarded by the appellant on to his employer or to the insurer.

25. On each form, under the heading "Capacity for work", the following printed instruction is included for the assistance of the medical practitioner completing the form:

> "Discussion with the employer may assist you to find out whether suitable employment is available for your patient, given his injury".

26. At least by the time the certificate of 10 February 2004 was provided, Dr Thompson accepted the view that no suitable employment was available. The employment of the appellant with Price Air Conditioning Pty Ltd had ceased by that time in any event.

27. It is not clear whether anything turns on it or not in this case, but the appellant did not complete the back of the "Certificate of Capacity".

28. The back of the form includes a "Patient Declaration". The employee is asked to declare whether or not they have been engaged in any form of paid employment, self-employment or voluntary employment since the last continuing certificate of capacity was provided and to declare that the details given in the certificate are true and correct, knowing that false declarations are punishable by law.

29. Somewhat surprisingly, the insurer made payments after receiving the certificates, notwithstanding the fact that the certificates were incomplete.

30. As I have already set out, the appellant had originally set out extensively the points of law and grounds of appeal relied upon in the Notice of Appeal.

31. There are a number of general difficulties which otherwise arise in this case. None of the evidence of the appellant is available due to an equipment malfunction. There is no doubt that the real "battle ground" in this case related to 14 charges of which the appellant was acquitted. The submissions on these three charges were very "economic".

32. When dealing with misleading Dr Thompson, there are two matters which are absolutely integral to the finding of guilt in this case. There are what was Doctor Thompson told and what was she not told. The second proposition will carry with it also a consideration of when it was she was not told of particular work being undertaken by the appellant.

33. It must be said these charges are technical. It is clear that the case would have been entirely different had the appellant completed the declaration on the back of the certificate. He should not have been paid benefits because he had made no declaration. It is in that context that the false or misleading information arises directly out of his dealings with the doctor when it might not otherwise have done so.

34. It is important to see what Dr Thompson was told. It appears on the whole of her evidence that she did know that the business, B-Wright, had been established and that it employed Luke McConville, the appellant's son, as an apprentice. She also knew that Luke was being supervised by the appellant, but surmised that it was by telephone. Her recollection was that she thought that was her belief as a result of something which she had been told by the appellant's wife, Tracey. In his record of interview, the appellant accepted that when Dr Thompson said in her statement: "During our discussions I believe Mark was spending most of his time on his course due to his chronic back pain … And if his son had any technical difficulties on the job, Mark could be contacted by his son on the phone", that statement or those statements was or were correct. (Question and answer 135 and 136, Exhibit B, appellant's affidavit of 10 January 2007).

35. In my view, it is a fair assessment of the evidence of Dr Thompson that, apart from knowing of its existence, she did not know very much about the appellant's involvement with B-Wright. She did seem to know more about the appellant's dealing with his former employer and knew that no real work was being offered to him there.

36. It was on about 10 February 2004 that she made the decision to change her assessment of the appellant's capacity for work. In the form headed "WorkCover Certificate of Capacity", under the heading "Capacity for work", she had said, under the sub-heading "Work Restrictions": "Not to drive long distances. Alternate between sitting and standing. No prolonged standing, no bending, no lifting weights > 5 kg. To continue working Tues and Thurs only for 6 hours per day". Her assessment capacity was: "Fit for alternative duties 9.1.04 to 9.2.04".

37. As I have already noted, in a certificate in the same form dated 10 February 2004, Dr Thompson certified that the appellant was "Unfit for any work duties from 9.2.04 to 23.2.04". She signed further certificates on 23 February 2004 and 23 March 2004 covering the periods 28 February 2004 to 23 March 2004 and 23 March 2004 to 23 April 2004. In each of those certificates she certified that the appellant was "unfit for any work duties" for the relevant period.

