31/05; [2005] VSC 387

SUPREME COURT OF VICTORIA

HONDA AUSTRALIA MOTORCYCLE & ORS v STATE CORONER & ANOR

Smith J

29-30 August, 29 September 2005

BIAS – APPREHENDED OR OSTENSIBLE BIAS – STATE CORONER CONDUCTING INVESTIGATION INTO DEATHS AND THEIR CAUSES – WHETHER STATE CORONER SHOULD MAKE CERTAIN RECOMMENDATIONS – DURING INQUEST STATE CORONER APPROACHED WITNESS REQUESTING HIM TO PARTICIPATE IN A FORTHCOMING SEMINAR FOR CORONERS – SUCH APPROACH REVEALED TO PARTIES IN INQUEST – DURING INQUEST STATE CORONER DISCUSSED AND TESTED WITH WITNESSES THE PROS AND CONS OF DIFFERENT PROPOSALS PUT FORWARD – TEST FOR APPREHENDED BIAS – WHETHER STATE CORONER'S CONDUCT INVOLVED AN ACKNOWLEDGEMENT OF APPREHENDED OR OSTENSIBLE BIAS.

1. It is common ground that the coroner was under a duty to accord procedural fairness to each of the plaintiffs and that the obligation to accord procedural fairness included a requirement that the coroner's decision making process be free from actual or apprehended bias. The nature and function of the entity concerned affect the content of the obligation to accord procedural fairness. The relevant test to be applied in determining the existence of apprehended or ostensible bias is whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide. The observer is taken to be reasonable and is to be assumed to have a broad knowledge of the material objective facts as ascertained by the reviewing court. At the same time, the observer is not to be assumed to have a detailed knowledge of the law or of the character or ability of a particular judge. The objective observer is to be assumed, however, to have sufficient knowledge to avoid an erroneous view of the particular facts of the case. In applying the test it is to be remembered that the person being observed is a professional judge whose training, tradition and oath or affirmation require a judge to discard the irrelevant, the immaterial and the prejudicial and the issues are to be considered in the context of ordinary judicial practice.

2. Where a coroner during the hearing an inquest made an approach to a witness to participate in a forthcoming forum for Coroners, it did not necessarily follow that such approach indicated that the coroner thought the witness had been a credible witness in the particular case or that he had been an impartial and objective witness. Having regard to all the material evidence including the way in which the coroner conducted the inquest and the various discussions held between the coroner and the witnesses and comments made, a fair-minded observer would have had no doubt that the coroner would bring an impartial and unprejudiced mind to the resolution of the outstanding questions.

SMITH J:

The application

1. By originating motion dated 31 March 2005, the plaintiffs seek the following relief:

(a) an Order, in the nature of *certiorari*, quashing the decision of the first defendant made 16 March 2005 dismissing the plaintiffs' application that he disqualify himself on the grounds of apprehended or ostensible bias;

(b) an Order, in the nature of prohibition –
(i) preventing the first defendant from continuing with the further hearing of inquests into the deaths of Thomas Scutchings, Patricia Smith, Elija Simson, Peter Crole, John Nash and Vincent Tobin ("the deaths");
(ii) preventing the first defendant from handing down any findings, or making any comment or recommendation in respect of the deaths;

(c) an Order, in the nature of mandamus, requiring the first defendant to refer the hearing of coronial inquiries into the deaths to the Deputy State Coroner for directions in relation to the further hearing of those inquests.

The inquests

2. On 12 December 2002 the first defendant commenced the hearing of inquests into the deaths of Thomas Scutchings, Patricia Smith, Elija Simson, Peter Crole, John Nash and Vincent Tobin. During the currency of those inquests, the first defendant was also conducting inquests into the deaths of Dr Shepherd and a Mr Jones in Tasmania, he also having been appointed a coroner for the State of Tasmania. An application similar to the present application has been brought in the Supreme Court of Tasmania with respect to those inquests.

3. The plaintiffs to these proceedings were granted leave to appear at the Victorian inquests. They are distributors of what are called All Terrain Vehicles (ATV). Each of the deaths subject to the coronial inquest occurred in 2002 and in each instance the deceased had been operating or riding upon an ATV at or about the time of death.

