22/91

SUPREME COURT OF VICTORIA

BALDWIN v GOODMAN FIELDER & MILLS PTY LTD

Nathan J

17 January 1991

BIAS – CIVIL PROCEEDINGS – PARTICULARS OF NEGLIGENCE SAID BY MAGISTRATE TO BE DRAWN IN AN INAPPROPRIATE ORDER – INFERENCE THAT WITNESS/PARTY MAY BE UNTRUTHFUL – ALLEGATION THAT PARTY'S SOLICITOR PROFESSIONALLY NEGLIGENT – NO OBJECTION BY COUNSEL – PARTY WHOLLY UNSUCCESSFUL – REASONS FOR JUDGMENT UNEXCEPTIONAL – WHETHER JUDGMENT SHOULD BE SET ASIDE: *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1989, O9.

Whilst evidence was being given by a defendant in a motor vehicle collision case, the magistrate indicated that a party was required to plead the particulars of negligence in order of importance and that as particular 9 (which was said to have been the most relevant to the defendant's case) was not pleaded first the inference could have been drawn that the defendant was untruthful and that the defendant's solicitor may have been guilty of professional negligence. However, in giving judgment for the plaintiff, the magistrate made no reference to these matters and gave reasons for judgment in unexceptional terms. Upon order nisi to review—

HELD: Order nisi discharged.
(1) Whilst particulars of negligence should be set out with clarity and in a manner which brings the issues clearly before the court, the magistrate was incorrect in remarking that an adverse inference could be drawn from the manner in which the particulars were pleaded and that the solicitor was guilty of professional negligence.

(2) The test to be applied when bias is raised is whether the parties or an independent observer might entertain a reasonable apprehension that the magistrate might not bring an impartial and unprejudiced mind to the resolution of the matter.

(3) In the present case, the remarks of the magistrate could have given rise to the apprehension that the defendant was unlikely to receive a fair hearing. However, the magistrate's order would not be set aside because:
(a) in giving reasons for decision the magistrate's judgment was unexceptional, and;
(b) no objection was taken by counsel at the hearing.
***Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568; (1989) 87 ALR 633; (1989) 63 ALJR 610; (1989) 9 MVR 193; [1989] Aust Torts Reports 80-277, applied.**

NATHAN J: [1] This is the return of an order nisi to review, the nature of which is a wholesale attack upon the way in which a Magistrate conducted a case before him and ultimately arrived at a decision. The grounds of the orders nisi as edited by me are as follows:

> (1) The Magistrate erred in finding that the particulars of negligence recited in the defendant's counter-claim were required to be pleaded in order of importance.
>
> (2) That the Magistrate erred in finding that he could draw an inference that a witness would or could be untruthful if the witness failed to give evidence in accordance with the priorities set out in the particulars of negligence.
>
> (3) That the Magistrate failed to afford to the defendant natural justice in that he considered irrelevant matters.
>
> (4) That the Magistrate failed to extend natural justice to the defendant revealed in remarks made during the currency of the trial.

To comprehend these grounds more fully, it is necessary to rehearse the facts. The case centred around a motor vehicle collision, vernacularly referred to as a 'crash and bash' case. The complainant was the owner of a motor vehicle driven by one of its employees when it came into collision with a car driven by the defendant on the Princes Highway at Narre Warren on 22nd August 1989. The complainant particularised the defendant's alleged negligence as excessive speed, failure to keep a **[2]** look-out, and the remainder of the particulars were those common and usual to a failure to avoid a collision.

The defendant, by its counter-claim, asserted eleven particulars of the complainant's negligence, the first eight of which are in the same terms as those alleged against him. However, by the ninth particular it is said that the complainant changed lanes when it was unsafe to do so. This particular, to which I will subsequently refer, forms the basic ground of the dispute between the parties.

Returning to the narrative, it appears the Magistrate intruded into the examination-in-chief of the defendant and asked, "After the collision, did you inform your solicitor as to the circumstances surrounding the accident?" Mr Baldwin replied "Yes". The Magistrate then asked, "Was what you told your solicitor the same as you have said in this court?' Mr Baldwin again replied, "Yes" The Magistrate said, "Did you advise your solicitor to draw particulars of negligence in the amended statement of counter-claim in the manner in which they have been compiled?" The Magistrate was then interrupted by counsel for the defendant in the following terms: "With respect, this witness would not have a clue what items were included in the particulars of negligence and the details as to how the counter-claim is compiled would likewise be beyond him. Those matters are the responsibility of solicitors for the defendant." The Magistrate replied, "But the solicitor acts on the defendant's instructions and he is therefore responsible for what is contained in the documentation put before the court."

