19/11; [2011] VSCA 186

SUPREME COURT OF VICTORIA — COURT OF APPEAL

PRIEST v WEST & ANOR

Maxwell P, Harper JA and Kyrou AJA

9 March, 6 April, 23 June 2011

PRACTICE AND PROCEDURE – CORONIAL INQUEST – APPLICATION BY THE ATTORNEY-GENERAL FOR LEAVE TO APPEAR AS A FRIEND OF THE COURT – BASIS FOR APPLICATION THAT, AS THE MINISTER RESPONSIBLE FOR THE ADMINISTRATION OF THE *CORONERS ACT* 2008 (VIC), HE MAY BE ABLE TO ASSIST THE COURT IN DEALING WITH QUESTIONS OF STATUTORY INTERPRETATION THAT MIGHT BE RAISED BY THE APPEAL – CONSIDERATION OF THE ROLE OF A FRIEND OF THE COURT AND THE MATTERS TO BE CONSIDERED IN DETERMINING WHETHER TO GRANT LEAVE TO A PERSON TO APPEAR AS A FRIEND OF THE COURT – ATTORNEY-GENERAL UNABLE TO IDENTIFY ANY ISSUE OF FACT OR LAW THAT WAS LIKELY TO ARISE IN THE APPEAL ON WHICH THE ATTORNEY-GENERAL COULD PROVIDE ASSISTANCE TO THE COURT THAT WOULD NOT OTHERWISE BE PROVIDED BY THE PARTIES THEMSELVES – APPLICATION REFUSED.

1. The role of a friend of the court is to provide assistance – on a matter of law or fact – which the court would not otherwise receive. In contradistinction to the position of a person seeking leave to intervene as a party, a person seeking leave to appear as a friend of the court does not need to demonstrate that his or her interests may be affected by the outcome of the proceeding. Typically, a friend of the court will be independent of the parties and neutral about the outcome of the proceeding, although neither independence nor neutrality is a prerequisite to the grant of leave.

2. Where a person is given leave to appear as a friend of the court, he or she does not become a party to a proceeding and hence has neither the rights nor the obligations of a party, such as the right to appeal and the obligation to pay costs. By contrast, a person who is given leave to intervene as a party enjoys all the benefits, and bears all the burdens, of a party to the proceeding.

3. The court has a broad discretion to allow a person to appear as a friend of the court. Where it is in the interests of justice to do so, the court can hear a friend of the court by allowing him or her to make oral submissions or to file written submissions, or to do both. Only in an exceptional case will a friend of the court be permitted to adduce evidence or to raise a new issue or special defence.

4. The court's power to grant such leave is not limited to any particular individuals or organisations or to any particular types of cases or circumstances. The individuals or organisations may include the holder of a non-governmental office, a Minister of the Crown, a public interest body, or a professional organisation.

5. Ordinarily, the court will not grant such leave unless it is of the opinion that the person will be able to assist the court in a way that the court would not otherwise have been assisted. Even when that criterion is satisfied, the court will need to be persuaded that the grant of leave will not result in additional costs to the parties, or delay in the proceeding, which would be disproportionate to the assistance expected to be derived.

6. Where the Attorney-General's contention was that, because of his 'particularly informed perspective' on the Coroners Court, he was 'uniquely positioned' to assist the Court in this appeal, the assistance would, so it was said, be directed at 'contextualising' the issues of statutory interpretation which are raised by the grounds of appeal.

7. The fundamental obstacle in the way of the Attorney's application in the present case was that he was unable to point to any matter, whether of fact or law, likely to arise in this appeal on which the Attorney could provide assistance which the Court would not otherwise receive from the parties themselves.

8. A friend of the court may be heard only 'if good cause is shown for doing so and if the court thinks it proper [to do so].' A non-party's desire to be present in case something is said, or omitted to be said, by the parties which might warrant the non-party making submissions to the court is not

'good cause' and – certainly where (as here) one of the parties opposes the course – the grant of leave in such circumstances would not be 'proper'.

9. Finally, the Attorney-General has failed to show that the parties 'are unable or unwilling adequately to protect their own interests or to assist the Court in arriving at the correct determination of the case.'

MAXWELL P, HARPER JA and KYROU AJA:

Summary

1. The Attorney-General for the State of Victoria has sought leave to intervene, as a friend of the Court,[1] in litigation between two private individuals. The litigation arises out of two rulings made by the Deputy State Coroner (the 'Coroner') in the course of an inquest into the disappearance in 1968 of Linda Stilwell, the daughter of the appellant, Jean Priest. (The Coroner is a party to the proceeding but is not participating in it.)

