

25/07; [2007] VSC 94

SUPREME COURT OF VICTORIA

***INSURANCE MANUFACTURERS of AUSTRALIA v VILLELLA***

King J

22 February, 11 April 2007

**PRACTICE AND PROCEDURE – MOTOR VEHICLE ACCIDENT – DRIVER'S VEHICLE COLLIDED WITH A CAR YARD CAUSING DAMAGE TO PROPERTY AND OTHER VEHICLES – DRIVER ADMITTED TO HOSPITAL – INTERVIEWED BY MEDICAL STAFF WHILST IN HOSPITAL – NOTES MADE BY MEDICAL STAFF AS TO CONVERSATION HELD WITH DRIVER – NOTATION THAT DRIVER SAID THAT HE TOOK "HEROIN TONIGHT" – CLAIM LATER FILED AGAINST DRIVER - DRIVER SOUGHT TO BE INDEMNIFIED BY INSURANCE COMPANY – MEDICAL STAFF CALLED TO GIVE EVIDENCE – DENIAL BY DRIVER THAT HE TOOK HEROIN ON THE NIGHT OF THE COLLISION – MAGISTRATE REJECTED EVIDENCE OF MEDICAL STAFF – NO ADEQUATE REASONS GIVEN FOR SUCH REJECTION – DRIVER'S CLAIM UPHOLD BY MAGISTRATE – WHETHER FINDINGS REASONABLY OPEN ON THE EVIDENCE – WHETHER MAGISTRATE IN ERROR.**

**Where evidence was compelling that a motor car driver involved in a collision told medical staff after admission to hospital that he had consumed heroin, a magistrate who rejected oral evidence of a medical practitioner and notes contained in hospital records without giving adequate reasons made an error of law. Further, the magistrate was in error in failing to act on evidence which was undisputed.**

**KING J:**

1. This is an appeal from a finding by the Magistrate that the respondent, Mr Villella, was entitled to be indemnified by the appellant, Insurance Manufacturers of Australia Pty Ltd ("IMA"). The third party proceedings arose as a result of a claim by Cychris Pty Ltd against Matthew Villella ("Villella"). The plaintiff claimed the sum of \$73,046.19 for property damage and damage to motor vehicles caused by Villella.

2. The damage was a result of a motor vehicle accident in which Villella was the driver in the early hours of the morning of March 13, 2004. His vehicle collided with the premises of the plaintiff, which was a car yard in Sydney Road, Fawkner. In his third party notice Villella sought indemnity from IMA pursuant to an insurance policy in respect of his vehicle. He sought indemnity for the claims made against him by the plaintiff and for the value of his own motor vehicle which was written off in the collision, in the sum of \$24,150. As per the Magistrate's findings, there was no dispute between the parties as to quantum, the issue of negligence by Villella and the manner in which he drove his motor vehicle were equally not contested. The real dispute in the action arose from the third party notice. The issue before the Court, as given by way of the defence to the third party notice, which was delivered on 12 September 2005, is that whilst IMA admitted the policy of insurance, it denied indemnity, on two grounds:

(a) First, that Villella was under the influence of drugs at the time of the accident.

(b) Second, that Villella had not been truthful and frank in his statements to IMA, particularly in relation to his heroin use. A further aspect of this ground of the allegation was that Villella had failed to properly cooperate with IMA.

3. The appellant in its notice of appeal stated that there were three questions of law, being:  
(1) Considering the whole of the evidence, could a reasonable Magistrate properly instructed have held that Matthew Villella ("Mr Villella") was truthful and frank in his dealings with the Insurance Manufacturers of Australia Pty Ltd?

(2) Considering the whole of the evidence could a reasonable Magistrate properly instructed have held that Villella was not driving under the influence of drugs at the time of the accident giving rise to his claim for indemnity from Insurance Manufacturers of Australia Pty Ltd pursuant to insurance policy number MOT145551261? And,

(3) Considering the whole of the evidence in light of the provisions of the contract of insurance and sections 13, 54 and 56 of the *Insurance Contracts Act* 1984 did the Magistrate err in concluding that Mr Villella was entitled to indemnity from Insurance Manufacturers of Australia Pty Ltd pursuant to insurance policy number MOT145551261?