38. In her evidence, Dr Thompson said at T107:

> "MR McKENNA: Did you next see him on 10th February 2004?
> DR THOMPSON: Yeah. Yes.
> MR McKENNA: And tell us what occurred at that consultation.
> DR THOMPSON: I've just summarised the whole consultation by saying that his back was getting sore with the travelling and also he was having trouble because he was going to physio regularly in Frankston and he was getting tired and sore from that.
> MR McKENNA: Now when you say that he reported, is that right, that his back was getting sore from the travelling?
> DR THOMPSON: Yes.
> MR McKENNA: Was the circumstances in which he was travelling. Did he tell you?
> DR THOMPSON: Well I thought it was travelling the long distances that his boss was making him drive.
> MR McKENNA: And by his boss, who did you understand that to be? The same gentleman …

DR THOMPSON: Yeah, the same nasty gentleman who I spoke to before.
MR McKENNA: Alright. That was 10th February 2004.
DR THOMPSON: Yeah.
MR McKENNA: Could you have a look at this document.
DR THOMPSON: Yeah, and that's why at that point decided that he ... I'd write him as unfit for any work because there was obviously a lot of animosity between him and his boss. I tried having him working at light duties with his boss and I think it was probably at that point that he told me that there was actually no real work for him. And in the past when he had actually been working for the two days he was just being made to travel long distances which wasn't suitable. And I think ... look I can't remember exactly but I think that at that time in time he actually hadn't been ... the boss hadn't actually given him any work for a long period of time.
MR McKENNA: At which point in time was it that you say he hadn't given him any work for a long time.
DR THOMPSON: I don't know, I didn't record it.
MR McKENNA: Yes. Doctors aren't so interested in that.
MR HARBER: You didn't identify what's in front of you. What is the document that counsel's given you there?
DR THOMPSON: Oh that's a WorkCover certificate from the 9/02 to 23/02/04 and it's unfit for any work duties. but I ... at that point in time I thought well the boss isn't giving him any work. He wants to ... Mark wants to concentrate on his rehab and getting his back right so we'll concentrate on that and just forget about the work, since there was no real work. Wasn't being given any and even when he was being given work earlier it was inappropriate. And I'm sorry I can't tell you at which point he actually hadn't been given any work.
MR McKENNA: On that date, that is 10th February 2004 ...
DR THOMPSON: Yeah.
MR McKENNA: Did he Mr McConville inform you of what he was doing to fill his days?
DR THOMPSON: No.
MR McKENNA: When did you next see him?
MR HARBER: If ...
MR McKENNA: Sorry Your Honour.
MR HARBER: Don't want to do your job for you.
MR McKENNA: I'm sorry. Your Honour done the job for me so I'm sorry.
MR HARBER: OK. Thank you. That will be Exhibit F gentlemen.
MR McKENNA: Thank you Your Honour.
DR THOMPSON: February 23rd. Monday February 23rd.
MR McKENNA: And I noticed that in the previous Exhibit the period covered that was to the 23rd February. What was the reason for his attendance on 23rd February?
DR THOMPSON: Oh to get another certificate and review of his condition. At that stage I had started him on anti-depressants hoping that would pick up his mood but as I've written there it hadn't really made any difference at all and he'd suffered a little bit of a setback after one of his examinations. And by back doctor I presume I mean Dr Brendan O'Brien who was the orthopaedic surgeon that I sent him to see, to see if there was anything else that could be done to help his back.
MR McKENNA: Do you know when that consultation with Dr O'Brien occurred?
DR THOMPSON: Yes. Yes. I've got it in my bag. I've got ... I've got letter from Dr Brendan O'Brien on 11th March 2004. I've got another letter on 30th March ... oh sorry, 31st of August 2004 and another one on 30th March 2005.
MR McKENNA: You said that he'd suffered a bit of a setback as a result of I think attending the specialist examination, you didn't say specialist but I gather it was Dr O'Brien's attendance. Which consultation was it with Dr O'Brien and when was it. That occurred.
DR THOMPSON: Right, so what date's that. February 23rd. Don't know. I haven't got a letter from that time.
MR McKENNA: Just what I'm concerned about is to try and identify when the setback was suffered in terms of what you said about impacting on his ...
DR THOMPSON: Yeah, OK.
MR McKENNA: ... depression apparently.
DR THOMPSON: Yeah. Well the setback is in terms of his leg pain returning. Now I have written back doctor but it looks like he didn't actually see Brendan O'Brien till 11th March. So I'm not sure what I meant by back doctor. Maybe it was the physio or someone like that.
MR McKENNA: In any event ...
DR THOMPSON: It was more that his pain had increased at that point.
MR McKENNA: In any event your notes of 10th February record this event. That is there was some setback.
DR THOMPSON: That's 23rd February.
MR McKENNA: I'm sorry. 23rd February.
DR THOMPSON: Yeah.
MR McKENNA: Beg your pardon.
DR THOMPSON: That's alright. And at that point I thought I'd do a trial of a short course of Prednisolone to see if I could settle some inflammation in his back due to the presumed injury.
MR McKENNA: Well now ...
DR THOMPSON: Or aggravation of the injury I should say.
MR McKENNA: Did Mr McConville tell you on 23rd February how he'd been filling in his days?
DR THOMPSON: No. Except that I knew he was going to attend the physio in Frankston quite frequently.
MR McKENNA: Can you say whether or not you enquired about what he was doing, I mean, during his daytimes or ...
DR THOMPSON: No I didn't.