2. The dispute concerns the scope of the inquest. Ms Priest contends that the Coroner erred in law by declining to require the second respondent, Derek Percy, to give evidence at the inquest, and by excluding a number of witness statements which – so Ms Priest contends – point to a possible connection between Mr Percy and her daughter's disappearance. Ms Priest's challenge to the Coroner's rulings was rejected by Ross J, and she now appeals to this Court.

3. The Attorney first sought leave to intervene in the appeal as a party, but now seeks to appear as a friend of the Court. The essential basis of the application is that, as the Minister responsible for the administration of the *Coroners Act* 2008 (Vic) (the 'Act'), the Attorney may be able to assist the Court in dealing with the questions of statutory interpretation which are raised by Ms Priest's grounds of appeal.

4. The role of a friend of the court is to provide assistance which the Court would not otherwise receive. As the Attorney was unable to identify any issue of fact or law in respect of which the Court would require assistance beyond that which the parties themselves would be able to provide, we have concluded that the application for leave must be refused.

Background

5. On 19 January 2011, Mr Percy filed a summons seeking an order that Ms Priest provide security for his costs of the appeal. That summons was listed to be heard on 9 March 2011. On 4 March, the Attorney filed a summons seeking leave to intervene as a party. That summons was supported by an affidavit sworn on 7 March by a solicitor in the Victorian Government Solicitor's Office, which set out the basis for the Attorney's application for leave to intervene.

6. The two applications – for security for costs and for intervention – came before the Court on 9 March 2011. Dr Freckelton SC appeared for the Attorney. Both Ms Priest and Mr Percy were represented by counsel. The Court was informed that, if the Attorney were granted leave, he would undertake to pay any costs that were ordered against Ms Priest.

7. Having noted the Attorney's application and proposed undertaking, we then heard submissions in relation to Mr Percy's application for security for costs. It was common ground that the matters to be considered included whether Ms Priest was impecunious and whether the making of an order for security for costs against her would stifle the appeal.[2]

8. Counsel for Ms Priest conceded that she was impecunious. As it appeared that the appeal would be stifled unless the Attorney's application to intervene were granted and his proposed undertaking as to costs accepted, the Court asked senior counsel for the Minister to identify the source of the Court's power to grant the Minister leave to intervene. Counsel was referred to the decision of the New South Wales Court of Appeal in *Corporate Affairs Commission v Bradley*,[3] which examines at some length the circumstances in which an Attorney-General might seek to intervene, either as of right or by leave.

9. Senior counsel indicated that he was not in a position to make submissions on the issue of the Court's power and sought an adjournment of the Attorney's application to enable written submissions to be filed. Given that the fate of Mr Percy's application hinged on the outcome of the Attorney's application, we adjourned the further hearing of both applications.

10. In written submissions subsequently filed, the Attorney stated that he had decided to abandon his application for leave to intervene as a party and had decided instead to seek leave to intervene as a friend of the Court. Significantly, the submissions stated that the Attorney would pay any costs which Ms Priest was ordered to pay to Mr Percy in the appeal, whether or not he was granted leave to intervene.

11. When the hearing of the applications resumed, counsel for Mr Percy informed the Court that, in the light of the Attorney's unconditional offer to meet any order for costs of the appeal which might be made in Mr Percy's favour, he would not press his application for security for costs.

Facts and procedural history

12. Linda Stilwell has been missing since 10 August 1968, when she was seven years of age. Although the evidence suggests that she was abducted and killed, her body has never been found. Understandably in the circumstances, Ms Priest is very anxious to ensure that every opportunity to discover her daughter's fate be properly explored.

13. On 2 April 1970, Mr Percy was found not guilty of the murder of a young girl, Yvonne Tuohy, by reason of insanity. He has been detained ever since, initially at the Governor's pleasure and later under the *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (Vic). He is a suspect in relation to the murders of other young children in Victoria and interstate.

14. The inquest into the disappearance of Linda Stilwell commenced in December 2009. During the inquest, the Coroner made an interim finding that Mr Percy was in the area in which Linda Stilwell was last seen on 10 August 1968.

15. This appeal concerns two subsequent rulings by the Coroner. The first excluded as irrelevant 11 witness statements that related to the deaths of five children in the period from 1965 until 1969. The second was that Mr Percy not be compelled to give evidence at the inquest.

