17/11; [2011] VSC 231

SUPREME COURT OF VICTORIA

TOMASEVIC v TOLL HOLDINGS LTD & ORS

Mukhtar AsJ

27 May 2011; (Reasons published 1 June 2011)

NATURAL JUSTICE — RIGHT TO SEEK LEGAL REPRESENTATION — LITIGANT IN PERSON — MOTOR CAR DAMAGE CLAIM —ARBITRATION TYPE PROCEEDINGS IN MAGISTRATES' COURT — INFORMAL PROCEDURE — SMALL CLAIM — MAGISTRATE'S INSISTENCE THAT CASE PROCEED — WHETHER DENIAL OF NATURAL JUSTICE.

T. sought damages from THLtd in relation to a motor vehicle collision. At the hearing (an arbitration) before a Magistrate, the parties gave evidence from which it appeared that when driving his motor vehicle T. cut across in front of a truck owned by THLtd thereby giving the truck driver insufficient time and space to avoid colliding with the rear of T's vehicle. T. was not legally represented at the hearing but was assisted by his father. The Magistrate found in favour of the version advanced by the truck driver and dismissed the complaint and made an order on the counterclaim plus costs. Upon appeal by T. it was submitted that he had been denied natural justice and procedural fairness in that he had been denied an adjournment and his father was not allowed to act in effect as T.s lawyer—

HELD: Appeal dismissed.

1. No application for an adjournment was sought therefore T. was not denied natural justice.

2. The Magistrate's refusal to allow T's father to act as his advocate was not a denial of natural justice. It is a duty of a judge or Magistrate in exercising relevant judicial powers and discretions to ensure a fair trial and to provide assistance to a self-represented litigant. Such an obligation, plain enough, is said to be consistent with international obligations specified in the International Covenant on Civil and Political Rights. This obligation requires a judge to intervene where this is necessary to ensure the trial is just and fair. In the present case, the Magistrate did precisely that.

***Tomasevic v Travaglini* [2007] VSC 337, MC38/2007, referred to.**

3. It will be a question of law if an appellant can show that there was some departure from the requirements of procedural fairness or natural justice. The Supreme Court is not concerned with the merits of the decision but only with the conduct of the proceeding below to see if it in some way deprived the plaintiff of a fair hearing. Enough in this case to state, resolutely, that there is not a particle of evidence that there was denial of natural justice. The proceedings were conducted in an orderly and fair fashion and T. was given every opportunity to give his explanation for how the accident occurred, and he did so. Naturally, there is an imbalance of skill of advocacy as between a barrister and a litigant in person. But nothing in this case supports the view that it was somehow abused or permitted by the magistrate to be abuse in any way so as to obscure a proper revelation of the facts.

MUKHTAR AsJ:

1. The appellant, a litigant in person, has filed a notice of appeal against a final order given against him by the Magistrates' Court at Moorabbin (constituted by Mr R Crisp) on 2 February 2011. This was, to use a widely accepted description in the legal profession, a "crash and bash" case on a relatively small legal scale. The respondent's truck collided with the rear of the appellant's stationary car. The impact was fortunately not severe. The appellant's was for damage to his car (a "write off") was $6000. The notice of defence, which went beyond the typical mere denials, said "the collision occurred when the vehicle driven by the plaintiff changed lanes in front of the vehicle driven by the defendant and came to a stop leaving insufficient room for the [respondent's vehicle] to avoid a collision...". And that is precisely what the Magistrate found. His Honour dismissed the appellant's claim, and made an order on the counterclaim for $5972 with interest of $252 and costs of $2347. The appellant can only appeal on a question of law. Doing the best I can to comprehend the grounds of appeal, it seems based on a broad complaint about a denial of natural justice although it also drifts into the merits of the decision.

2. On 27 May 2011 I dismissed the appeal under rule 58.10(8) on two grounds. First, the notice of appeal did not expose sufficiently or at all a question of law. Secondly and in any case,

there was no arguable case to be put on the appeal. Indeed, in my view it was bound to fail; and if it matters I would have come to the same decision as the Magistrate. I now publish my reasons for that decision. But before exposing the elements of the case, there are three contextual matters that should be exposed at the outset.

3. First, under section 102 of the *Magistrates' Court Act*, if, as here, the complaint seeks monetary relief under $10,000 the case is referred to and decided by arbitration. Under section 103(2), the Court is not required to conduct the proceedings in a formal manner. The Court is bound by the rules of natural justice. It is not bound by the rules of evidence and may inform himself in any matter that he thinks fit. An award made by the magistrate, as arbitrator, has the same force and effect as a court judgment. Naturally enough, the whole idea of this procedure is to enable small claims to be determined informally and with minimal expense. For a motor car collision the procedure lends itself to the drivers each giving their side of the story and typically a Court looking to the available objective or circumstantial evidence.