Circumstances giving rise to the allegation of ostensible bias

4. The major disputed issues in the inquest relevant to the present application were the following:

- whether the lack of roll-over structures on their ATVs caused the death of Mr Crole and Dr Shephard
- whether roll-over structures should be installed on ATVs
- whether the question of the provision of roll-over structures for ATVs should be investigated further.

5. The coroner had before him a considerable body of expert material relevant to these issues. He and the Victoria WorkCover Authority had commissioned reports from DVE Experts International Pty Ltd at Monash University Accident Research Centre ("MUARC"). Those reports were prepared by Dr Rechnitzer, Dr Grzebieta and Shane Richardson. The plaintiffs in the present proceedings had also provided reports from two American experts, Mr Breen and Mr Zellner. The experts also gave oral evidence.

6. At the inquests Dr Grzebieta strongly expressed the opinion that

- the absence of roll-over protection structures was a cause of the deaths of Crole and Shepherd,
- there was considerable merit in fitting such systems to ATVs, and
- there was a need for further research and testing to be done in relation to the placing of roll-over protection structures on ATVs.

I note that he accepted that the survival of Crole and Shepherd would also have been dependent on an appropriate restraint system being in place. Contrary evidence was given for the plaintiffs through two expert witnesses from the United States of America – Mr Kevin Breen and Mr John Zellner. They strongly disagreed with the opinions of Dr Grzebieta on each of the above matters. Each engaged in trenchant criticism of the other.

7. In late October 2004, in the course of receiving evidence from Dr Grzebieta, the coroner indicated that his then view was that he would not be prepared to make a recommendation that roll-over protection structures be fitted to ATVs but might entertain a recommendation that there be further investigation into the question of whether such protection structures ought to be fitted to ATVs.

8. There was a break in the hearing of the inquest during which the coroner approached Dr Grzebieta to invite him to be a "presenter/trainer" in a program for coroners under the auspices of the Judicial College and the Zelman Cowen Centre to take place in May of that year. One of the proposed topics was "Engineers and the Coronial System". At the resumption of the inquest on 24 January 2005 the coroner informed the participants in the inquests of these facts. He stated at the time:

> "There was no discussion about this case, however, it was a discussion purely on that issue."

9. Counsel representing the Victorian WorkCover Authority immediately indicated that he did not have any concern. The coroner then stated

> "That doesn't necessarily mean I accept or reject his evidence here. I think I have indicated to the parties that I'm swinging well away from saying that roll/over protection is the answer. Whether it's left with experts to sort out is another matter."

A little later he also informed the parties that he had also asked the professor to suggest other engineers for the presentation. A little later counsel for the plaintiffs submitted that this contact initiated by the coroner was a matter of concern because it carried with it the coroner's seal of approval. The coroner commented that he probably did not think it through when he contacted him and indicated that he was thinking that it was probably inappropriate for the professor to continue to be involved in the presentation to the coroners. A little later he also commented that it was probably an error on his part. Not long after these comments, the coroner returned to the issue when addressed by counsel for the Victorian WorkCover Authority when he stated that on reflection it would have been better had he not contacted the professor. These latter comments occurred in the course of discussion of evidentiary matters.

10. On 25 January 2005, the hearing resumed and counsel for the plaintiffs in the present proceedings made application that the coroner disqualify himself on the grounds of apprehended or ostensible bias from the hearing of both the Victorian and Tasmanian inquests. A written submission was filed in support of the application in which arguments were canvassed similar to those put before this Court in this proceeding. They were further developed by counsel in oral submissions. At the conclusion of submissions the inquest was adjourned to a date to be fixed. Subsequently, in March 2005 submissions were prepared by counsel assisting the coroner to which the plaintiffs in the present proceeding responded by a written response. Submissions were also made by others persons interested in the proceedings including the families of the deceased.