16. The second ruling was made after Mr Percy's counsel objected to his giving evidence on the ground of self-incrimination. The ruling was made under s57 of the Act, which provides:

> **57 Privilege in respect of self-incrimination in other proceedings**
> (1) This section applies if a witness objects to giving evidence, or evidence on a particular matter, at an inquest on the ground that the evidence may tend to prove that the witness—
> (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or
> (b) is liable to a civil penalty under an Australian law or a law of a foreign country.
> (2) The coroner must determine whether or not there are reasonable grounds for the objection.
> (3) If the coroner determines that there are reasonable grounds for the objection, the coroner is to inform the witness—
> (a) that the witness need not give the evidence unless required by the coroner to do so under subsection (4); and
> (b) that the coroner will give a certificate under this section if—
> (i) the witness willingly gives the evidence without being required to do so under subsection (4); or
> (ii) the witness gives the evidence after being required to do so under subsection (4); and
> (c) of the effect of such a certificate.
> (4) The coroner may require the witness to give evidence if the coroner is satisfied that—
> (a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
> (b) the interests of justice require that the witness give the evidence.
> (5) If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the coroner must cause the witness to be given a certificate under this section in respect of the evidence.
> (6) The coroner is also to cause a witness to be given a certificate under this section if—
> (a) the objection has been overruled; and
> (b) after the evidence has been given, the coroner finds that there were reasonable grounds for the objection.
> (7) In any proceeding in a court or before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence—
> (a) evidence given by a person in respect of which a certificate under this section has been given; and

(b) any information, document or thing obtained as a direct or indirect consequence of the person having given evidence—

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

(8) Subsection (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

17. The Coroner was satisfied that there were reasonable grounds for Mr Percy's objection. He ruled that it would not be in the interests of justice to require Mr Percy to give evidence and to grant him a certificate under s57(5) of the Act. The Coroner rejected the submission of counsel for Ms Priest that the likelihood of Mr Percy being prosecuted was 'infinitesimal' and found that, by reason of Mr Percy's mental state, any evidence that he gave was likely to be unreliable.

18. On 25 February 2010, Ms Priest sought judicial review of the rulings. Her application under O56 of the Rules seeks orders quashing both rulings. The inquest was adjourned on 11 December 2009 and remains adjourned pending the outcome of this appeal.

19. At the hearing of the application for review before Ross J, Ms Priest made the following submissions in relation to the excluded witness statements:[4] that they showed that Mr Percy had the propensity to abduct, torture and kill children; that they were relevant to the determination of what happened to Linda Stilwell; and that, by excluding them, the Coroner's first ruling was vitiated by jurisdictional error.

20. Ms Priest submitted that the second ruling was vitiated for two reasons: first, because the Coroner had not complied with s57(3) of the Act;[5] and, second, because, in finding that any evidence which Mr Percy might give about the circumstances of Linda Stilwell's disappearance would be unreliable, the Coroner had regard to an irrelevant consideration (namely, the psychiatric reports from Mr Percy's 1970 trial (the '1970 reports')) and failed to have regard to a relevant consideration (namely, a statement of evidence by Professor James Ogloff (the 'Ogloff statement')).

21. Ross J dismissed the application for review. His Honour relevantly held that:

(a) the subject-matter, scope and purposes of the Act did not support Ms Priest's contention that the Coroner was bound to have regard to the material in the excluded witness statements, and therefore the first ruling did not involve jurisdictional error;[6]

(b) the legislative context and the particular circumstances of the case did not point to the necessity of strict compliance with the requirements of s57(3) of the Act, and therefore the failure to comply with those requirements did not invalidate the second ruling;[7]

(c) the 'relevant consideration' was the reliability of the evidence that Mr Percy might give and the Coroner had taken that into account. The 1970 reports and the Ogloff statement were not themselves 'relevant considerations' in the administrative law sense, but merely items of evidence. No question of jurisdictional error could therefore arise.[8] The Coroner was neither precluded from taking into account the 1970 reports nor bound to take into account the Ogloff statement;[9] and

(d) even if jurisdictional error had been established, relief should be refused on discretionary grounds.[10]

22. Ross J made an order, by consent, that Ms Priest pay Mr Percy's costs of the application for review. Mr Percy's solicitor subsequently quantified the costs in the amount of $32,247. Those costs have not been paid.

23. Ms Priest's notice of appeal contends that Ross J erred in upholding the legal validity of the Coroner's rulings. The full grounds of appeal are attached as an appendix to these reasons.