MR McKENNA: You think you did not ask him?
DR THOMPSON: No, not at that point.
MR McKENNA: Why not?
DR THOMPSON: Why not? Because I didn't think it was relevant. I was … in that consultation I was more focused on his increase in pain and what I could do to lessen it.
MR McKENNA: Yeah.
DR THOMPSON: I suppose I was more focused on the medical things. I wasn't so much focusing on the depression in that consultation.
MR McKENNA: I'd ask you to look at this document please. Is that a medical certificate for WorkCover purposes that you provided on 23rd February 2004?
DR THOMPSON: Yes.
MR McKENNA: Certifying him unfit for any duties?
DR THOMPSON: Yes.
MR McKENNA: Can you say whether it occurred to you to consider at that time whether he might be suited for alternative duties or light duties?
DR THOMPSON: Look I did think that he was able to do light duties but he was attending the physio so frequently that after … the day after he'd see the physio he'd be in a lot of pain so the idea at this point in time was him to focus on his physio rehabilitation. Get his back as good as we possibly could and then once we'd done that then focus on you know, returning him to the workforce.
MR McKENNA: I tender the WorkCover certificate of capacity.
MR HARBER: Thank you. It will be G gentlemen.
MR WAUGH: Is that 22nd March 04?
MR McKENNA: 23rd Feb.
MR WAUGH: 22nd March 04.
MR McKENNA: 23rd Feb.
MR HARBER It's the period 23/2 until 23/3 of 04 Mr Waugh.
MR WAUGH: Thank you sir.
MR McKENNA: When did you next see him?
DR THOMPSON: March 22nd. And that was to receive another certificate. And I increased his anti-depressants at that point and I gave him a script for some pain killing tablets I'd also given him a script for painkillers back on February 23rd.
MR McKENNA: Now for the purpose of … did you … did you make enquiries of him, discuss what he was doing during the daytime?
DR THOMPSON: I think around this sort of time I started asking how the business was going because I knew that he had set up his own business to employ his son. He'd actually told me that I think before Christmas. But I didn't actually enquire as to what part he was playing in the business … although I did know that he was meant to be supervising his son as his son wasn't fully trained but I didn't enquire as to how he was doing that. I presumed it was by telephone or by … be he didn't actually say. I just presumed that." (Affidavit of appellant dated 13 June 2007 Exhibit "E").

39. It is of importance to see what was happening to the B-Wright business at that time and to ascertain what part the appellant was playing in it.

40. Bluescope Steel operate a business in Westernport Bay at Hastings. B-Wright could obtain work from Bluescope, but only indirectly as they were not registered contractors. The work was, therefore, by way of sub-contract to Universal Contracting Services. The witness, David Fritsch, operated that company. His dealings were largely with the appellant and all of his on-site dealings appear to have been with the appellant. It appears from documents tendered through Fritsch that B-Wright performed services on the Bluescope Steel premises at Hastings on 16 days between 12 January 2004 and 30 January 2004, 21 days between 2 February 2004 and 27 February 2004, 21 days between 1 March 2004 and 26 March 2004. Then in April, 13, 15 and 16, the appellant is recorded as working for eight hours on each of those days. The time sheets for all of the other days do not show to whom the hours worked relate. The earlier sheets were not kept in the same form.