4. Secondly, before me, as happened in the Court below, the appellant's father, Mr Milan Tomasevic sought leave to appear on behalf of his son as his advocate. For convenience I shall refer to him as the father. He told me, in essence, that he, the father, was experienced in court proceedings, he had argued and won cases in Courts, and was able to handle the court proceedings better than his son and ensure there was no disadvantage. The appellant is 24 years old and a full time student at Deakin University. There is not a particle of a suggestion that the appellant is suffering from any physical, mental or emotional disadvantage or disability preventing him from addressing the Court or explaining the basis of an appeal. Indeed, he was able to conduct the case in the court below without difficulty in circumstances I shall explain later.

5. Thirdly, when the matter was last before me on 10 May 2011, I granted the appellant, who again spoke through his father, an adjournment over the opposition of the respondent to enable him to apply to the Public Interest Law Clearing House ("PILCH") for legal assistance. He had applied to PILCH on 4 May 2011, but a decision was yet to be made. When the matter returned for hearing, I was shown a letter dated 11 May 2011 from PILCH saying that the application for legal assistance had been accepted by the Victorian Bar pro bono scheme and would be referred to a barrister for advice on whether the appeal had reasonable prospects of success. As the letter says, that assessment would then enable PILCH to determine whether further assistance would be provided.

6. The father tells me that he has heard nothing from PILCH more since that letter. He says he was contacted on 23 May to be told that a transcript was needed before any advice could be given. The father says a transcript that would cost $600 which he cannot afford. Instead, he has obtained and exhibited a CD recording of the proceedings below. He went on to tell me that he has "shopped around" and spoken to seven solicitors in this case, none of whom would act without payment.

7. I recite all this, lest this case go further, to state the fact that when the matter came before me the father was not seeking an adjournment, but instead was seeking to appear on behalf of his son as his advocate. Initially, I informed the father that he could not in effect act as his son's lawyer, and there was no reason why his son could not address the Court. I need hardly say this, but the father and the son were assured that this Court would make allowances for anybody who appeared without a lawyer and would be treated with respect and equality, and that the most important thing was for me to understand what actually happened in the court below to discern whether there was a question of law for the Supreme Court to consider. I informed the father that he could appear as a *McKenzie*[1] friend, that is, sit with his son, provide moral support, assist him with documentation if any, prompt him, and quietly advise and assist him. The father said that was inadequate.

8. I am afraid to say there followed much quibbling, circumlocution and insistence. In the end, faithful to what I regard as this Court's duty to a litigant in person, I put to one side that there was no written transcript of the proceedings below and using a laptop computer brought to court by the respondent's counsel, I asked for the CD recording of the proceedings below to be played in court. I, together with the respondent's counsel and the father and son sat and listened. The object, of course, is not for this Court to assess the merits of the decision. The object of the

exercise was for me to understand what occurred in the court below to see if there was any question of a denial of natural justice in the way the Magistrate allowed the case to be conducted.

9. Having set the scene, I shall say a little bit about the claim. The collision occurred on 20 June 2010 in Warrigal Road in Oakleigh near the intersection with Dandenong Road. The plaintiff was in a passenger vehicle. The defendant was driving a B-Double truck—that is, a truck consisting of a prime mover towing two semi-trailers. It is a very large vehicle. I will not go through the evidence. In essence, the truck driver said (and the magistrate accepted) that whilst he was travelling along Warrigal Road, the appellant's car came across from the left-hand lane and directly stopped in front of him to turn right into a side street leaving him only about 20 to 30 metres to stop. He says he could not stop in time and collided with the back of the appellant's car. The elements of the case were not at all complicated. The question was whether the plaintiff did suddenly turn in front of the truck leaving him only 20 to 30 metres and no time to stop, or, whether there were some other facts to explain the collision.

10. As I said, I have listened to the entirety of the recording. I cannot be expected to provide my own transcript so what follows is very much an abbreviated account.

11. When the case was called over, the father sought to appear on behalf of his son. The magistrate told him that he could not appear and that his son was capable of conducting the proceedings himself. The magistrate also told the father that he could not sit at the Bar table and pretend to be a lawyer. He explained that one has to be a legal practitioner to represent a party in court. Pausing there, I wish to say that from beginning to end of this recording in my respectful view, the learned magistrate, did not in my judgment say anything, or use a manner and tone, which were in any way legalistic, discomposing or demoralising to the father and son in any way. To the contrary, if I may say so, they were as one would expect, treated very well throughout; firmly but with care to ensure the appellant gave his side of the story. After all, the appellant was hit from behind.