The Attorney-General's applications

24. As noted earlier, an affidavit was filed in support of the Attorney's initial application for leave to intervene as a party. That affidavit stated that, as the Minister responsible for the administration of the Act, the Attorney had a 'true interest' in the appeal. (Intervention as a party ordinarily depends upon the intervener establishing that its legal interests are likely to be affected by the outcome of the proceeding.[11])

25. That 'true interest' was said to comprise the following interests:

> (a) an interest in ensuring that jurisdiction conferred by the Act and powers exercised under, or in consequence of, the Act are properly exercised;
>
> (b) an interest in proceedings the outcome of which may affect the operation and implementation of the Act;
>
> (c) an interest in ensuring that decisions made in the exercise of jurisdiction and powers by the Coroner pursuant to the Act accord with the law;
>
> (d) an interest in ensuring that this Court, before exercising its discretion to grant or refuse Mr Percy's application for security for costs, takes into account what effect relief of that kind could have on interested persons with respect to the inquest into the suspected death of Linda Stilwell and on other such persons; and
>
> (e) an interest in ensuring that the laws of the State are not implemented in a way that is contrary to public policy or in a way that diminishes the protection that members of the public are entitled to expect from the law.

26. Although the Minister no longer relies on any such assertion of interest, the last of these warrants brief comment. In *Bradley*, the New South Wales Court of Appeal rejected – properly, in our view – the notion that Ministers have a right to intervene in proceedings where questions of public policy arise. Hutley JA said:

> The doctrine that generally in issues of public policy the courts should accept the guidance of the executive is, in my opinion, subversive of the independence of the judiciary. The judiciary exists to protect the citizen against the vagaries of executive decision and its independence is given to it for the purpose of maintaining the continuing values of society as embodied in the common law and legislation. The invitation of the executive to intervene in the formulation of public policy in the courts must carry with it the corollary that such binding authorities as are produced by its intervention should be changed at the behest of a different executive with a different public policy. This is to resurrect the concept that judges should be lions but lions under the throne.[12]

27. The affidavit on behalf of the Attorney further stated:

> The Attorney-General considers that this proceeding gives rise to important questions of law concerning the operation and interpretation of the Act. By his proposed participation he seeks to ensure that these are properly ventilated before this honourable Court.
>
> The Attorney-General accepts that, if leave to intervene is granted, he would become a party to the proceeding with all the benefits and burdens of a party, including being subject to the jurisdiction of the Court on the question of costs.

28. As already noted, there was a subsequent change in the nature of both the Attorney's application to intervene and his undertaking as to costs. No reasons were given for either change. The submission simply stated:

> Having had the opportunity to give further consideration to both the application and the undertaking, the Attorney-General:
> - applies for leave to intervene in the appeal (only) by way of being an *amicus curiae*; and
> - undertakes to pay the costs of the Appellant should costs be awarded against her by this honourable Court, independent of the result of this application.

'Friend of the court'

29. The role of a friend of the court is to provide assistance – on a matter of law or fact – which the court would not otherwise receive.[13] In contradistinction to the position of a person seeking leave to intervene as a party, a person seeking leave to appear as a friend of the court does not need to demonstrate that his or her interests may be affected by the outcome of the proceeding. Typically, a friend of the court will be independent of the parties and neutral about the outcome of the proceeding, although neither independence nor neutrality is a prerequisite to the grant of leave.[14]

30. Where a person is given leave to appear as a friend of the court, he or she does not become a party to a proceeding and hence has neither the rights nor the obligations of a party, such as

the right to appeal and the obligation to pay costs. By contrast, a person who is given leave to intervene as a party enjoys all the benefits, and bears all the burdens, of a party to the proceeding. [15]

31. The court has a broad discretion to allow a person to appear as a friend of the court.[16] Where it is in the interests of justice to do so, the court can hear a friend of the court by allowing him or her to make oral submissions or to file written submissions, or to do both.[17] Only in an exceptional case will a friend of the court be permitted to adduce evidence or to raise a new issue or special defence.[18]

32. The court's power to grant such leave is not limited to any particular individuals or organisations or to any particular types of cases or circumstances.[19] The individuals or organisations may include the holder of a non-governmental office,[20] a Minister of the Crown,[21] a public interest body,[22] or a professional organisation.[23]

33. Ordinarily, the court will not grant such leave unless it is of the opinion that the person will be able to assist the court in a way that the court would not otherwise have been assisted. [24] Even when that criterion is satisfied, the court will need to be persuaded that the grant of leave will not result in additional costs to the parties, or delay in the proceeding, which would be disproportionate to the assistance expected to be derived.[25]

34. Matters to be considered in determining whether to grant leave to a person to appear as a friend of the court include:

> (a) whether the intervention is apt to assist the court in deciding the instant case;
> (b) whether it is in the parties' interest to allow the intervention;
> (c) whether the intervention will occupy time unnecessarily;
> (d) whether the intervention will add inappropriately to the costs of the proceeding.[26]

35. The assistance of a friend of the court may be indispensable if there would otherwise be no proper contradictor. That appears to have been the basis upon which the Victorian Attorney-General was granted leave to appear in *Re BWV; Ex parte Gardner*[27] and in *Domaszewicz v State Coroner*.[28] No such consideration arises in the present case.