41. Mr Fritsch gave evidence that B-Wright had first done a sub-contracted job in October 2003, although Mr Fritsch's company was really only the conduit for the payment of the work. After that, work became available in relation to air conditioning. In relation to that work, it was the appellant who contacted him on behalf of B-Wright.

42. Mr Fritsch said at p82 and following:

"MR FRITSCH: As in our employees and our casuals who come to site every day. And we'd see B-Wright utes on site and I would see Mark there on numerous occasions but I … as far as exactly what days I couldn't be sure of that either.
MR HARBER: Did you say numerous occasions or just occasions?
MR FRITSCH: Numerous occasions. Like two or three times a week sort of thing.

MR HARBER: Yep.
MR McKENNA: Did you ever can you say speak to him on any of those occasions when you were at a common toolbox meeting?
MR FRITSCH: Oh I'd say good morning to him. And yeah ... but as far as ... not that many times you'd actually ... I'd talk to him about the specifics of a job because that was handled by the Bluescope people.
MR McKENNA: I understand.
MR FRITSCH: Occasionally we would get quotes for project work which would involve air conditioning and I'd talk to Mark about that then. But ... but generally anything on site I'd talk to Mark. Anything off site in the office I'd talk to Tracey.
MR McKENNA: You said occasionally you would get quotes for project work and on those occasions you'd talk to Mark, is that right?
MR FRITSCH: Yes.
MR McKENNA: What do you mean by project work?
MR FRITSCH: If we were to do ... if I had a job packaged up and the job entailed numerous steps and one of those steps was air conditioning we would put that in part of the quote as a lump sum figure.
MR McKENNA: So you'd have to get, if you like, a sub-quote from him as to that component of the job, is that what you're essentially saying?
MR FRITSCH: Yes, yeah. And then bundle it all up together and give a total figure for the project. But they weren't all that frequent, those sorts of jobs.
MR McKENNA: As far as your dealings with B-Wright were concerned whenever it was necessary to get a quote for one of those project jobs for an air conditioning component would you ever speak to any person at B-Wright other than Mark McConville?
MR FRITSCH: No.
MR McKENNA: Did you ever see anyone else from Bluescope ... not Bluescope, from B-Wright at a toolbox meeting other than Mark McConville.
MR FRITSCH: Yes.
MR McKENNA: Who?
MR FRITSCH: Well Luke McConville. There was a fellow, I think it was Rob Newland.
MR McKENNA: Did you ever see either of them, Luke or Rob at toolbox meetings when Mark McConville was not there?
MR FRITSCH: No.
MR McKENNA: And just finally before we go, we'll return perhaps a bit to it tomorrow, but apart from you seeing Mr ... Mark McConville on the occasions that you've told us about, did you ever see him involved in any other activity at Bluescope?
MR FRITSCH: As in?
MR McKENNA: Any work activity. Work related activity. On site.
MR FRITSCH: Probably the only time I ever saw him was if he was looking at a job. Obviously ... I've definitely seen him in utes driving around the site.
MR McKENNA: When you say you'd seen him looking at a job, what do you mean by that?
MR FRITSCH: Well with a notepad and folder in hand and taking details of a job.
MR McKENNA: Yeah. Did it appear to you that there was any hierarchy of workers in B-Wright of those three that you named? Were they equal or ...
MR FRITSCH: Well I believe Mark was the group leader."

43. To further reinforce the period and the evidence which underlined the role played by the appellant, some of the evidence of the appellant's wife, Tracey McConville, is relevant. She said that she employed Robert Newland from 4 February until the end of March or early April 2004. She also said that it was the appellant, with assistance from his son Luke, who had done the work in October or November 2003.

