

22/12; [2012] VSC 257

SUPREME COURT OF VICTORIA

VELISSARIS v YANG

McMillan J

4, 19 June 2012

CIVIL PROCEEDINGS – NEGLIGENCE – MOTOR VEHICLE ACCIDENT – WHETHER MAGISTRATE BIASED – WHETHER MAGISTRATE ERRED IN ADMITTING EVIDENCE OF INSURANCE ASSESSORS – FINDING THAT PLAINTIFF LIABLE FOR DAMAGE CAUSED IN THE ACCIDENT – WHETHER MAGISTRATE’S CONCLUSION OPEN ON THE FACTS – BIAS – ALLEGATION THAT MAGISTRATE DEMONSTRATED APPREHENDED BIAS – WHETHER ALLEGATION MADE OUT – APPEAL DISMISSED: MAGISTRATES’ COURT ACT 1989, S109

V. was involved in a motor vehicle collision with a motor vehicle driven by Y. V. issued proceedings seeking damages for repairs to his vehicle and the balance for the cost of a hire car and loss of earnings. After hearing the parties and witnesses, the Magistrate found that the collision was caused by the negligence of V. and dismissed the claim. The Magistrate stated that V.’s evidence in relation to the damage to his motor vehicle was not accepted, there was no evidence that repairs had been carried out and no evidence to prove the claim for loss of earnings and the cost of hiring a motor vehicle. Upon appeal—

HELD: Appeal dismissed.

1. In relation to the allegation by V. that the Magistrate was biased, the test for apprehended bias is whether “a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide”.

Ebner v Official Trustee in Bankruptcy [2000] HCA 63; (2000) 205 CLR 337; (2000) 176 ALR 644; (2000) 75 ALJR 277; (2000) 63 ALD 577; (2000) 21 Leg Rep 13, applied.

2. The fact that V. considered that he was not allowed to speak at certain times during the hearing did not substantiate the ground that the Magistrate was biased against him. In considering the transcript of the proceedings before the Magistrate there was no basis to support these submissions. A fair-minded lay observer would not reasonably apprehend that the Magistrate did not bring an impartial or unprejudiced mind to the resolution of the dispute between V. and Y. The test for bias was not met.

3. The Magistrate was entitled to allow, and accept, the evidence of the both insurance assessors. Although V. alleged a conspiracy between the assessors, the Magistrate did not accept his submission on that point. No other evidence was put forward in the Magistrates’ Court to support a submission that the insurance assessors’ evidence should not have been accepted. Further, the Magistrate’s acceptance of their evidence was not done in isolation. The Magistrate had the benefit of seeing each of the assessors give oral evidence, and be cross-examined by V.

4. In any event, the evidence of the assessors was only one factor that weighed in favour of the decision reached by the Magistrate. The Magistrate was entitled on the evidence, to prefer the version of the collision given in evidence by Y. to that of V., where their evidence conflicted. In turn, Y.’s evidence was supported not only by the evidence of the two assessors, but also by the evidence of V.’s witnesses.

5. On the basis of all the evidence, the Magistrate correctly concluded that V. was claiming the same damage in respect of both collisions and that V.’s vehicle had not been repaired.

6. Accordingly, V. failed to demonstrate any error of law on the part of the Magistrate in accepting the evidence of the two insurance assessors and in dismissing V.’s claim.

McMILLAN J:**Introduction**

1. By notice of appeal filed 30 November 2010, the appellant, Mr Velissaris, appeals, pursuant to s 109(1) of the Magistrates’ Court Act 1989, on questions of law from a decision of the Magistrates’ Court with respect to a claim for property damage caused by a motor vehicle collision in July 2009.

2. Mr Velissaris' grounds of appeal are that:^[1]
- (a) the Magistrate was "fully" biased against him; and
 - (b) the Magistrate erred in law in accepting the evidence of the insurance assessors of CGU Insurance and Just Car Insurance, especially the evidence of the assessor for CGU Insurance, Mr James.