The Attorney-General's powers and responsibilities under the Act

36. The submissions filed on behalf of the Attorney accepted that

> [t]he footing on which an *amicus curiae* is heard is that that person is willing to offer the Court a submission on law or relevant fact which will assist the Court in a way which the Court would not otherwise have been assisted.

The Attorney's submission was that, because of his statutory roles and responsibilities under the Act, he was

> integrally involved in the functioning and review of the role of the Coroners Court. He is uniquely positioned to provide to this honourable Court an informed perspective upon the jurisdiction.

37. The submission pointed out that, under the Act, the Attorney:

> (a) has the right to appear or to be represented at a coronial inquest and to examine or to cross-examine witnesses and to make submissions;[29]
>
> (b) makes recommendations to the Governor-in-Council on the appointment of the State Coroner,[30] the Deputy State Coroner,[31] acting coroners,[32] judicial registrars[33] and members of the Coronial Council;[34]
>
> (c) receives various reports and recommendations from the State Coroner,[35] and an annual report from the Coronial Council,[36] and is responsible for tabling in Parliament the annual reports of the Coroner[37] and of the Coronial Council;[38]
>
> (d) has the right to be consulted in the preparation of guidelines relating to the appointment of judicial registrars of the Coroner's Court, and in relation to any amendment or revocation of such guidelines;[39] and

> (e) has the right to approve the State Coroner's suspension of a judicial registrar from office.[40]

38. Hence, it was said, it would be 'in the interests of justice' for the Attorney to be permitted to intervene:

> As an independent law officer with a particularly informed perspective and interest in the running of the Coroners Court ... and in the absence of the participation of the [Coroner], as in *Domaszewicz v State Coroner*,[41] the Attorney-General is uniquely positioned to assist the Court with respect to the case law and law reform background of s57 of the *Coroners Act* 2008.
>
> From his neutral and informed perspective, the Attorney-General can facilitate the Court's informed and contextualised analysis of the legislative scheme in this case.

39. This was, essentially, a claim of specialist expertise. The Minister's contention was that, because of his 'particularly informed perspective' on the Coroners Court, he was 'uniquely positioned' to assist the Court in this appeal. The assistance would, so it was said, be directed at 'contextualising' the issues of statutory interpretation which are raised by the grounds of appeal. (It was not suggested, however, that there was any particular feature of this litigation, or of the interpretive issues which arise, which called for the Minister's input.)

40. There are, we think, a number of difficulties with this submission. First, the mere fact that a Minister is responsible for the administration of a statutory scheme does not, in our view, endow him or her with any particular expertise in the interpretation of the legislative provisions. Nor does the fact that he or she has designated functions under the legislation. If the 'special expertise' proposition were correct, it would be of almost unlimited application. Whenever a proceeding raised a question of interpretation under a legislative scheme, the responsible Minister would be entitled to offer his or her interpretive assistance as a friend of the court. Reference need only be made to the frequency of litigation about provisions of the accident compensation, occupational health and safety and planning schemes to demonstrate what a remarkable change in adversarial litigation this would represent.

41. Secondly, for the Court to entertain the submission of a member of the Executive about the interpretation of a legislative provision would be to divert attention from the interpretive task, which is to ascertain the intention of the legislature. (Statements made by Ministers in second reading speeches are in a special position but even they, 'however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.'[42])

42. Thirdly, the submission which an intervening Minister might make about how an Act should be interpreted might well be thought to be – and might in fact be – influenced by the policy position of the government of the day, which has no place in the interpretive task which an independent judiciary must perform. (Rights of intervention which Parliament itself confers upon Ministers are, of course, in a quite different category.)[43]

43. Those difficulties apart, there was a fundamental obstacle in the way of the Attorney's application. Quite simply, his counsel was unable to point to any matter, whether of fact or law, likely to arise in this appeal on which the Attorney could provide assistance which the Court would not otherwise receive from the parties themselves.