11. The inquest resumed on 16 March 2005 for the purpose of hearing further submissions on the question of whether the coroner should disqualify himself. The coroner retired to consider the submissions, material and argument. He returned to court and gave his ruling on the application. *Inter alia*, he stated:

> "Having considered a number of items of correspondence, written and oral submissions, in all of the circumstances and also when considering the context of the whole of the investigation into the eight deaths – six in Victoria and two in Tasmania – I am satisfied that I should continue in the investigation of each of these deaths and in the hearing of the inquest. I am of the view that a fair minded and informed member of the public would not entertain a reasonable apprehension that, as investigating and presiding coroner, I might not bring an impartial and unprejudiced mind to the resolution of the issues before me. That is my decision and I propose to adjourn further hearing of the matter *sine die*."

Submission of the plaintiffs

12. Counsel for the plaintiffs did not rely on the fact of the contact as such and did not challenge the coroner's account of what passed between him and Dr Grzebieta. Rather, counsel submitted that, in asking Dr Grzebieta to be a potential presenter/trainer of coroners in the coronial training program in relation to the topic "Engineers and the Coronial System" and in asking his advice as to other suitable presenters, the coroner demonstrated that he had formed a favourable view of Dr Grzebieta in respect of

> (a) his credibility,
> (b) his standing as an expert,
> (c) the value to be placed on his expertise as a witness, and
> (d) his impartiality and objectivity.

13. Counsel submitted that the approaches to Dr Grzebieta carried with it an implied endorsement of him as an engineer and a witness who had the appropriate standing to instruct coroners in relation to engineering matters. Counsel submitted that it also demonstrated that he had formed the view that Dr Grzebieta had been appropriately objective in his evidence and was lacking any form of bias in respect of that evidence. Counsel further submitted that in approaching Dr Grzebieta the coroner had demonstrated that he had formed an entirely favourable view of him in the above respects and done so prior to further evidence on the topics dealt with by him and prior to hearing and analysing submissions of the manufacturers in respect of his evidence in relation, in particular, to the need for further research into the use of roll/over structures on ATVs. Counsel also submitted that in subsequently acknowledging that it would have been better if he had not contacted Dr Grzebieta, the coroner was conceding his error. This, it was argued, was further confirmed by the proposal to withdraw the invitation to take part in the training programme. Counsel submitted that this did nothing to cure the perception of apprehended bias

created by the coroner through his own actions. Counsel emphasised the fact that the contact that occurred was not an incidental contact but that the coroner had sought out Dr Grzebieta and approached him with the invitation to act as a potential trainer or instructor in a national coronial training programme.

14. Counsel submitted that the question was of particular importance because of the heated conflict between Dr Grzebieta and the experts called by the manufacturers, Mr Breen and Mr Zellner on the questions–

- whether any of the deceased's lives would or might have been saved by roll-over protection systems and

- whether recommendations ought to be made for further investigation of the placement of such systems on ATVs.

15. Counsel further argued that Dr Grzebieta had demonstrated a lack of objectivity and a significant bias in his views and that it was in that context that the coroner appeared by his conduct to have expressed his approval of him. A number of items of evidence were relied upon. The following were of particular significance:

- Dr Grzebieta's suggestion that Mr Zellner's recommendation that a uniform standard for investigation gathering and recording data (an ISO standard) be developed for ATVs was a delaying tactic used by manufacturers, a comment later in his evidence confined to vehicle industry manufacturers in the late 1980's. Counsel noted that the coroner at the hearing expressed the view that his understanding of the original evidence of Dr Grzebieta was that it was intended to be of wider scope and applying to manufacturers of ATVs.
- Dr Grzebieta stated that he was in agreement with the notion that an ISO standard be developed and applied to ATVs provided that it resulted in a roll-over protection system being introduced.
- When the coroner stated that unless he concluded that Mr Crole or Dr Shephard might have been saved if a roll-over protection structure had been in place he would not be in a position to make a recommendation for further investigation, Dr Grzebieta indicated that regardless of any recommendation he would pursue further research in any event.
- Counsel also referred to the comments on Mr Zellner's report in a supplementary report produced by Dr Grzebieta, Dr Rechnitzer and Mr Richardson on 14 September 2004. They referred to Mr Zellner as point scoring and making fatuous assertions about their original report. They commented that Mr Zellner had made light of scientific method and presented defamatory arguments, had made key misrepresentations, that he was biased in his evaluations, that his critique of the computer modelling in the MUARC original analysis was of a misleading style and that Mr Zellner could not distinguish in-principle analyses from design analyses. These sorts of criticisms were repeated in very strong terms. They accused Mr Zellner of engaging in "deplorable acts or pseudo science in ignoring the obvious".
- Criticisms of a similar kind, were made in a further supplementary report of 22 October 2004 co-authored by Dr Grzebieta alleging serious flaws, bias and a lack of ethics.