4. The grounds for appeal upon which the appellant relied were:

- (1) The Magistrate failed to consider all of the evidence.
  - (2) The Magistrate failed to give adequate reasons for accepting the evidence of Villella in preference to the evidence of Dr Quarin and Dr Alexander in relation to the ingestion of heroin on the night of the accident.
  - (3) The Magistrate erred in holding that the *Briginshaw* standard applied to the issues in the case in circumstances where Mr Villella admitted his heroin use.
  - (4) The Magistrate erred in finding that Villella visited the scene of the accident with Mr Thompson.
  - (5) The Magistrate erred in concluding that Villella cooperated with IMA in circumstances where the matters relied on by the Magistrate as evidencing Villella's cooperation were not the matters particularised in IMA's defence to the third party notice as instances of Villella's failure to cooperate.
  - (6) The Magistrate erred in rejecting the evidence of Dr Alexander that Villella told her that he had taken heroin on the night of the accident.
  - (7) The Magistrate failed to deal with the evidence of Dr Quarin.
  - (8) The Magistrate erred in preferring the evidence of Villella to that of Dr Quarin and Dr Alexander as to the ingestion of heroin on the night of the accident.
  - (9) The Magistrate ought to have found that Villella had told hospital staff that he had taken heroin on the night of the accident.
  - (10) The Magistrate failed to make any finding about the credibility of Villella in circumstances where the Magistrate accepted the evidence of Villella in preference to the evidence of witnesses called on behalf of IMA.
  - (11) The Magistrate erred in finding that the ambulance note contradicted any condition of incapacity to control a motor vehicle or being under the influence of drugs or a drug in circumstances where no evidence was led as to the notation in the ambulance notes that Villella was alert and oriented to time and place.
- Grounds 12 and 13 were not argued.
- (14) The Magistrate ought to have accepted the evidence of the medical practitioners and psychologist called on behalf of Insurance Manufacturers of Australia Pty Ltd as to Villella's heroin usage at and prior to the date of the accident.
  - (15) The Magistrate erred in concluding that Exhibit 1 was not the statement of Villella.
  - (16) The Magistrate erred in concluding that Villella had not adopted the contents of Exhibit 1 as true and correct.
  - (17) The Magistrate erred in concluding that Villella had been truthful and frank in his dealings with IMA investigator Mr Tim Thompson.
  - (18) The Magistrate erred in accepting Villella's evidence that he gave up heroin immediately after the accident.
  - (19) The Magistrate erred in concluding that for the answers as to Villella's drug use contained in Exhibit 1 to be false the Magistrate would have to be satisfied to the appropriate standard that the buprenorphine treatment commenced before the making of the statement contained in Exhibit 1.
  - (20) The Magistrate erred in accepting Villella's evidence that he was not taking illegal drugs at the time of making his statement contained in Exhibit 1.
  - (21) The Magistrate erred in not drawing any *Jones v Dunkel* inference against Villella from his failure to call Dr Jagoda to give evidence.

### The Factual Scenario

5. In the early hours of the morning of 13 March 2004, Villella was driving his motor vehicle along Sydney Road, Fawkner. That vehicle collided with the premises of a car yard, damaging the premises and some of the cars contained within the yard. It was a single car motor vehicle collision. Villella was taken from the scene of the collision to the Royal Melbourne Hospital by ambulance that morning. He was taken to the emergency department and subsequently admitted. He was released later the next day. Villella subsequently made a claim on IMA in respect of the collision. As a result, IMA sent an investigator out to interview Villella which occurred on 23 March 2004. Notes were taken of that discussion, those notes were signed as being true and correct by Villella. Subsequent to the interview with Villella, enquiries from the hospital revealed that Villella had admitted to medical staff that he had used heroin on the night of the accident, a fact not disclosed to IMA.