44. Senior counsel for the Attorney conceded that all of the materials to which the Attorney would wish to refer if leave were granted – case law, law reform reports and other extrinsic materials – were publicly available. He disavowed any suggestion that the respective legal representatives for Ms Priest and Mr Percy would not be able to make appropriate submissions to the Court based on such materials. He also conceded – rightly – that Mr Percy was a proper contradictor to Ms Priest's appeal and that the decision in *Domaszewicz* was therefore distinguishable.

45. Senior counsel submitted, nevertheless, that the Attorney should be given leave to participate in the hearing so that he could decide, as the appeal hearing proceeded, whether it was necessary for him to make any submissions in the light of the presentation of the issues by Ms Priest and Mr Percy. In so submitting, Dr Freckelton acknowledged the possibility that, having heard the submissions of Ms Priest and Mr Percy, the Attorney might decide not to make any submissions to the Court.

46. In our opinion, that would not be a proper basis for granting leave. It is for the parties to a civil proceeding to define the issues in the proceeding through their pleadings or other court documents. They are entitled to 'carry on their litigation free from the interference of persons who are strangers to the litigation.'[44] A friend of the court may be heard only 'if good cause is shown for doing so and if the court thinks it proper [to do so].'[45] A non-party's desire to be present in case something is said, or omitted to be said, by the parties which might warrant the non-party making submissions to the court is not 'good cause' in our view and – certainly where (as here) one of the parties opposes the course – the grant of leave in such circumstances would not be 'proper'.

47. We are not aware of any case where a court has granted leave to a person to intervene as a friend of the court where that person has not identified a particular issue of fact or law in respect of which it is said that the court would be assisted. This is not surprising. In the absence of an identification of such an issue, the granting of leave would, at the very least, be premature.

48. As was the case with the unsuccessful application for leave to appear as a friend of the High Court in *Kruger v Commonwealth*, the Attorney has failed to show that the parties 'are unable or unwilling adequately to protect their own interests or to assist the Court in arriving at the correct determination of the case.'[46]

49. For the above reasons, we are not satisfied that the intervention of the Attorney-General as a friend of the Court would assist the Court in deciding any issue in the appeal. The application must therefore be refused.

APPENDIX

Grounds of Appeal

1. The learned trial judge erred in holding that there was no implication in the subject matter, scope and purpose of the Act to include the statements where he failed to consider
(a) that an inquest must be held in the case of a suspected homicide;
(b) that having found that a coroner must investigate the cause of death and the circumstances in which a death occurred, failed to consider the obligation of a [principal] registrar to notify the Director of Public Prosecutions if the coroner believes an indictable offence may have been committed in connection with the death.
2. The learned trial judge erred in holding that the coroner was not bound to admit the statements when the Act required the coroner
(a) to hold an inquest in the case of a suspected homicide;
(b) to investigate the cause of death and that such investigation was not to be restricted by the rules of evidence;
(c) to investigate the circumstances in which a death occurred;
(d) to consider his belief after his investigation that an indictable offence may have been committed in connection with the death and to consider the obligation of a [principal] registrar to notify the Director of Public Prosecutions,
and the statements established
(a) a propensity in the second [respondent] to abduct and kill children, and
(b) the rarity of such an event,
the coroner having found that the second [respondent] had been in the vicinity of Linda Stilwell on the day of her disappearance; the excluded statements being the only evidence that tended to identify an abductor at the time of the ruling.
3. The learned trial judge erred in failing to recognise the coroner's obligations in combination
(a) to determine if the death was a suspected homicide, and the lack of such an obligation if someone had been charged with respect to the death;
(b) to consider whether an indictable offence may have been committed in connection with the death and a subsequent obligation of a [principal] registrar to notify the Director of Public Prosecutions;
(c) to investigate the cause of death and that such investigation was not to be restricted by the rules of evidence;
(d) to investigate the circumstances in which a death occurred in determining the subject matter, scope and purpose of the Act.
4. The learned trial judge erred in failing to find that the coroner was bound if possible to find the identity of any person who caused the death of the deceased (s67(1)(b)), and erred in excluding from his consideration the only evidence at that stage that tended to prove the identity of such a person.
5. The learned trial judge erred in failing to find that the coroner was bound if possible to find the circumstances in which the death of the deceased occurred (s67(1)(c)), and erred in excluding from his consideration the only evidence at that stage that tended to prove the circumstances in which such a death occurred.