44. In the Court below, the learned Magistrate said:

> "Over the course of the January to March period she was having discussions with the defendant about what was happening, not happening with his former employer. Further as a result of discussions with the defendant and perhaps his wife, she knew about B-Wright and on several occasions asked how it was going. She was told that the defendant was supervising his son in the context of the defendant spending most of his time on the couch. Supervision she assumed, and there is some suggestion in the defendant's answers in the record of interview that he in fact laid the seed for that assumption, that supervision would take place by telephone. She was not told in any discussions with the defendant the following: That the defendant was attending work sites on a regular basis to supervise his son and sometimes another worker. She was not told that the defendant was helping his wife occasionally with quotations. She was not told that the defendant was performing limited work himself for B-Wright. The defendant did not tell Dr Fraser those things in the context of her treating him and certifying his work status and capacity on a regular basis. I am satisfied in that context that what the defendant did tell Dr Fraser was misleading information, because of its truncated and limited nature. I am further satisfied that the defendant has raised from an evidentiary point of view the loosely termed defence of *Proudman and Dayman* as I have articulated it relying on Mr Justice Dixon's reasoning. I am satisfied that the defendant honestly believed that he was not attending

> and speaking to Dr Fraser to discuss his ongoing position fully with respect to B-Wright, his son or his limited role. Rather he honestly believed that he was attending and speaking to Dr Fraser to facilitate his own treatment and rehabilitation.
>
> The final question and the most crucial question is did the defendant have reasonable grounds for his belief or more correctly has the prosecution eliminated any doubt about there being reasonable grounds for that honestly held belief. In my view the prosecution has so achieved that position. When attempting to answer that question context is all important in my view. The defendant was discussing mentioning B-Wright and his own involvement in the context of the doctor assuming an ongoing responsibility to assess, determine and report his present work status and capacity. When anything was discussed about B-Wright and the defendant's relationship with B-Wright, that context demanded a full not part disclosure. I am satisfied that the whole relationship of doctor patient in a WorkCover setting demands full disclosure and there is nothing about that relationship or the surrounds of that relationship that provide a reasonable basis for the defendant's belief. In those circumstances given that this as I have said these charge are strict liability offences and I am satisfied that the prosecution have eliminated in my mind any reasonable doubts about the concepts raised by His Honour in *Proudman and Dayman* charges 15, 16 and 17 are proven gentlemen. Is there anything alleged."

It is common ground that the references to Dr Fraser are really references to Dr Thompson.

45. The actual grounds which need to be dealt with are as follows: Grounds (g), (h), (i), (j), (p) and (q).

46. I am satisfied that the offence created by s249(1) does include information provided to a doctor, including a treating doctor. The doctor in the present circumstances is obliged to certify capacity for work in accordance with s111 of the Act. The three charges under consideration alleged that the appellant provided false or misleading information to Dr Thompson in relation to his "work status" and "capacity for work". He may be convicted if the misleading information related to either particular. In this case, however, status related to no more than what the appellant was actually doing. His capacity has a more technical meaning related to s111 of the Act and is more directly under the Act. Dr Thompson is required to certify as to capacity but that certification will be bound up with the status of the worker, particularly in a case such as this. Dr Thompson has said that she may have certified differently if the complete position was known to her.

> "MR HARBER: The patient comes in and requires this certificate to continue the WorkCover payments.
> DR THOMPSON: Yes.
> MR HARBER: From a medical point of view you fill out the front …
> DR THOMPSON: Yes.
> MR HARBER: … to assert the continuing medical condition to facilitate the payments.
> DR THOMPSON: Yes.
> MR HARBER: But what happens hypothetically if a patient says well look since the last time I was here I have done some, to take the terms that he used, I've done some self employment. For example let's take this case. What if the defendant had said well in my company which you know all about, we've set it up, I've indeed gone out and done some supervision work which I'm satisfied is self employment.
> DR THOMPSON: Well I think you'd have to let WorkCover know about that.
> MR HARBER: I understand that, but doesn't he really have to let you know because that may affect …
> DR THOMPSON: Yes.
> MR HARBER: … what you're recommending on the front.
> DR THOMPSON: Yes. Yes.
> MR HARBER: And isn't that one of the purposes of the patient declaration.
> DR THOMPSON: Yes. Yeah. Because I … I would say suitable for light duties, supervisory role only.
> MR HARBER: Yes, that's what I'm saying to you. There's a nexus between what he's been doing in the last month and what you recommend to the WorkCover people through your front.
> DR THOMPSON: Yes.
> MR HARBER: So I'm still not following therefore why it would not … assuming that he said either to you directly or in that declaration, I have done some supervision work for my own company. I consider that self employment. Why would that part of the declaration not come to you before you did the front?
> DR THOMPSON: Well I … well the thing is that neither of us considered him to actually be employed …
> MR HARBER: No, no. This is hypothetical. This is hypothetical.
> DR THOMPSON: Oh OK. Well he fills the back out after he leaves the consultation.
> MR HARBER: Yeah it doesn't make sense does it.
> DR THOMPSON: No.
> MR HARBER: Because the declaration may indeed impact quite dramatically on what you recommend on the front.
> DR THOMPSON: But what … what happens is I just give a medical opinion as to what I think he is capable of doing. That's all I'm doing on the front. My medical opinion as to what he's capable of doing.