The applicable legal principles

16. It is common ground that the coroner was under a duty to accord procedural fairness to each of the plaintiffs[1]. It is also common ground that the obligation to accord procedural fairness included a requirement that the coroner's decision making process be free from actual or apprehended bias[2]. The nature and function of the entity concerned affect the content of the obligation to accord procedural fairness.[3]

17. It is also common ground that the relevant test to be applied in determining the existence of apprehended or ostensible bias is whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.[4] Further it is common ground that the observer is taken to be reasonable and is to be assumed to have a broad knowledge of the material objective facts as ascertained by the reviewing court.[5] At the same time, the observer is not to be assumed to have a detailed knowledge of the law or of the character or ability of a particular judge. The objective observer is to be assumed, however, to have sufficient knowledge to avoid an erroneous view of the particular facts of the case.[6]

18. The parties are also agreed that in applying the test it is to be remembered that the person being observed is a professional judge whose training, tradition and oath or affirmation require

a judge to discard the irrelevant, the immaterial and the prejudicial[7] and the issues are to be considered in the context of ordinary judicial practice.

19. The presence of the word "might" twice in the test has been the subject of judicial discussion.[8] It was explained by Tadgell JA in *Gascor v Ellicot*:[9]

> "Although the criterion of apprehension of partiality or prejudice is possibility, not likelihood, a reasonable apprehension is to be established to the court's satisfaction: it is a reasonable and not a fanciful or fantastic apprehension that is to be established; and the apprehension is to be attributed to an observer who is 'fair-minded' – which means 'reasonable'."

It was in fact conceded by counsel for the plaintiffs that a reasonable apprehension must be firmly established and that a court should not lightly conclude that an allegation of apprehended or ostensible bias is made out.[10]

Assessment of the coroner's conduct

20. There are two essential steps in the plaintiffs' argument. The first is that a fair minded observer might have reasonably inferred that the coroner approached Dr Grzebieta to participate in the training programmes, and to suggest others, because he had formed a view favorable to Dr Grzebieta as to his credibility, his standing as an expert witness and the value to be placed on his expertise as a witness, and his impartiality and objectivity. The second step is that a fair minded lay observer, with knowledge of the material facts might on the basis of such an inference, reasonably apprehend that the coroner might not bring an impartial and unprejudiced mind to the resolution of the disputed issues?

21. Counsel for the second defendant submitted that the plaintiffs' first proposition is erroneous. Counsel submitted that the invitation by the coroner to Dr Grzebieta revealed no more than that the coroner accepted him as an expert suitable to speak generally in relation to engineering matters, in a 10 minute presentation as part of a training programme with a multi disciplinary base.

22. The material evidence on the basis of which the plaintiffs argued the inferences should be drawn is somewhat limited. On the basis of the submissions and materials filed by the parties, such evidence would appear to be the information conveyed by the coroner at the time he informed the parties of the approach, the information referred to by Mr Ruddle in an affidavit filed for the second defendant and the conference programme exhibited to his affidavit.

23. I refer above to my summary of the statements made by the coroner when he informed the parties of the contact with Dr Grzebieta. From Mr Ruddle's affidavit it would appear that the coroner was involved as State Coroner in organizing the First National Coronial Training Programme in May 2003. Subsequently, it was decided that there should be a more extensive interactive programme for the training of coroners nationally. The coroner was appointed to devise and co-ordinate a new systematic training programme to be held every two years in Melbourne commencing in May 2005. The format for the programme was to have speakers make a 10 minute presentation by way of introduction to an open forum for discussion and debate. I accept, however, that the programme itself supports the conclusion that Dr Grzebieta would have been involved in a session of some 2½ hours. The speakers were drawn from a multi-disciplinary base and included a range of speakers from the media and from the legal and medical professions, engineers, forensic scientists and investigators.