### The Hearing

6. At the hearing of this matter evidence was called from Stephen Christofi, the owner of

the car yard where Villella was involved in a collision as to the quantum of the damage and his ownership of the car yard. Timothy Mark Thompson, the investigator employed by Quest Investigations, who gave evidence as to the manner in which he interviewed Villella. Thompson gave evidence that his normal process was that he asked questions from a pro forma. He said he would write down the insured person's responses. He had a lap top computer and printer and once that task was complete he would print out the compiled statement and ask the insured person to read it over make any alterations and confirm the information was correct. He says that that is what occurred in this case. He said that as a result of his interview with Villella he did not have any major concerns, pending results of any treatment at the Royal Melbourne Hospital. He was asked,<sup>[1]</sup>

In relation to your investigations, if you had been told that the insured had taken drugs would you have made further enquiries?

Answer: Yes I would have, both with the insured and I would have been more specific with my request to the hospital.

And further:<sup>[2]</sup>

If the insured had told you that he had taken heroin would you also have asked the insured further questions in relation to that heroin use?

Answer: Yes I would have

Question: What sort of questions would they have been?

Answer: How much he would have taken, when he last took it. If he was a regular user – various questions along those lines.

7. Mr Thompson gave evidence of Villella telling him that he did not have any alcohol or drugs whilst in his room before going for a drive and that he does not take any illegal drugs or substances. He indicated, following obtaining records from the Royal Melbourne, that he became aware of heroin use by Villella and he passed that information on to IMA. It was suggested to him in cross-examination by counsel for Villella that, when he was examined in casualty, Villella apparently made admissions in the course of his examination in casualty as to his heroin usage. The witness agreed.

8. The next witness was Treena Marie Quarin, an emergency physician who was working on the emergency ward at the Royal Melbourne on 13 March 2004. She viewed the medical records of the Royal Melbourne Hospital. She said she vaguely remembered the story but did not claim to have any real independent memory. She stated that from looking at the documents, which were in her handwriting, that according to her notes she saw Villella at 3.37 am, six minutes after he arrived at emergency. She said she would have spoken to him and taken notes of the conversation. She identified the notes in her handwriting. She said her notes record that he was a 21 year old male, involved in high speed single vehicle MVC (motor vehicle collision), not belted, indicating that he was not wearing a seat belt from his history. She said she had then written: "Admits to heroin tonight" – which she stated was something the patient would have told her when she questioned him. She stated that the notes recorded that he denied taking any alcohol – equally something the patient would have told her. In relation to drugs, she said normally she would ask generally about intake, first about alcohol specifically, and then any street drugs. She said patients either deny or admit to those matters and that is what she notes down. She said there is a medical purpose to those enquiries particularly if there are any head injuries. It was put to her in cross-examination that she had recorded Villella's admission that he was on heroin that night, she said yes and she further agreed in cross examination that she was not in a position to test whether he had taken heroin or not. She agreed that she did not know precisely what Villella meant when he said tonight. She was asked about the records in relation to something noted by another person in the margin, being the triage nurse, "claimed took heroin ? time". She said that Villella was referred to the psychiatric service, ECATT (Enhanced Crisis Assessment Treatment Team), as a result of a concern that this may have been an attempt at suicide by Villella.

9. Catherine Theresa Alexander, a surgical registrar, who was on duty at the Royal Melbourne Hospital in 2004, was the next witness to give evidence. She was the general surgical registrar involved with trauma on 13 March 2004. She was asked about seeing Villella, and stated she

actually remembered speaking to him. She said she took notes of her conversation with him at 8.10 on the morning of 13 March. She said she identified herself by surname and title to Villella and then recorded the following notes: "21 year old male brought in by ambulance trauma, noted it was a single vehicle MVA, the motor vehicle crashed into fence of car lot. Query multiple collisions with other parked cars. She said that that section of the history had been taken from the ambulance officers who had in fact brought Villella in. She then said that she had another notation – "heroin tonight" – she said that that record was from her questioning of the patient. She said that, as with all patients she sees in a trauma setting, she asked if there have been any drugs consumed or imbibed that evening. She said she already had the information that he had claimed to have had heroin tonight and she said she recalled asking him: "So you've had heroin tonight". Initially the witness said she didn't recall his exact response but had he denied that she would have written that in her notes. By tonight she said meant the period over which her shift had been so it would have been earlier that morning, that is, in the early hours.

10. In cross-examination she was asked<sup>[3]</sup>:

When did you ask the specific question and before you asked the question about heroin you testified that you were aware of the previous note that he had admitted to it?