Factual Background

3. On 2 July 2009, Mr Velissaris and the respondent, Mr Yang, collided on High Street, Reservoir. In the hearing before the Magistrate, the parties gave conflicting accounts of the circumstances of the collision.

4. Mr Velissaris alleged that he was travelling north along High Street and that as he slowed down to turn left, Mr Yang's vehicle collided with the rear right hand side of his vehicle. Mr Velissaris alleged that as a result of the collision, his vehicle was damaged along the right hand side, including the tail light, rear quarter panel, door and a broken right rear vision mirror.

5. In contrast, Mr Yang alleged that Mr Velissaris veered into the lane in which he was travelling, without giving way. Mr Yang gave evidence that the left rear vision mirror of his vehicle clipped the right rear vision mirror of Mr Velissaris' vehicle and that the damage was limited to the damage to the mirror.

6. Some months later, Mr Velissaris had another collision with another vehicle, involving damage to the same area of his vehicle.

The Magistrates' Court Proceedings

7. With respect to the collision with Mr Yang, Mr Velissaris issued proceedings in the Magistrates' Court, seeking damages in the amount of \$7,000, being \$2,967 for repairs to his vehicle and the balance for the cost of a hire car and loss of earnings. The application was dismissed by Judicial Registrar Mithen on 7 December 2009. Mr Velissaris appealed and the matter was heard before Magistrate McGarvie on 3 and 8 November 2010.

8. The Magistrate found that the collision was caused by the negligence of Mr Velissaris in circumstances where, on the basis of the evidence before her, she preferred Mr Yang's evidence to that of Mr Velissaris. This was in part due to numerous inconsistencies and gaps the Magistrate identified in Mr Velissaris' evidence. These included:

- (a) The extent of the alleged damage to Mr Velissaris' vehicle.
- (b) Whether Mr Velissaris had engaged and paid Mr El Sheikh of Sheikh Bodyworks to repair the damage to his vehicle.
- (c) In respect of the claim for loss of earnings, the Magistrate found that Mr Velissaris did not provide independent evidence of his time lost from work or how his lost earnings were calculated.
- (d) Mr Velissaris provided no evidence of the hiring of a car or the cost of the hire car which was included in his claim for damages.

9. In the hearing before the Magistrate, Mr Yang called two insurance assessors to give evidence. The first assessor was Mr Williams, who assessed both Mr Velissaris' vehicle and Mr Yang's vehicle on behalf of Mr Yang's insurer, Just Car Insurance, in November 2009. His evidence was that there was no evidence of damage to Mr Yang's vehicle which was consistent with the damage claimed by Mr Velissaris to his vehicle and that there was no evidence that Mr Yang's vehicle had ever been repaired. On the other hand, his evidence with respect to Mr Velissaris' vehicle was that he thought that the damage on the side of Mr Velissaris' vehicle had been caused by someone scraping an object backwards and forward on the panels. Mr Williams took photographs of Mr Velissaris' vehicle at this time.

10. Mr Williams gave evidence that he inspected the vehicle a second time, on 26 October 2010, with Mr James, who assessed Mr Velissaris' vehicle on behalf of CGU Insurance, the insurer of the vehicle involved in the second collision. Mr Williams gave evidence that the damage to the vehicle observed by him in October 2010 was the same damage that he observed in November 2009. It was his opinion that the bumper bar was still the original bumper bar, but with new clips to attach it to the vehicle.

11. When Mr James inspected Mr Velissaris' vehicle, he took photographs and compared them with the photographs taken by Mr Williams in November 2009. Mr James observed that the damage was the same damage as that observed by Mr Williams at the first inspection. Mr James also conducted a paint gauge test in at least four areas of Mr Velissaris' vehicle and gave evidence that those tests indicated there had been no repainting of the vehicle.