MR HARBER: I ... I follow that and I don't want to cross-examine you but surely what he ...
DR THOMPSON: And that can vary from patient to patient.
MR HARBER: Good. But surely what he is saying he has done in the last month in terms of employment.
DR THOMPSON: Yes.
MR HARBER: ... must impact surely ...
DR THOMPSON: Yeah, it would impact on what I would write on here. Yes it would.
MR HARBER: OK. Alright.
DR THOMPSON: Yes.
MR HARBER: OK. That's enough cross-examination from me, but that generally ... I ... I had no idea how this works and that indeed clarifies for me the way at least it works.
MR McKENNA: Did Mr McConville at any of the consultations prior to 30th April 2004 say anything about he personally lifting or carrying equipment relating to the business that he had ... was setting up or had set up?
DR THOMPSON: No.
MR McKENNA: Did he say to you anything about the duration for which he travelled in a motor car, drove a motor car from point A to point B?
DR THOMPSON: No."

47. Dr Thompson certified as she did on the basis that the relationship with the previous employer had broken down and that, apart from a small amount of supervision of the son, the appellant had nothing to do and she would therefore treat him as having no capacity.

48. The analysis of the evidence outlined above shows that the appellant was actively involved in B-Wright in October 2003 and then re-involved in January to April 2004. The importance of his involvement in October 2003 was that the appellant knew from that time onwards that such opportunities were open to him.

49. It is true that the doctor was misled largely by omission, but it was in a context that some information being provided, full and proper information ought to have been provided. That meant communicating to Dr Thompson at least enough information to show that the appellant was actively involved in the B-Wright business in the way described by the learned Magistrate below.

50. Put simply, Dr Thompson was misled because she was left in a position where she could not certify with any certainty what the appellant's capacity for work was. See *Commonwealth Homes and Investment Co Ltd v Smith* [1937] HCA 73; (1937) 59 CLR 443.

51. The grounds which allege lack of specificity between the dates of the charges and therefore the capacity for work forms and the lack of specificity as to what was told to Dr Thompson need to be considered in relation to the evidence. Dealing with periods 10 February 2004 to 23 February 2004, 23 February 2004 to 23 March 2004 and 23 March 2004 to 23 April 2004, it is clear that Dr Thompson was told very little, if any, of that activity and was left with the impression that the appellant was supervising to a very limited degree, and probably by telephone. The appellant confirmed that such information had been provided to Dr Thompson.

52. On the evidence of Mr Fritsch, read in conjunction with the evidence of Mrs McConville, it is clear that throughout the whole of the period January 2004 to April 2004 and covering the specific dates, the appellant was involved in the matters outlined by his Honour in his judgment to a substantial degree. His finding of guilt was appropriate.