[3] The Magistrate then went on – and I use a narrative form of rehearsal as the same is not ascribed in direct speech in any of the affidavits. The Magistrate indicated that in his view the primary allegation was that the plaintiff's servant changed lanes without indication and that this was not mentioned until the ninth paragraph in the particulars, in his view it was, therefore, not the primary allegation of negligence. The Magistrate said further that the real issue had been buried in a mass of irrelevancy thus hiding from the plaintiff and the court the real issue in the case, this could give rise to the impression that the witness, that is in this case the defendant, could or may have been lying.

The Magistrate then had submitted to him by defendant's counsel that the way in which the counter-claim was drawn was generally through a word processing machine and therefore the solicitor would merely select the appropriate particulars and they would be printed electronically. The Magistrate then went on to observe that he was sick and tired of solicitors filing inaccurate and misleading documentation, as indeed were the particulars before him. He went on to say the true nature of the case could not be ascertained from the particulars of negligence as the prime allegation of changing lanes when unsafe was embedded at the tail-end of the document.

It appears the Magistrate then went on to say words to the effect that "it was high time practitioners were brought to account for this sloppiness and it may be that costs could be awarded against them." The Magistrate continued in terms that he felt "the defendant may well have an action in negligence against his solicitors for **[4]** incompetence in drawing up the particulars in the manner in which they were presented before the court."

It appears that the Magistrate said on a number of occasions that the correct allegations were not included in the particulars. This statement was apparently challenged by counsel for the defendant who contended that all the relevant particulars were before the Magistrate, but were not in the order preferred by him. The Magistrate apparently replied that he thought they should be in correct order with the central allegation of negligence, or contributory negligence, at the top of the particulars of negligence in the counter-claim.

It was put to the Magistrate by defence counsel there was no rule of law requiring the particulars of negligence to be set out in an order of priority and the Magistrate replied there may not be such rule, but common sense demanded it. Apparently the Magistrate went on to say that he believed that he had been misled and there was a duty on solicitors not to mislead courts. The Magistrate reiterated his view that an adverse inference could be drawn against the witness because what he was swearing to in the witness box was not in accordance with the particulars of negligence and this could, or may, give rise to an inference that the witness was lying.

Defence counsel submitted to the Magistrate upon hearing those remarks that it would be unfair to penalise the defendant himself because of what may have been conduct on his solicitor's part. The Magistrate replied – and I return to the direct speech as the same is contained in the

affidavit material – that "practitioners had to change their attitude of take the money and run." The Magistrate said there was no **[5]** excuse for sloppy work. He then went on to comment that Magistrates' Courts had not been courts of pleading but they now had become so by virtue of the rule changes. The plaintiff's counsel properly conceded that he had not been caught unawares and was not in any way ambushed.

The affidavit material does not assist me further as to the events which occurred before the Magistrate but it does seem apparent that the complainant's evidence had been heard at the time of this exchange and it was during the course of evidence being called on behalf of the defendant that it occurred. In any event, after hearing all the evidence the Magistrate proceeded to make his findings. He said that he preferred the evidence of the complainant only marginally over that and above by the defendant and commented "the plaintiff had just got home ahead of the defendant on the balance of probabilities".

I can return to the grounds of the order nisi *seriatim* raised on these facts. The first is that the Magistrate erred in finding that the particulars of negligence are required to be stated in order of importance. Close examination of the facts indicates the Magistrate did not find as a matter of law that this was a procedural or substantive requirement. He did make observations that the same was a matter of good sense – and with the latter comment I concur. But had he found there was a legal requirement to state particulars in any form of priority, then indeed he would have been wrong.

The *Magistrates' Courts Civil Procedure Rules* Order 9 – which largely reflect the Supreme Court Rules – **[6]** operates as a code in pleading matters. The rules do not require, and cannot in any way be interpreted as to require, the particulars of negligence to be set out in any form or order. All that is required is that those particulars upon which the party intends to rely be recited with clarity. Undoubtedly, it would be preferable for practitioners to recite the particulars of negligence in a way which brings the issues clearly before the court in as expeditious a manner as possible. The vexation of the Magistrate is understandable but it is not, as a matter of law, correct. However the Magistrate went on from those comments to pass further remarks about purported negligence on the defendant's solicitors part. These remarks were wholly gratuitous and, in my view, incorrect as a matter of law. It follows that he could have raised in the defendant's mind a very clear implication that he was being ill-served by his solicitor and legal advisers, when in fact he was not. The gratuitous and irrelevant references to professional negligence are very much to be regretted. Really, they are matters which should not have been raised at all. More so in this case as the remark was legally incorrect. The order nisi cannot be made absolute on this ground as the Magistrate did not in fact find as a matter of law that the particulars required to be prioritised.