12. Both Mr Williams and Mr James were of the opinion that the damage to Mr Velissaris' vehicle observed in October 2010 was the same damage observed in November 2009. According to both assessors, the damage on Mr Velissaris' vehicle had not been repaired. The Magistrate found that this fact was confirmed by a witness for Mr Velissaris, Mr El Sheik. The evidence of Mr El Sheik was that the only repairs he carried out were to the right rear vision mirror, the right back tail light and the bumper bar and that all of the parts used by him were second-hand and supplied to him by Mr Velissaris, which was contrary to Mr Velissaris' evidence that Mr El Sheik fixed his vehicle in August 2009.

13. In all other respects, Mr El Sheik confirmed that when he was driven to court by Mr Velissaris for the hearing before the Magistrate, the damage to Mr Velissaris' vehicle which he had observed in July 2009 was still there.

14. During the hearing before the Magistrate, Mr Velissaris alleged a conspiracy against him in that the assessors colluded to set him up or, alternatively, that one of the assessors caused the damage to his vehicle. The Magistrate rejected the conspiracy submission made by Mr Velissaris.

15. In support of his case before the Magistrate, Mr Velissaris produced an assessment report by Mr Veluto, who assessed the damage to Mr Velissaris' vehicle. The report contained photographs taken by Mr Veluto of Mr Velissaris' vehicle. Mr Veluto was not called by Mr Velissaris as a witness. Mr Velissaris said that this report was dated in August 2009, before the vehicle was repaired by Mr El Sheikh. However, the actual report was dated 25 November 2009 and the invoice for the report was dated the same day and paid the day after.

16. Four sets of photographs were tendered as evidence before the Magistrate. These were photographs taken by:

(a) Mr Velissaris and Mr El Sheikh in July 2009;

(b) Mr Veluto in August 2009, according to Mr Velissaris, in November 2009 according to Mr Veluto's report;

(c) Mr Williams in November 2009; and

(d) Mr James in October 2010.

17. The Magistrate found that a comparison of the four sets of photographs showed the same damage to the right rear quarter panel of Mr Velissaris' vehicle at all times. The Magistrate found that the photographs of Mr Veluto, Mr Williams and Mr James all showed a gap between the bumper and the body of the vehicle. Mr El Sheikh's photographs did not include a photograph of the back bumper. Mr Yang's vehicle had no evidence of any damage other than a scratch to the back left side of his left rear vision mirror and old damage to the back side of the front left wheel arch.

18. On the basis of the evidence of the two assessors, the evidence of Mr El Sheikh and the four sets of photographs, the Magistrate found that Mr Velissaris had not satisfied the Court that Mr Yang was liable for the damage to his vehicle. Accordingly, the Magistrate dismissed Mr Velissaris' claim and ordered him to pay Mr Yang's costs in the amount of \$9,536.

Appeal to the Supreme Court

19. During the hearing before this Court, Mr Velissaris made submissions as to the basis on which he alleged that the Magistrate erred in law.

20. Mr Velissaris' first ground of appeal was that the Magistrate was biased against him.

21. The submissions made by Mr Velissaris in support of this submission were, essentially, that he believed that the Magistrate cut him off from speaking during the hearing and told him he was lying.

22. It is unclear whether Mr Velissaris alleges actual bias, or apprehended bias. The test for actual bias is a stringent one.^[2] In this case, it is sufficient for this Court to apply the test for apprehended bias, which has a lower threshold.

23. The test for apprehended bias is whether “a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide”.^[3]

24. In my view, the fact that Mr Velissaris considered that he was not allowed to speak at certain times during the hearings does not substantiate the ground that the Magistrate was biased against him. I have considered the transcript of the proceedings before the Magistrate and I conclude that there is no basis to support these submissions.

25. In this case, I find that the test for bias is not met. The transcript of the proceeding before the Magistrate was in evidence before me and, after considering the whole of the transcript, in my view, a fair-minded lay observer would not reasonably apprehend that the Magistrate did not bring an impartial or unprejudiced mind to the resolution of the dispute between Mr Velissaris and Mr Yang.