53. His Honour found that the appellant acted honestly, that is, he did not set out to deceive Dr Thompson, and may well have confused her role as a treater with her additional role of being a "certifier", but he was the person obtaining the certificate for the purpose of continuing his payments and he was passing them on to his employer and on to the insurer. It was not reasonable for him to have not appreciated the importance of full disclosure to his doctor of what he was doing since it was patent that she was required to certify his work capacity, which she said was "nil". The appellant said in his record of interview that he did not regard that as being his capacity. It follows as an additional consideration that he was put on notice by what Dr Thompson had certified in the form. I do not accept that disclosure to others associated with the worker could alter that position. It follows that I do not accept that the so-called *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 ground has not been made out.

54. I also generally reject the notion that a person cannot mislead by material which is provided honestly, although that matter was not separately argued or relied upon before me. It seems that

the Magistrate below accepted that the misleading here was by inadvertence. That was consistent with his dismissal of the fraud charges and the small penalty (with conviction) which he imposed on those charges.

55. It was also argued before me that disclosure to any "functionary" associated with the insurer would constitute disclosure. It is really a sub or alternative ground to that which suggested that "information" supplied to your doctor was not information under the Act. It is, however, the importance of the certification system (s111 of the Act) which makes the "information", information under the Act and which, therefore, cannot be discharged by communication to the insurer in some other way or through some other party.

56. I should not be taken by the comments immediately above to mean that I would accept that disclosure in the detail necessary has been made in this case.

57. When the case is looked at as a whole, it does not seem to me that the Prosecution did alter the way the case was put. It was always clear that with respect to the three charges before the Court, the Prosecution were complaining that full disclosure had not been made to Dr Thompson.

58. I have considered the other written grounds and each of the points of law. There is nothing in that material which would lead me to conclude that his Honour the learned Magistrate fell into error.

59. For the reasons set out above, I dismiss the appeal with costs.

APPENDIX A

(I) The Order which is the subject of appeal

The order of the Magistrates' Court at Frankston constituted by his Honour, Mr Harber M., made on 18 December 2006 when his Honour found the following charges under s249(1) of the *Accident Compensation Act* 1985 proved:

(a) On or about 9 February 2004 the defendant at Somerville provided false or misleading information under the *Accident Compensation Act* 1985, namely to Dr Jill Thompson in relation to his work status and capacity for work.

(b) On or about 23 February 2004 the defendant at Somerville provided false or misleading information under the *Accident Compensation Act* 1985, namely to Dr Jill Thompson in relation to his work status and capacity for work.

(c) On or about 22 March 2004 the defendant at Somerville provided false or misleading information under the *Accident Compensation Act* 1985, namely to Dr Jill Thompson in relation to his work status and capacity for work.

And without recording a conviction adjourned the proceeding for a period of 12 months and released the appellant on the appellant entering a good behaviour bond to be of good behaviour and to attend Court on 18 December 2007 if called upon to do so. The learned Magistrate on 18 December 2006 also made orders dismissing 14 charges of fraud.

(II) Whether the appeal is from the whole or part only of the order and, if so, what part

The appeal is against the order or finding of the learned Magistrate that the appellant was guilty of the said three charges under s249(1) *Accident Compensation Act* 1985 ("ACA").

(III) The questions of law upon which the appeal is brought

(a) Can information honestly and truthfully provided be false or misleading within the meaning of s249(1) ACA.

(b) Did the learned Magistrate err in law in finding the appellant provided false or misleading information within the meaning of s249(1) ACA in circumstances:

(i) where the learned Magistrate concluded –

(aa) the appellant acted honestly;

(bb) the appellant gave honest and truthful information to his doctor;

(cc) the appellant was seeing or attending Dr Thompson for treatment.

(ii) where the learned Magistrate found that Dr Thompson was misled –

(aa) because of information given by the defendant's wife;

(bb) because of assumptions made by Dr Thompson.

(c) Can a person be guilty of providing false or misleading information within the meaning of s249(1) ACA not because of information provided but because of information not provided.

(d) Can a person be guilty of providing false or misleading information within the meaning of s249(1) ACA because of not providing information where there is no evidence that he was asked for such information.

(e) Can a person be guilty of providing false or misleading information within the meaning of s249(1) ACA where there is no evidence that the information given was inaccurate.

(f) Can truthful information honestly given be misleading within the meaning of s249(1) ACA.