I turn to the second ground: that was that the Magistrate erred in finding that an inference could be drawn, or may be drawn, that a witness is lying if the witness fails to recite the narrative in the same order as the particulars of negligence. **[7]** This remark is wrong in law. It is not an inference which can be drawn and the magistrate was wholly incorrect. It is not for the witness to settle the pleadings and although he authorises them, insofar as the litigation is instituted on his behalf, he does not thereby accept a responsibility to recite the narrative in the form or order chosen by his advisers who may have settled the pleadings. The witness's prime obligation, and one which never leaves him or her, is to give evidence in accordance with his recall as appropriately aided but, nevertheless, with truth. The witness is not to be constrained by some legal form set out in the pleadings. To draw an inference that a witness may be lying because his narrative does not follow the form set out in the pleadings is wholly incorrect. The veracity or weight to be given to a witness's evidence is to be assessed in the totality of that evidence and by the usual processes of assessment of any adjudicator.

In most cases the evidence of a witness will not substantiate all of the particulars, and it would be churlish to assume magistrates could then conclude the witness could be found to be lying or unreliable because the narrative did not meet the pleadings in all respects. As I shall go on to relate, I do not think the magistrate concluded in this case that the defendant, whose solicitors he had impugned, was found to have been lying or untruthful on this basis. Once again, the magistrate's remarks were gratuitous, irrelevant and to be regretted, but I do not make the order absolute on this ground.

I turn to the third and fourth grounds which raise more substantial issues, namely, that the magistrate failed **[8]** to afford natural justice to the defendant in that the passing of these remarks could be seen by an outside observer to have raised the likelihood of bias in the mind of the Magistrate and thereby taint the judicial process. This case is governed by the principles in law set out in *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568 at 598; (1989) 87 ALR 633; (1989) 63 ALJR 610; (1989) 9 MVR 193; [1989] Aust Torts Reports 80-277, a case which is apposite because the Judge's remarks there followed the bifurcated approach adopted by the Magistrate here. In that case the Judge had passed gratuitous and plainly prejudicial remarks during the currency of the trial. They were not objected to. In a reserved and written judgment he passed further remarks which seems to have adopted the prejudicial remarks made during the currency of the trial and those remarks were impugned after judgment. The distinction is between the remarks passed during the currency of trial and the remarks passed during judgment.

In order to comprehend what I say, recourse to the headnote is appropriate.

> "In the course of the trial of a personal injuries case, the Judge who was sitting without a jury made statements critical of evidence given by the defendant's medical witnesses in previous cases. They included the remark that the doctors 'think you can do a full week's work without any arms or legs', and that the doctors' opinions were almost invariably slanted in favour of the Government Insurance Office by whom they had been retained consciously or unconsciously. The Judge also made remarks critical of the efficiency of the Government Insurance Office and said that it 'would have to carry the can', or 'that it may be necessary to tip the can on the GIO'. Counsel for the defendant did not object to the remarks and made no application about them. **[9]** In a reserved judgment in favour of the plaintiff, the Judge said that the evidence of the doctors was 'as negative as it always seems to be and based as usual upon his non-acceptance of the genuineness of the plaintiff's complaints of pain', and prefaced his account of a number of apparent concessions made by the doctor with the words 'even Dr Lawson said or thought'."

In respect of those remarks the High Court turned its mind and held as follows:

> "The remarks would have excited in the minds of the parties and in members of the public a reasonable apprehension that the Judge might not bring an unprejudiced mind to the resolution of the matter before him."

However, it was further held by a majority that by not objecting to the Judge's remarks the defendant had waived any right to appeal against any adverse decision on the ground of what had been said during the hearing. However, in so far as the judgment is concerned, the whole court observed that the remarks amounted to ostensible bias because they would lead to the conclusion in the minds of reasonable or fair-minded observers that the Judge was heavily influenced by views he had formed on other occasions and not on the basis of an assessment of the facts in hand. The common law of Australia relating to bias has been well canvassed, and I refer to the useful statement of it contained in *Grassby v R* [1989] HCA 45; (1989) 168 CLR 1; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183. At CLR p20 the statement is as follows:

> "The remarks would have excited in the minds of the parties and in members of the public a reasonable apprehension that the Judge might not bring an unprejudiced mind to the resolution of the matter before him. **[10]** The test which is to be applied when bias is raised has been clearly laid down. It is whether in all the circumstances the parties or the public might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the matter before him."