12. The father told the Magistrate they had asked to see the duty solicitor, and they tried to obtain the services of another solicitor which is why he, the father, wished to appear. The magistrate remarked that the case had to go on as it involved only the amount of $6000. He told the son that if he was driving the car then he would be more than capable of looking after himself. The son responded by saying, "I have no experience in court." The magistrate more out of reassurance than anything else, told him "That's okay" and that there would really be no difference between him speaking or his father speaking. Indeed, the magistrate said, it may be better that he the son spoke for himself because then there would be no obstacle between him and the Court and the free flow of evidence. The magistrate explained that it was a simple motor vehicle collision and it would come to be decided on the evidence of the parties. (All of that is surely correct.) The magistrate said the case would have to proceed, and that if it did not proceed, it would be dismissed. He then asked the son if he wished to proceed with the claim and the son replied that he did.

13. Again, in my judgment, telling the son that if the case did not proceed it would be dismissed was not said in a threatening or disarming tone. It was saying no more than the case should go on and there was no reason why it should not go on if it was simply going to turn on competing versions of who was to blame for the accident. It must be remembered this was an arbitration.

14. Witnesses were ordered out of court (except an assessor) and the appellant gave sworn evidence. I have listened to the evidence-in-chief. It is unquestionable the appellant was clear, articulate and spoke in an intelligent way. Not only that, but spoke in a way that showed he understood what the proceedings were about and he gave his account of the accident.

15. He was then cross-examined. As is usual with these cases, he was tested about his driving manoeuvres and intentions, his familiarity with the area, pre-accident observations, and relative positions of the vehicles. More pertinently, he was tested on the objective facts about the collision, his prior inconsistent statements to an insurer, and his admissions in post-accident conversation. This was all put to him to support the truck driver's version. One thing was clear. There is no doubt the plaintiff did wish to turn right into a street. And he was giving a version of events which was inconsistent with what he had said in writing to the truck driver's insurers

before proceedings were instituted. Moreover, in a conversation after the accident he admitted telling the truck driver that he gave him 20 to 30 metres and that was plenty of room to stop.

16. Pausing there, I wish to say that there was very limited questioning by the magistrate. His questions were designed mainly to clarify a few things. For reasons I will come to later, I have to also remark that counsel for the truck driver, Mr Kenyon (who appeared before me) conducted himself in a most unflamboyant, unaggressive and courteous manner, doing no more than clinically eliciting the facts to advance his client's case, and properly putting the truck driver's version to the plaintiff.

17. Then, the plaintiff called a passenger, Ms Amy Lee. The Magistrate helped her give her evidence. She was sitting in the front seat. She did not see much because she was checking a road map to see where they were supposed to be going. This was the first time they had been in this area and, she said, they were supposed to turn right back at Dandenong Road, they did not do so, and having passed through the intersection they knew they had to go back. This is why they had to find somewhere to turn right, and go back. She said the first time she saw the truck was when it hit them. This evidence did not assist the plaintiff's case.

18. The truck driver then gave his evidence. He has been driving for 35 years. He was in the right-hand lane without any cars in front of him. He travelled (south) along Warrigal Road having crossed over the Dandenong Road intersection. Then, the plaintiff's car simply changed lanes in front of him and stopped to turn right giving him only about 20 to 30 metres to stop. He said that he quickly applied the brakes which works on both sets of trailers but could not avoid impact. After the accident, he confronted the plaintiff and asked, "Why did you cut across?" The answer was, "I gave you 20 metres; you should have been able to stop."

19. The plaintiff was allowed to cross-examine. He had no difficulty formulating questions, although he did not ask many questions. His case did not seem at all concerned with road movements and the facts of the collision. Rather, the plaintiff sought to concentrate on the fact that the impact was not severe which suggests that there must have been a lot more than 20 to 30 metres between his car and the truck. (Yet that was irreconcilable with his own evidence.)

20. The magistrate gave judgment almost immediately. I shall not recite its contents but it was explicative and went through the evidence of all witnesses. He concluded the plaintiff was negligent in moving around the truck and giving the truck no room to stop. He preferred the evidence of the truck driver. In any event, the evidence was that having crossed Dandenong Road the plaintiff had to turn back, he was preoccupied and did not give the truck sufficient time to stop. As for the load speed impact, the magistrate put that down to the driver's quick reaction and his good brakes. The magistrate found, as I think he had to, that the plaintiff turned in front of the truck when there was only 20 to 30 metres between them.

21. Again, I would say with great respect to the magistrate, the reasons were careful and explanatory and lest it be thought that the milieu of the Court was in some way intimidating or unfair, I would say as a listener at least that the whole thing was conducted with decorum and behavioural fairness.