6. The learned trial judge erred in failing to find that the exclusion of the statements breached the coroner's obligation to investigate a suspected homicide, to find if possible a cause of death and the circumstances of the death.
7. The learned trial judge erred in distinguishing between direct methods of proof and inferential methods of proof in his rejection of the contention that the coroner was bound to accept the statements regarding the disappearance of Linda Stilwell.
8. The learned trial judge erred in failing to find that the propensity of the second [respondent]
(a) to abduct and kill children, and
(b) the rarity of such an event,
was relevant to the inquest, after the coroner had found that the second [respondent] had been in the vicinity of Linda Stilwell on the day of her disappearance.
9. The learned trial judge erred in
(a) finding that the provisions of section 57(3) did not require strict compliance;
(b) construing section 57 in a manner that did not distinguish the section as one that abrogated a common law privilege;
(c) finding that the determination under [section] 57(4) was not contingent upon compliance with [section] 57(3).
10. The learned trial judge erred in failing to find that the reports of Doctors Ball and Bartholomew did not bear on the second respondent's capacity to give reliable evidence.
11. The learned trial judge erred in finding, in construing section 57, that for the appellant to succeed in showing that an irrelevant consideration has been taken into account she must show that additionally to showing that the consideration is irrelevant, that the Coroners Act must have forbidden its consideration also.
12. The learned trial judge erred in finding that the coroner was not bound to consider Professor Ogloff's statement as the only relevant psychiatric material before him as to the second [respondent's] material state and memory in deciding
(a) the reliability of the evidence;
(b) if the interests of justice require that the witness give evidence.
13. The learned trial judge erred in finding that there should be a discretionary refusal of certiorari
(a) because counsel for the [appellant] submitted that the coroner should have regard to the reports, but in circumstance[s] where he submitted that the reports did not demonstrate that the second [respondent] was inherently unreliable;
(b) because no counsel had referred to the statement of Professor Ogloff in determining the state of the second respondent's memory including the plaintiff's counsel, where the coroner had stated that he had reviewed the statement (13) and excluded it (188-190) and the next application was in relation to self incrimination (submissions 191-218, ruling 219-220).

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[1] In these reasons, we will use the expression 'friend of the court' in preference to the Latin expression 'amicus curiae'.
[2] See *Equity Access Ltd v Westpac Banking Corporation* (1989) 11 ATPR 40-972, 50,635; *Maher v Commonwealth Bank of Australia* [2008] VSCA 122 (26 June 2008) [80].
[3] [1974] 1 NSWLR 391 ('*Bradley*').
[4] The application for review was confined to eight out of the 11 excluded witness statements.
[5] It was common ground that the Coroner had not informed Mr Percy of the matters set out in s57(3) of the Act.
[6] *Priest v Deputy State Coroner (Vic)* [2010] VSC 449 (7 October 2010) [46], [52].
[7] Ibid [69].
[8] Ibid [93].
[9] Ibid [95]–[98].
[10] Ibid [99]–[102].
[11] *Levy v Victoria* [1997] HCA 31; (1997) 189 CLR 579, 601–4; [1997] HCA 31; (1997) 189 CLR 579; (1997) 146 ALR 248; (1997) 71 ALJR 837; (1997) 12 Leg Rep 14 ('*Levy*').
[12] *Bradley* [1974] 1 NSWLR 391, 403.
[13] *Levy* [1997] HCA 31; (1997) 189 CLR 579, 604; (1997) 146 ALR 248; (1997) 71 ALJR 837; (1997) 12 Leg Rep 14.
[14] See *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377, 381–2; [1996] Aust Torts Reports 81-391 ('*Hokit*').
[15] *Bradley* [1974] 1 NSWLR 391, 396; *United States Tobacco Co v Minister for Consumer Affairs* [1988] FCA 213; (1988) 20 FCR 520, 534; (1988) 80 ALR 525; [1988] ASC 58; [1988] ATPR 40-909 ('*United States Tobacco*').
[16] *Levy* [1997] HCA 31; (1997) 189 CLR 579, 604; (1997) 146 ALR 248; (1997) 71 ALJR 837; (1997) 12 Leg Rep 14; *Karam v Palmone Shoes Pty Ltd* [2010] VSCA 252 (29 September 2010) [3].
[17] *United States Tobacco* [1988] FCA 213; (1988) 20 FCR 520, 534; (1988) 80 ALR 525; [1988] ASC 58; [1988] ATPR 40-909; *Levy* [1997] HCA 31; (1997) 189 CLR 579, 604-5; (1997) 146 ALR 248; (1997) 71 ALJR 837; (1997) 12 Leg Rep 14; *Breen v Williams* (1994) 35 NSWLR 522, 532-3 ('*Breen*'); *Re BWV; Ex parte Gardner* [2003] VSC 173; (2003) 7 VR 487, 490–1 [12]–[17] ('*BWV*').
[18] *Re Medical Assessment Panel; Ex parte Symons* [2003] WASC 154; (2003) 27 WAR 242, 250 [20].
[19] *United States Tobacco* [1988] FCA 213; (1988) 20 FCR 520, 535.