Answer: Yes.

Question: And when you asked the question you didn't get much of an answer?

Answer: No.

Question: But because he did not deny it you assumed that the answer was yes?

Answer: As far as I can remember, and I have given this some thought, he nodded and groaned and turned his head away from me.

His Honour: I'm sorry

Answer: He nodded. He sort of – can I imitate his response – he went umm. I'm sorry I can't explain that any better.

His Honour then noted the witness grimaced.

11. In re-examination, counsel for the appellant asked<sup>[4]</sup>:

I think in relation to that last question which my friend asked, you said he nodded, cried and turned away and then his Honour said to describe the action it was a grimace. Is that a word – is that the way that you would describe it?

Answer: No. It was more of an acknowledgement but I guess I can't think of a better word.

12. Edward John David Ogden, a legally qualified medical practitioner, was the next witness who gave forensic evidence as to the effect of heroin upon persons driving ability in relation to motor vehicles.

13. The final witness for the appellant was George Tristan Vasquez, a psychiatric nurse at the Royal Melbourne Hospital. He spoke to Villella at the Royal Melbourne Hospital and was part of the ECATT (Enhanced Crisis Assessment Treatment Team), made up of psychiatric clinicians who do assessments on people that have been referred to them by the emergency department. He examined the notes of the Royal Melbourne Hospital and said he very vaguely recalled the episode and he went through the notes that he obtained. His notes stated that Villella said that at the time he was angry and speeding but that he had no intention to hurt himself or suicide. His notes indicated that Villella had told him that he had begun using heroin frequently about three months ago. He made no note in relation to whether or not there was any heroin usage on the night. In relation to that matter, two questions were asked – one in cross-examination on behalf of Villella, namely<sup>[5]</sup>:

Nowhere on your report have you recorded a comment that he reported heroin – he had used heroin on that night is there?

Answer: No there isn't.

And in re-examination<sup>[6]</sup>:

Did you ask Mr Villella if he took heroin that evening?

Answer: I haven't recorded it and again I do not recollect the exact conversation that I had with Mr Villella on that night.

That was the case presented on behalf of the appellant.

14. It was not suggested in cross examination to any of the medical witnesses that were called at the hearing that Villella had not made the statements relating to heroin use that night, only that they could not be sure what he meant when using the expression "tonight".

15. Villella gave evidence on his own behalf and no other witnesses were called. His evidence was that he went to work and came home at about 5 pm. He was watching television; sometime later he could not sleep so he decided to go for a drive in his Toyota Camry. He had had the car for about three months. He said that a few minutes into the drive his eye was a bit itchy so he went to scratch it, he knocked his glasses off, he fumbled around for his glasses and that is when the accident happened. He said a police officer came to the scene and a few minutes later he was carted off by ambulance to hospital. He said he did not remember much of the events at the hospital. He did not remember making any statements to the people in the hospital, or any questions being asked at the hospital but he does recall being discharged from hospital and his parents being called to come and pick him up. He recalled discussing the claim with an insurance investigator. He was shown the statement that had been tendered. The following passage took place<sup>[7]</sup>:

Counsel for the respondent: if I could just take him through that statement.

His Honour: Exhibit 1 is it?

His Honour: Yes I don't know what you are going to do with it.

There was an objection. His Honour continued:

"I'm not either, but it is in evidence at the moment".

Counsel for the respondent: Alright. Well look I'm happy that it's in evidence your Honour. I want to ask him about his comments.

Villella was then asked:

Do you recall your statement that you had not taken any drugs before you took the car out that evening.

Answer: Yes. I said I didn't do drugs on the night. Yes.

Question: So you said that you didn't use drugs on the night?

Answer: Yes.

Question: Is that still your testimony?

Answer: Yes.

Question: What makes you believe that you did not use drugs on the night?

Answer: Cos I know that I didn't.

Question: Is that the only reason?

Answer: Well I wouldn't use drugs before I drove my car. I would just like stay home and relax if I was using.

In cross-examination he was asked if he had refused to discuss the incident with the ambulance driver and was shown records which indicated his refusal. He said he did not have a recollection of that occurring and said he honestly couldn't say that he was asked any questions by the ambulance officers.