26. Accordingly, I find that Mr Velissaris has not demonstrated any error of law on the part of the Magistrate in respect of the first ground of appeal.

27. Mr Velissaris’ second ground of appeal was that the Magistrate ought not to have allowed the evidence of the two insurance assessors, in particular the evidence of Mr James. The reasons given by Mr Velissaris were that:

(a) Mr James was acting in respect of the second collision.

(b) Mr James inspected the vehicle nearly a year after the second collision.

(c) The photographs provided by Mr James were not relevant to the damage caused to his vehicle by the first collision, as Mr Velissaris had had the vehicle repaired in August 2009.

(d) The second collision had nothing to do with the damage to his vehicle caused by the first collision.

28. Counsel for Mr Yang submitted that in an appeal of this kind, the Court is not entitled to reconsider the evidence and decide questions of fact for itself. Counsel submitted that this Court’s role is confined to considering whether there was any reasonable basis for the findings of fact made by the Magistrate. In making this submission, counsel relied on the decisions of *Spurling v Development Underwriting (Vic) Pty Ltd*^[4] and *Young v Paddle Brothers Pty Ltd*.^[5]

29. In my view, the Magistrate was entitled to allow, and accept, the evidence of the both insurance assessors. Although Mr Velissaris alleged a conspiracy between the assessors, the Magistrate did not accept his submission on that point. No other evidence was put forward in the Magistrates’ Court to support a submission that the insurance assessors’ evidence should not have been accepted. Further, the Magistrate’s acceptance of their evidence was not done in isolation. The Magistrate had the benefit of seeing each of the assessors give oral evidence, and be cross-examined by Mr Velissaris.

30. In any event, the evidence of the assessors is only one factor that weighed in favour of the decision reached by the Magistrate. In my view, the Magistrate was entitled, on the evidence before her, to prefer the version of the collision given in evidence by Mr Yang to that of Mr Velissaris, where their evidence conflicted. In turn, Mr Yang’s evidence was supported not only by the evidence of the two assessors, but also by the evidence of Mr Velissaris’ witnesses, Mr El Sheikh at the hearing and Mr Veluto in the form of his report.

31. On the basis of all the evidence before her, the Magistrate correctly concluded that Mr

Velissaris was claiming the same damage in respect of both collisions and that Mr Velissaris' vehicle had not been repaired.

32. Therefore, in my view, Mr Velissaris has not demonstrated any error of law on the part of the Magistrate in accepting the evidence of the two insurance assessors.

One Further Matter

33. Although not a ground of appeal, in his written submissions in the appeal, Mr Velissaris submitted that the Magistrate ought not to have accepted the evidence of the assessors because they were not independent. Mr Velissaris did not make any oral submissions on this point. The Magistrate found that Mr James was from an independent assessing company. I find that Mr Velissaris' written submissions misconceived, and that there was no evidence before the Magistrate that could support it.

Conclusion

34. For the reasons set out above, I dismiss the appeal, with costs to be paid by Mr Velissaris, to be taxed in default of agreement.

^[1] The remainder of the grounds of appeal were struck out by orders of Daly AsJ on the grounds that they did not identify questions of law.

^[2] *McGovern v Ku-Ring-Gai Council* [2008] NSWCA 209; (2008) 251 ALR 558; (2008) 72 NSWLR 504, 517; (2008) 161 LGERA 170, per Basten JA.

^[3] *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337, 344; (2000) 176 ALR 644; (2000) 75 ALJR 277; (2000) 63 ALD 577; (2000) 21 Leg Rep 13 per Gleeson CJ, McHugh, Gummow and Hayne JJ (citations omitted).

^[4] [1973] VicRp 1; [1973] VR 1, 11; (1972) 30 LGRA 19, referring to *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346; (1961) 19 LGRA 232.

^[5] [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301.

APPEARANCES: For the appellant Velissaris: In person. For the respondent Yang: Mr I McEachern, counsel. Ligeti Partners, solicitors.