That statement of the law by Dawson J who was a dissentient in *Vakauta's case* was supported by *Livesey v NSW Bar Association* [1983] HCA 17; (1983) 151 CLR 288; 47 ALR 45; (1983) 57 ALJR 420, and *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11. The law in this State was extensively examined and I need not rehearse it in full, by Kaye J in *Humphrey v Wills* [1989] VicRp 42; [1989] VR 439. The latter case, as with the matter before me, involved the return of an order nisi to review the comments of a magistrate made during the currency of a trial. In that case the magistrate had said in relation to an application for an adjournment by the Crown in a drink/driving case, "I'll give them 150 adjournments if necessary. I'll move heaven and earth to make sure that technical points like this don't stand in the way of putting people who exceed the blood alcohol limit off the road." In that case, Kaye J made the order absolute and returned the matter to the magistrate for rehearing *de novo* finding that the statement during an adjournment

application indicated such an extent of pre-judgment of the issues that a fair-minded observer would conclude the defendant was unlikely to receive a fair or appropriate hearing.

I then come to the issue of whether the remarks passed by the magistrate in this case could give rise in the mind of the independent observer or a to party a similar apprehension. My view is that they would. The gratuitous references to a possibility of negligence on the defendant's solicitors part and a statement that a defendant could be disbelieved because evidence was given in discord **[11]** with the particulars rest on a fundamental misapprehension of the law that there is some requirement to prioritise the particulars of negligence. Hence I am confronted with gratuitous and irrelevant statements built upon an error. Were the remarks to have stood alone the person in court listening to them fall from the Bench could hardly conclude the defendant was in the same position as the complainant. He would necessarily conclude that an imbalance of chances or opportunities for justice were being had, ostensible bias would have been established.

However, in this case there is a sharp distinction between the remarks passed by the magistrate in the currency of the hearing and those upon which he founded his judgment, and I need to recite them again. The magistrate said he "preferred the evidence of the complainant only marginally over the evidence presented by the defendant and on the balance of probabilities the complainant should get home."

It would seem the magistrate when actually adjudicating on the issues of fact before him put to one side the error of law he had previously pronounced and the errors which arose out of it, namely, the possibilities of professional negligence and the inference of disbelief. He seems to have weighed and assessed the narratives of the parties and the term "marginally over the evidence" indicates he was referring to their stories of the motor accident as they were presented to him.

Hence, I am confronted in this case with improper remarks made by the magistrate during the currency of the trial, but a judgment delivered in terms which are unexceptional. It follows that if a preference is found for one party over another, then the probabilities rest with the **[12]** party in whose favour the Magistrate has leant and adjustment will follow accordingly.

No objection was taken on the basis of bias when the remarks were made or when judgment was delivered. *Vakauta's case* binds me as authority for the proposition that objection on that basis should be made then and there and not at some subsequent time. A party cannot stand aside when bias is displayed and wait to see if judgment is given in his favour, in any event. **[13]** It was observed by Jacobs J in *R v Swanston* that judicial silence is the counsel of perfection. The Magistrate would be well advised to take heed of the admonition. Silence can be golden, but the law is clear, objection should have been taken at the time of the remarks or at judgment to the Magistrate's display of bias. It was not.

Although some objection was taken to the Magistrate during trial, no direct objection on the ground of bias was adverted to. Accordingly, even if regretfully, even if unfortunately, the objection cannot be raised before me now. There may be circumstances where the behaviour of a Magistrate is so gross in terms of actual as opposed to ostensible bias, that it could be said his decision must be tainted by remarks expressed during the hearing, that the decision should be set aside.

But in this case, the Magistrate seems to have separated himself from the bias displayed during the hearing and the decision making process which he ultimately performed.

I cannot say that the decision is necessarily tainted by the remarks which I have spelt out in full. It follows that the orders nisi will be discharged.

APPEARANCES: For the applicant Baldwin: Mr R Lancy and Mr J Walsley, counsel. Noel Waters, solicitor. For the respondent Goodman Fielder: Mr K Billings, counsel. Mr B DuBois, solicitor.