16. He agreed he did not give the explanation that he provided to the Court, to any of the medical staff at the hospital, as to how the accident occurred. During cross examination he was asked<sup>[8]</sup>:

Counsel: Just to get something clear, you have heard a number of the medical practitioners from the hospital refer to their notes where there is a record of having 'taken heroin tonight' I take it you agree - You have no recollection of having said that but you don't suggest that the notes are wrong do you?

Answer: I'd say they are wrong.

Question: You understand that if you've taken heroin this night and you were driving whilst under the influence you won't get indemnity from the insurer don't you.

Answer: Yes.

Question: You understand that?

Answer: Yes.

Question: So you understand that it's very important for you to say that you didn't taken heroin on this particular night don't you?

Answer: Yes.

There were then a series of questions about giving up heroin after the collision.



17. He was then asked about his interview with Mr Thompson on 23 March, when Mr Thompson asked him<sup>[9]</sup>:

Do you take illegal drugs or substances?

Answer: Right.

Question: Do you remember that?

Answer: Yes.

Question: What did you take him to be asking you about? What did you understand the question to mean back in 2004?

Answer: Were you taking drugs on the night of the accident and I said no.

Question: That was a separate question wasn't it?

Answer: Was it. I don't know.

Question: He asked you a more general question about whether at the time you were taking any drugs or illegal substances didn't he?

Answer: Yes.

Question: And you answered no didn't you.

Answer: Yes.

He was also asked:

You don't remember speaking to medical staff very well do you.

Answer: Not quite no.

Question: You don't remember any conversations with either the medical staff or the psychological staff?

Answer: Sort of yeah.

They were as I see it, the salient points of the case as put before the Court.

### **The Findings of the Magistrate**

18. His Honour made a number of findings of fact which are the subject of challenge in this court. The findings are challenged on the basis that the decision of the learned Magistrate in respect of these findings of fact are contrary to what any reasonable view of the evidence could support.

19. The law in respect of findings of fact being challenged as questions of law, is well established. In a case where an appeal lies on matters of law, the failure of a Judge to identify why the evidence of one witness is preferred to another may, in an appropriate case constitute an error of law<sup>[10]</sup>. That matter, together with other relevant considerations dealt with in the judgment of Phillips JA in *S v Crimes Compensation Tribunal*.<sup>[11]</sup> make it clear what is required of an appellate Court hearing an appeal of this nature. In that very helpful decision His Honour at pages 86-89 discusses the process of a review and states clearly that the role of the Court on review is to first determine what is the proper meaning, as a matter of construction, of the statutory description which is relevant to the claimant's success or failure, which determination is a matter of law and reviewable. Once that determination is complete, the question whether the claimant's particular circumstances fall within the relevant statutory description is essentially a question of fact. Nevertheless if, in determining whether the particular circumstances of the claimant are such as to fall within the relevant statutory description, the fact finding tribunal arrives at a conclusion which was simply not open to it, that is an error of law; and the question whether it arrived at a conclusion which was not open to it, is a question of law.

20. The findings of the Magistrate that are in issue in this case are the following:<sup>[12]</sup>

As to drugs, the third party's evidence is this. It is based virtually exclusively on the evidence of those that attended the defendant at the Royal Melbourne Hospital. Dr Quarin was the first doctor to see the defendant at the Royal Melbourne Hospital Emergency Department, he having arrived there at about 3.31 a.m. according to the records. In her notes she wrote the words "admits to heroin tonight". She, while giving *viva voce* evidence, had no specific recollection of asking the defendant about that, but said she asked generally about drugs

There is another note in the Emergency Department records in different handwriting that I believe was not mentioned in evidence, though it may have been. But it reads in the margin under the time 3.30, the words "claims took heroin at ? time". To some extent it appears to conflict with Dr Quarin's note as to any alleged time of ingestion of heroin.