24. Plainly, the coroner's approach to Dr Grzebieta to participate in such a forum reasonably gave rise to an inference that he had a favorable view of him as a suitable speaker and participant in such a forum. His approach to him to suggest other speakers also gave rise to an inference that he had a favorable view of him as a source of information and introduction to other suitable speakers. It could reasonably follow from those conclusions that the coroner saw him as an expert of standing whose opinions were worth considering at the forum and who also had relevant experience and could make a positive contribution to the forum discussion.

25. Might it be reasonably inferred, however, that the approach to Dr Grzebieta indicated that the coroner thought he had been a credible witness in the particular case, or that he had been an impartial and objective witness in that case? That conclusion does not necessarily follow.

26. It could be inferred from the coroner's approach to him that his performance as a witness was not such as to adversely affect the coroner's view as to his suitability to take part as an expert in a forum. But the plaintiffs' argument requires more - that the inference might reasonably be drawn from the coroner's actions that he had before hearing all evidence and argument formed the view favorable to Dr Grzebieta as to his credibility, impartiality and objectivity in the inquest and as to the value to be placed on his evidence. That is not an inference that readily emerges from the above material evidence. For the coroner did not approach him to give evidence as a witness. In addition, a fair minded person would bear in mind that, from time to time, experts of high standing and quality may give evidence that is not credible or may in a particular case lose their objectivity and impartiality and that their evidence may be rejected even though the judge otherwise regards them of high standing and quality. It might also be noted that aspects of Dr Grzebieta's performance as a witness which formed the basis of the plaintiffs' attack on his objectivity and impartiality made him an ideal choice for the forum. He was plainly someone who had strong opinions and was prepared to express them forcefully and clearly. That sort of person is likely to provoke discussion and debate – major assets in a participant in such a forum.

27. But there is other material background evidence to be considered in deciding whether the necessary inference might reasonably be drawn. Critical to the argument advanced for the plaintiffs is the proposition that the coroner's decision to approach Dr Grzebieta to participate in the forum was the result of the view the coroner formed of him as a witness in the inquest. But other evidence strongly supports the conclusion that the decision was based on other experiences that preceded the inquest.

- At the time Dr Rechnitzer was sworn to give evidence the coroner stated the following:

> "Can I just say something, that Mr Rechnitzer and I have known each other in a professional capacity for 15 years or more. Mr Rechnitzer has worked in coronial enquiries for that length of time, so we have come across each other at conferences and various other venues for a number of years. Mr Grzebieta is also known to me in the same capacity but for a significantly lesser time, really only the last probably couple of years. Any comments on that? Thankyou. Dr Rechnitzer gave his occupation as forensic engineer. Mr Grzebieta gave his occupation as associate professor in the Department of Civil Engineering as well as a partner in DV Experts".

Thus the coroner had known Dr Grzebieta for approximately two years through his work in coronial inquiries and at conferences and other venues.

- The fact was that, prior to the inquest, the coroner had formed the view that Dr Grzebieta was an expert of standing whose views were worth considering and who was capable of giving credible and impartial evidence of value. For the coroner had joined with the VWA to approach him and his colleagues to assist the inquiry. This would have been apparent to any fair minded bystander observing the inquest. I also note that that engagement was not a matter which appears to have given rise to any concern prior to the knowledge of the subsequent contact being made.[11]

I suggest, therefore, that a fair minded observer being aware of these facts would be likely to assume that the coroner approached Dr Grzebieta because of the opinion he had formed of his capacity to assist in a forum on the basis of his contacts with him in the past and not because of any views he had formed about him because of the evidence he had given, the way he had given it or the content of it.

28. But let it be supposed that the inference necessary for the plaintiffs' argument was one of the inferences reasonably open on the above evidence. There is other evidence that negates the inference.

29. A reading of the transcript makes it clear that the coroner had not formed a final view on the critical issues which agreed with the views of Dr Grzebieta. In addition, in key areas, he indicated a reluctance to accept the evidence of Dr Grzebieta This would suggest to the fair-minded observer that the coroner had either formed an unfavorable view about Dr Grzebieta as a witness, contrary to the inference suggested by counsel for the plaintiff, or, that while maintaining a favorable view on the matters mentioned, was not prepared to accept the opinion. If the former, it contradicts the proposed inference. If the latter, it is strong evidence that the coroner was exercising an impartial judgment.