(g) Can a person be guilty of providing misleading information within the meaning of s249(1) ACA in circumstances where there is no record and no evidence of precisely what information was actually sought.

(h) Can a person be guilty of providing misleading information within the meaning of s249(1) ACA where there is no determination of the information that was in fact false or misleading.

(i) Is information provided by a patient to his doctor during a consultation when treatment is being rendered by the doctor, information given under the *Accident Compensation Act* 1985 within the meaning of s249(1) of that Act.

(j) If a person is found to have acted honestly and truthfully at all relevant times, can he be found guilty of an offence under s249(1) ACA.

(IV) The Grounds of Appeal

(a) The learned Magistrate erred in failing to determine or define precisely what information was provided that was false or misleading.
(b) The learned Magistrate erred in finding that Dr Jill Thompson was misled –
(i) by comments made by the defendant's wife;
(ii) by assumptions made by the doctor;
(iii) by the absence of information provided –
And these factors rendered information given by the appellant that was honest and truthful to be misleading within the meaning of s249(1) ACA.
(c) The learned Magistrate erred in determining that information provided by the appellant to the doctor was false or misleading under s249(1) ACA when that information was true.
(d) The learned Magistrate erred in deciding that he could take into account assumptions made by the doctor when there was no evidence that the doctor communicated those assumptions to the defendant.
(e) The learned Magistrate erred in determining that he could take into account statements made by the defendant's wife.
(f) The learned Magistrate erred in determining that the Workcover scheme demanded full disclosure by a patient to his doctor.
(g) The learned Magistrate erred in determining that a person could be guilty of providing false or misleading information under s249 because of information not provided.
(h) The learned Magistrate erred by failing to define or determine precisely what false or misleading information was provided on or about 9 February 2004.
(i) The learned Magistrate erred by failing to define or determine precisely what false or misleading information was provided on or about 23 February 2004.
(j) The learned Magistrate erred by failing to define or determine precisely what false or misleading information was provided on or about 22 March 2004.
(k) The learned Magistrate erred by failing to define or determine precisely what false or misleading information was provided in relation to the appellant's work status and incapacity for work –
(i) on 9 February 2004;
(ii) on 23 February 2004;
(iii) on 22 March 2004.
(l) The learned Magistrate erred by failing to define or determine what information was given under the *Accident Compensation Act* 1985 to Dr Jill Thompson by the appellant:
(i) on 9 February 2004;
(ii) on 23 February 2004;
(iii) on 22 March 2004.
(m) The learned Magistrate erred by failing to determine precisely what evidence related to each of the charges under s249(1) ACA.
(n) The learned Magistrate erred by failing to take into account the evidence of Dr Jill Thompson and the evidence of the appellant that any information given by the appellant to Dr Jill Thompson was honest and truthful.
(o) The learned Magistrate erred by concluding that there was some law or principle to the effect that the doctor/patient relationship in a Workcover context required full disclosure.
(p) The learned Magistrate erred in determining or concluding that a failure by a patient to make full disclosure was an offence within the meaning of s249(1) *Accident Compensation Act* 1985.
(q) The learned Magistrate erred in determining that information given by the appellant to his doctor during consultations in the doctor's surgery when treatment was being rendered by the doctor to the appellant/patient was information provided under the *Accident Compensation Act* 1985 within the meaning of s249(1) ACA.
(V) The Order Sought in Place of that from which the appeal is brought
(a) That the three charges under s249(1) be dismissed.
(b) That the respondent pay the appellant's costs of the trial and the costs of this appeal.
All the persons upon whom it is proposed to serve the Notice of Appeal:
(I) The Clerk or Registrar or proper officer of the Magistrates' Court at Frankston
(II) The respondent, Mr Jim Wason.
(III) The Victorian Workcover Authority, Level 24, 222 Exhibition Street, Melbourne, Victoria, 3001.
Dated the 21st day of December 2006

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[1] [1941] HCA 28; (1941) 67 CLR 536.

APPEARANCES: For the appellant McConville: Mr MJG Waugh, counsel. Hounslow & Associates, solicitors. For the respondent Wason: Mr OP Holdenson QC, counsel. Victorian Workcover Authority.