Dr Alexander, the general surgical registrar at the Royal Melbourne Hospital at the time, said that she remembered speaking to the defendant on the morning of 13 March and taking notes. As I have said,

it is more than two years ago. She wrote, she says, the words "heroin tonight" and that is under the timeline of 8.10 a.m. Her evidence went on that – that is, her viva voce evidence – that although the history was taken from speaking to ambulance officers of from their note, the note "heroin tonight" would have been from questioning the patient. Then she went on to say that she did not recall his exact response, and then later said the defendant was not very communicative. There was not a lot of interaction. And finally said, when referring to the defendant's apparent admission to taking heroin, she these words: "as far as I can remember, and I have given it some thought, he nodded and grimaced. It was more of an acknowledgment."

I was not impressed by her manner and the evidence she gave did not appear to me to be from remembering speaking to the defendant some two years ago. I am not satisfied that the defendant actually told her that he had taken heroin in any form that night.

21. It has been submitted by the appellant that the rejection of Dr Alexander's evidence, the failure to deal with Dr Quarin's evidence and the acceptance of the evidence and the credibility of Villella, without explanation, are matters that amount to an error of law. It was also submitted that no tribunal could have accepted, without an adequate explanation, the evidence of Villella in light of the sworn evidence of the medical practitioners and the hospital records of that night, in respect of the issue of his consumption of heroin on the night of the collision.

22. Whilst not discussed, or relied upon, in His Honour's decision, a passage which occurred during the submissions of counsel for the Applicant is noteworthy. His Honour stated:<sup>[13]</sup>

let's say I accept that they've correctly written down, and I'll just digress for a moment, I am always suspect of medical records having practices (sic) for many years in the industrial accident personal injury jurisdiction, and seen many, many hospitals and doctors records that are inaccurate. I am always – unless there's supportive evidence of some kind, I have difficulty...

There was no application for disqualification of the Magistrate for bias, and in respect of the argument relating to bias that was in the Applicant's outline of argument before this Court, after some discussion the Applicant agreed it would not be appropriate to pursue that matter as a separate argument. However there is some relevance in this hearing of the Magistrate's comments during the hearing in the Magistrates' Court.

23. The relevance is that, despite the existence in the hospital records of two different notes that that the respondent had told them he had "consumed heroin tonight", and the oral evidence of those two separate doctors, including one who stated she specifically remembered the incident and ultimately described the manner in which the respondent provided that information, the learned Magistrate rejected that evidence. The comments made by his Honour may in some way explain that rejection. The reasons that the learned Magistrate expressed for the rejection of the evidence of Dr Alexander were<sup>[14]</sup>:

I was not impressed by her manner and the evidence she gave did not appear to me to be from remembering speaking to the defendant some two years ago. I am not satisfied that the defendant actually told her that he had taken heroin in any form that night.

24. The learned Magistrate gave no reasons at all for rejection of the evidence of Dr Quarin, except to say that she had no independent memory of the incident. He queried a note that was in the records which he said conflicted "to some extent" with the notes of Dr Quarin. As mentioned earlier that note said "claimed took heroin ? time". Such a notation may equally support the detail contained in the hospital records written by the two doctors, in that it may constitute an admission by the Respondent that he had consumed heroin, but without there being clarity as to exactly what time that consumption occurred. What follows from his Honour's findings must be that his Honour not only rejected the oral evidence of Dr Alexander but also rejected the notes of Dr Alexander and Dr Quarin, contained in the hospital records, as being inaccurate, unreliable or wrong, or a combination of those factors. There was no evidence before the Court, or challenge made, that reflected adversely upon the accuracy or reliability of the notes, the only challenge being as to the possible interpretation of what was meant by the admission within those notes.

25. As noted, it was not put to either of the doctors that no such statements or admissions were made by the Respondent, and in Villella's evidence in chief the matter of his statements to the medical practitioners was raised only in the manner of asking did he remember making any

statements to the people at the hospital or if any questions were asked of him by those at the hospital, to which initially he replied "I can't remember" then said no.

26. It was submitted by the Respondent that in respect of his Honour's reliance upon the demeanour of Dr Alexander in the rejection of her evidence, that the law is as stated in *Fox v Percy*<sup>[15]</sup>. In that case the High Court in the joint judgment of Gleeson CJ, Gummow and Kirby JJ stated:<sup>[16]</sup>

However the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot prevent the performance by a court of appeal of the functions imposed upon it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusion are erroneous, even when they appear to be, or are stated to be based on credibility findings.