30. On a number of occasions he showed that he was not prepared to accept the position put forward by Dr Grzebieta. For example, in the discussion on 25 October 2004, he spoke of the difficulty posed by the possibility that there were only two instances of roll-overs before the coroner upon which he was being asked to make recommendations applicable to all ATVs. On 27 October 2004, he put forward a proposal to Dr Grzebieta, seeking his views, about what he saw as the best way forward to resolve the tension between the experts' positions as being perhaps to recommend a move towards an ISO standard or to recommend that such a standard be developed. Dr Grzebieta responded:

> "I agree with that, your Worship, so long as it results in a roll-over protection system."
> The coroner replied:
> "It doesn't necessarily follow that that is going to happen?"
> Dr Grzebieta replied:
> "That's my concern."

On 28 October 2004, he stated that he was not going to recommend that roll-over protection be fitted to all ATVs – something pressed for by Dr Grzebieta. He stated that everyone could put that out of their minds. He went on to say, however, that he was yet to reach a final conclusion on the question of whether the deaths of Mr Crole and Professor Shepherd could have been prevented by roll-over protection structures and seat belts. He stated that he was not going to express a view about that because he had to reach a final conclusion after submissions on both those matters. These statements were made in the course of Dr Grzebieta giving his evidence. Following these statements, Dr Grzebieta said that that was what they were asking for but the coroner then stated:

> "But, see, I am attracted to Mr Zellner's suggestion for development of the ISO standard applying to verification of systems".

Dr Grzebieta then replied that that was satisfactory so long as it was rapid and they weren't sitting around for 10 or 15 years coming up with a solution. A little later the coroner indicated that he was not accepting and was in fact having great difficulty considering accepting the position being put forward by Dr Grzebieta. The coroner commented that the recommendations and results sought by Dr Grzebieta were not open if he, the coroner, did not conclude that Mr Crole or Dr Shepherd would have been saved by roll-over protection structures and said that that was why they were investigating the matters that they were. Dr Grzebieta commented that that would be a sad situation because it would mean that it would reduce further work in the area. The coroner responded saying:

> "Sad as it might be, it's a possibility that I might not conclude".

Dr Grzebieta replied in effect that regardless of what the coroner recommended he would be trying to pursue funding for research. Counsel for the Victoria WorkCover Authority then sought to resume his questioning and the coroner interrupted, apologizing to counsel, and then commenting to Dr Grzebieta that his jurisdiction to make the recommendations depended on him coming to the conclusion and accepted Dr Grzebieta's comment that that was the coroner's dilemma. The coroner then commented that his next dilemma was the possibility of making a recommendation that may result in unintentional consequences. Dr Grzebieta put that all they were asking for was more research to which the coroner replied:

> "You are asking for a bit more though aren't you? You are asking for more than research – asking for actual commitment and real time testing with real equipment?"

Later, Dr Grzebieta expressed the opinion that further research into roll-over bars was necessary to which the coroner responded:

> "It is for me to recommend that there needs to be more work by co-operative expert committee and a range of agencies."

In addition, notwithstanding Dr Grzebieta's conclusion that Dr Shepherd and Mr Crole would have been saved by the fitting of the roll bars and that this would be sufficient to justify a recommendation that they be fitted, the coroner expressed a provisional view that:

> "My view at the moment is that it does not give me enough to recommend roll-over protection."

The above and other evidence of the way the coroner conducted himself gives the clear impression that the coroner in his dealings with Dr Grzebieta and the plaintiffs' experts Mr Breen and Mr Zellner was appropriately testing the evidence they were putting forward and not yet ready to make up his own mind on a number of issues and, in particular, unable in his own mind to resolve what he described as the tension between their views.

31. Generally the transcript reveals the coroner discussing and testing in an open minded fashion with all experts the pros and cons of the different proposals and opinions that they were putting forward. The coroner appeared to articulate his thinking frankly and tested the expert evidence so that the parties knew the way his thinking was developing and what issues were troubling him. It is quite clear that he had not formed a final view about key recommendations advanced by Dr Grzebieta prior to his approach to Dr Grzebieta about taking part in the training forum.