22. I turn now to the Notice of Appeal. I find it difficult to make a lot of sense of it. The father, who I let speak, was preoccupied with a decision of Bell J in *Tomasevic v Travaglini.*[2] That was the father's own case in which he sought and obtained *certiorari* in some County Court proceeding. That case stands for the proposition that it is a duty of a judge in exercising relevant judicial powers and discretions to ensure a fair trial and to provide assistance to a self-represented litigant. Such an obligation, plain enough, is said to be consistent with international obligations specified in the International Covenant on Civil and Political Rights. This obligation requires a judge to intervene where this is necessary to ensure the trial is just and fair. I would say the Magistrate did precisely that.

23. I pressed the father to state with precision what the complaints were about the denial of natural justice. This is what he said and in each case I shall deal with it:

(a) **He said that the magistrate was wrong to refuse the application for an adjournment.**

I reject this. No application for adjournment was sought. The magistrate refused the father permission to act as his son's advocate. Of course there are cases where an adjournment should be granted in the interests of justice: see *Dietrich.*[3] Otherwise, the requirement of natural justice must depend on the circumstances of the case, the rules under which the Court is acting, and the subject matter being dealt and considerations of cost and efficiency. The law is concerned to avoid practical injustice: see *Lam*[4] and generally Aronson and ors, *Judicial review of Administrative Action*[5] The Magistrate told the son that the case must go on. I think the case did have to go on and in any event I would not say there was a denial of natural justice in the context where there was an arbitration hearing and the object was to ascertain on evidence the competing explanations for the accident.

(b) **The magistrate accepted an irrelevant one-sided story.** This is an unintelligible point. When pressed, it was said that counsel had put words in his son's mouth. I reject this. Counsel did no such thing. Counsel tested, in the manner I have described, the son's version of the accident and demonstrated it to be improbable.

(c) **Counsel misled the Court about the road conditions for turning right.** Counsel did no such thing. He cross-examined the son about the prohibition on right turns in some of the streets. In the end that did not matter. The plaintiff cut across in front of the truck.

(d) **Counsel used his skill to "feed" the magistrate what was in the truck driver's favour.** Counsel did no such thing. The magistrate preferred the evidence of the truck driver which seemed to be consistent with the admissions made by the plaintiff after the accident had occurred.

(e) **The magistrate made a decision on facts which did not exist.** As I understood it that amounted to an argument that the decision was not open on the facts. This is unsustainable. The decision was not only open on the facts, but it was based on the strong weight of the evidence and the admissions made.

(f) **The magistrate was biased.** This was said to be because the magistrate accepted what is not fact. This makes no sense.

(g) **The magistrate breached human rights and the International Covenant on Civil and Political Rights.** I reject this. As I have said, the magistrate conducted himself in a manner that in my view was beyond criticism.

(h) **The magistrate applied the wrong test.** This makes no sense to me. The magistrate was conducting an arbitration. It was right to insist the case go on. The magistrate acted on the evidence.

(i) **The magistrate did not respect the disadvantaged of litigant in person against counsel.** I reject this. It was one version of the accident as against another.

(j) **The magistrate ignored the public interest in letting off a dangerous truck driver.** This is ludicrous.

24. Of course, it will be a question of law if an appellant can show that there was some departure from the requirements of procedural fairness or natural justice. This Court is not concerned with the merits of the decision but only with the conduct of the proceeding below to see if it in some way deprived the plaintiff of a fair hearing. I think I have said enough in this case to state, resolutely, that there is not a particle of evidence that there was denial of natural justice. The proceedings were conducted in an orderly and fair fashion and the plaintiff was given every opportunity to give his explanation for how the accident occurred, and he did so. Naturally, there is an imbalance of skill of advocacy as between a barrister and a litigant in person. But nothing in this case supports the view that it was somehow abused or permitted by the magistrate to be abuse in any way so as to obscure a proper revelation of the facts.

25. It is for those reasons that I have dismissed this appeal.

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[1] *McKenzie v McKenzie* [1970] 3 All ER 1034; [1970] 3 WLR 472; [1971] P 33. See also *Current Issues* in (2011) 85 ALJ 127 at 129.
[2] [2007] VSC 337.

[3] [1992] HCA 57; (1992) 177 CLR 392.
[4] [2003] HCA 6; (2003) 214 CLR 1, 13-14; (2003) 195 ALR 502; (2003) 77 ALJR 699; (2003) 72 ALD 613; (2003) 24 Leg Rep 8.
[5] (Fourth ed), chapter 8, *passim.*

APPEARANCES: For the plaintiff Tomasevic: In person. For the defendants: Mr N Kenyon, counsel. Harwood Andrews Lawyers.