That this is so is demonstrated in several recent decisions of this Court. In some, quite rare cases, although the facts fall short of being "incontrovertible", an appellate conclusion may be reached that the decision at trial is "glaringly improbable" or "contrary to compelling inferences" in the case. ...

Further in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical.

27. The reliance by the learned Magistrate on his observations of Dr Alexander in my view fall into that category. The doctor was an independent person in respect of this case, she was never challenged as to her note taking, or her memory of the events, and equally no challenge was made to Dr Quarin. It is my view that the analysis of the evidence and his Honour's findings indicate that he has failed to adequately disclose how he came to his ultimate decision<sup>[17]</sup>, namely, that the appellant had not satisfied him to the required standard that Villella had consumed any heroin on the night prior to the collision. The issue of whether he was driving under the influence of heroin at the time, and whether that had any impact upon the cause of the collision is not an issue for this appeal. It is my view that the evidence was compelling that Villella told the medical staff on that night that he had consumed heroin and that his Honour's findings on that matter.

28. In relation to the matter of the admission of the notes of the conversation between Villella and the investigator employed by IMA, whilst it may have been open to the learned Magistrate to initially reject the contents of that document relating to his statement that he had not taken heroin on the night, it was not open to reject that as being his statement to the investigator once Villella gave evidence in chief. During his evidence in chief, his counsel asked him if he recalled his statement to the investigator that he had not taken any drugs before he took the car out that evening, to which he replied that he had told the investigator that he didn't do any drugs that night and that was still his testimony. Accordingly the evidence in respect of Villella making that statement to the investigator was undisputed and his Honour was bound to act on the undisputed evidence. There was no basis upon which the learned Magistrate could have failed to have been satisfied that the relevant part of the statement had been made. In my view, the combination of his findings are such that they were not reasonably open to a tribunal of fact, acting lawfully.

29. His Honour has in my view made an error of law in relation to, the failure to provide adequate reasons for his decision, and in respect of his findings of fact that were not reasonably open on the evidence and the matter will be remitted to the Magistrates' Court for hearing before another magistrate.

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<sup>[1]</sup> Page 43 transcript of Magistrate's hearing 11 April 2006.

<sup>[2]</sup> Page 44 transcript of Magistrate's hearing 11 April 2006.

<sup>[3]</sup> Page 75 transcript of Magistrate's hearing 11 April 2006.

<sup>[4]</sup> page 75 transcript of Magistrate's hearing 11 April 2006.

<sup>[5]</sup> page 97 transcript of Magistrate's hearing 11 April 2006.

<sup>[6]</sup> page 99 transcript of Magistrate's hearing 11 April 2006.

<sup>[7]</sup> Page 105 transcript of Magistrate's hearing 11 April 2006.

<sup>[8]</sup> page 121 transcript of Magistrate's hearing 11 April 2006.



<sup>[9]</sup> page 124 transcript of Magistrate's hearing 11 April 2006.

<sup>[10]</sup> *Sumbul v Melbourne All Toyota Wreckers Pty Ltd* [2006] VSCA 292 at [29]; (2006) 14 VR 602; *Insurance Manufacturers of Australia v Vandermeer* [2007] VSC 28 at [29]

<sup>[11]</sup> [1998] 1 VR 83

<sup>[12]</sup> page 206-7 transcript of finding 31 May 2006

<sup>[13]</sup> page 170 transcript of Magistrate's hearing 12 April 2006.

<sup>[14]</sup> *ibid* page 207

<sup>[15]</sup> [2003] HCA 22; (2003) 214 CLR 118; (2003) 197 ALR 201; (2003) 77 ALJR 989; (2003) 38 MVR 1; (2003) 24 Leg Rep 2

<sup>[16]</sup> at pages 128-9

<sup>[17]</sup> *Sumbul v Melbourne All Toyota Wreckers Pty Ltd* [2006] VSCA 292 at [29]; (2006) 14 VR 602; *Insurance Manufacturers of Australia v Vandermeer* [2007] VSC 28 at [29]

**APPEARANCES:** For the appellant: Mr DA Klempfner, counsel. Gadens Lawyers. For the respondent Villella: Mr F Jones, counsel. Ronald V Tait, solicitors.

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