[20] See, eg, *BWV* [2003] VSC 173; (2003) 7 VR 487, 490 [16] (Catholic Archbishop of Melbourne); *R v Murphy* (1986) 64 ALR 498; (1986) 23 A Crim R 349; (1986) 5 NSWLR 18 , 24–5 (President of the Senate).
[21] Eg, *Domaszewicz v State Coroner (Vic)* [2004] VSC 528; (2004) 11 VR 237, 242 [20]; (2004) 151 A Crim R 72 (Attorney-General); *Y v Austin Health* [2005] VSC 427; (2005) 13 VR 363, 366 [11]–[12] (Attorney-General); *Zukanovic v Magistrates' Court of Victoria* [2011] VSC 141 (20 April 2011) [26] (Attorney-General).
[22] *BWV* [2003] VSC 173; (2003) 7 VR 487, 490 [15]–[16] (Right to Life Australia Inc and Catholic Health Australia Inc; *Breen* (1994) 35 NSWLR 522, 532-3 (Public Interest Advocacy Centre); *Levy* [1997] HCA 31; (1997) 189 CLR 579, 593; (1997) 146 ALR 248; (1997) 71 ALJR 837; (1997) 12 Leg Rep 14; (Australian Press Council); *Commonwealth v Tasmania* [1983] HCA 21; (1983) 158 CLR 1, 50-1; (1983) 46 ALR 625; (1983) 57 ALJR 450; 68 ILR 266 (Tasmanian Wilderness Society); *Hokit* (1996) 39 NSWLR 377, 380; [1996] Aust Torts Reports 81-391 (Consumers Federation of Australia).
[23] *Levy* [1997] HCA 31; (1997) 189 CLR 579, 593; (1997) 146 ALR 248; (1997) 71 ALJR 837; (1997) 12 Leg Rep 14 (Media, Entertainment and Arts Alliance).
[24] *Levy* [1997] HCA 31; (1997) 189 CLR 579, 604–5; (1997) 146 ALR 248; (1997) 71 ALJR 837; (1997) 12 Leg Rep 14. See, eg, *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, 359; 153 ALR 490; (1998) 72 ALJR 841; (1998) 8 Leg Rep 41.
[25] *Levy* [1997] HCA 31; (1997) 189 CLR 579, 604–5; (1997) 146 ALR 248; (1997) 71 ALJR 837; (1997) 12 Leg Rep 14.
[26] *Hokit* (1996) 39 NSWLR 377, 381; [1996] Aust Torts Reports 81-391.
[27] [2003] VSC 173; (2003) 7 VR 487, 490 [13].
[28] [2004] VSC 528; (2004) 11 VR 237, 242 [20]; (2004) 151 A Crim R 72.
[29] Section 66(2) of the Act.
[30] Section 91(2) of the Act.
[31] Section 92(2) of the Act.
[32] Section 94(1) of the Act.
[33] Section 102D of the Act.
[34] Section 111(1)(d), (3) of the Act.
[35] See the following sections of the Act: s72(1) (report on a death or fire that the coroner has investigated), s72(2) (recommendations on any matter connected with a death or fire that the coroner has investigated, including recommendations relating to the administration of justice), s102(1) (annual report).
[36] Section 113(1) of the Act.
[37] Section 102(2) of the Act.
[38] Section 113(2) of the Act.
[39] Section 102B of the Act.
[40] Section 102G(1) of the Act.
[41] [2004] VSC 528; (2004) 11 VR 237; (2004) 151 A Crim R 72.
[42] *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252, 264–5 [31]; (2010) 267 ALR 204; (2010) 84 ALJR 507; (2010) 115 ALD.
[43] See, eg, *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s34; *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) s73.
[44] *United States Tobacco* [1988] FCA 213; (1988) 20 FCR 520, 536; (1988) 80 ALR 525; [1988] ASC 58; [1988] ATPR 40-909.
[45] Ibid.
[46] Transcript of Proceedings, *Kruger v Commonwealth* [1996] HCATrans 68 (12 February 1996); quoted in *Levy* [1997] HCA 31; (1997) 189 CLR 579, 604; [1997] HCA 31; (1997) 189 CLR 579; (1997) 146 ALR 248; (1997) 71 ALJR 837; (1997) 12 Leg Rep 14.

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