32. Finally, it is necessary to consider the statement made by the coroner at the time he informed the parties of the contact with Dr Grzebieta. As noted above, he told the parties that they had not discussed the case and he reiterated that his contact did not necessarily mean that he accepted or rejected Dr Grzebieta's evidence and stated that he thought he had indicated to the parties that he was swinging well away from saying that roll-over protection was the answer but that whether it was left to the experts to sort out was another matter. The latter statements were consistent with the statements he had made in October and early November about his thinking.

33. The fair-minded observer might be expected to approach with caution a statement by the judicial officer seeking to deny the attack upon his impartiality. In this case, however, his statement that his contacting Dr Grzebieta did not mean he accepted or rejected his evidence and that he was swinging well away from saying that roll-over protection was the answer were entirely consistent with his prior conduct in the inquest and confirmed his impartiality.

34. In conclusion I note that the plaintiffs sought to attach significance to the coroner's acknowledgements of having erred in contacting Dr Grzebieta and the alleged confirmation of that admission by his statement that he would withdraw the invitation extended to Dr Grzebieta to take part in the forum. It was put that the coroner thereby demonstrated that he realized that he had displayed ostensible bias.

35. In my view, that is reading far too much into what occurred. Hindsight is a wonderful thing. Most judicial officers finding themselves in the position of the coroner would prefer that they had not done what he did because it is the sort of action which can give rise to complaints and difficulties however unmeritorious the arguments put may be. Any conscientious judicial officer would regret creating such a situation and, being honest, would say so. The conduct does not involve an acknowledgment of apprehended or ostensible bias.

Conclusion

36. As I have indicated, in my view the inference sought to be relied upon about the view formed by the coroner about Dr Grzebieta was not reasonably open on the evidence. Alternatively, at its highest, it was no more than a possible inference and, was contradicted by the other evidence referred to above. Thus the critical first step in the plaintiffs' argument is not made out. As to the ultimate question, I am satisfied that a consideration of all the material evidence would have left a fair- minded observer with no doubt that the coroner would bring an impartial and unprejudiced mind to the resolution of the outstanding questions.

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[1] *Annetts v McCann* [1990] HCA 57; (1990) 170 CLR 596, 599; 97 ALR 177; (1990) 65 ALJR 167; 21 ALD 651; *Firman v Lasry & Anor* (2000) VSC 240, 7; *Harmsworth v State Coroner* [1989] VicRp 87; (1989) VR 989 at 994.

[2] *Firman v Lasry & Anor* above.

[3] Ibid.

[4] *Livesey v New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288, 293 – 294; 47 ALR 45; (1983) 57 ALJR 420; *Webb v R* [1994] HCA 30; (1994) 181 CLR 41, 67 – 68; (1994) 122 ALR 41; (1994) 68 ALJR 582; 73 A Crim R 258; *Johnston v Johnston* [2000] HCA 48; (2000) 201 CLR 488, 492; (2000) 174 ALR 655; [2000] FLC 93-041; (2000) 74 ALJR 1380; (2000) 26 Fam LR 627; (2000) 21 Leg Rep 21; *Gascor v Ellicot & Ors* [1997] 1 VR 332.

[5] *Webb v R* above, 73 and *Johnston* above 493.

[6] *Gascor v Ellicot*, above, 343.
[7] *Johnston*, 493
[8] *Gascor v Ellicot*, above, 342, 350-1.
[9] Above at 342.
[10] *R v Commonwealth Conciliation and Arbitration Commission*; *ex parte Angliss Group* [1969] HCA 10; (1969) 122 CLR 546, 553-554; *Firman v Lasry & Anor* (2000) VSC 240, [18]
[11] Presumably because the parties had due regard to the function of the coroner.

APPEARANCES: For the plaintiffs Honda Australia Motorcycle & Power Equipment Pty Ltd: Mr R Ray QC and Mr J Noonan, counsel. Deacons, solicitors. For the second defendant Attorney-General for the State of Victoria: Mr J Ruskin QC and Ms C Anagnostou, counsel. Victorian Government Solicitor.
