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|  | **CASE SUMMARIES 2012** |
| **1** | **Drink/driving – refuse breath test – “requirement”**  In *DPP v Serbest* MC01/12, Robson J determined an appeal against a magistrate’s dismissal of a charge of refusing to accompany a police officer for a breath test. At the hearing, the Magistrate found that the police informant had only made a request rather than a requirement and dismissed the charge on the ground that the police had not proven that S. understood that he had to go to the police station. Upon appeal—  HELD: Appeal allowed. Magistrate's order quashed. Remitted to the Magistrates' Court for hearing and determination according to law.  1. The test as to what constitutes a request is whether the evidence as it stood was such to prove that the driver was given reasonably sufficient information to know what was required of him and why. Consequently, a requirement need not take the form of a demand in imperative terms. A request in precatory or polite terms by a person clothed with apparent authority will ordinarily be sufficient and indeed it is to be hoped, and in most cases expected, that a requirement will be made in terms of a polite request. In any event, whatever terms may or may not be used in any given case, it will be enough that the intent of the police officer and the obligation of the person required to comply have been made clear.  *Sanzaro v County Court of Victoria* [2004] VSC 48; (2004) 42 MVR 279; MC09/04 per Nettle J, applied.  2. The offence is created under s49(1)(e) of the Act by the driver’s refusal to accompany a member of the police force when required to do so. In the present case the informant told S. he had a choice. That is, there was no compulsion on S. to comply with the requirement of the informant to accompany him to the police station. There were consequences and, indeed, serious consequences if S. failed to comply with the requirement of the informant and S. was clearly told of these consequences. The Magistrate proceeded on the assumption that the informant was required to prove that S. understood that he had to go to the police station.  3. There is no enforceable obligation imposed on the driver by the Act that he accompany the police officer. Rather, the driver commits an offence if he or she 'refuses' to comply with the request. It is the refusal to comply that triggers the offence. The person cannot be compelled to go and cannot be arrested for failing to go and take another test.  4. The police informant correctly informed S. that he was not under arrest but there were important consequences if he did not comply with the request. S. was not confused as to the necessary elements of the offence. That is, a request had been made and that his refusal to comply constituted an offence.  5. Accordingly, the Magistrate was in error in finding that the subjective state of the mind of S. was relevant to the offence and in dismissing the charge. |
| **2** | **Proof required by the Crown in relation to a charge of Blackmail**  In *Murdoch v The Queen* MC02/12, the Court of Appeal (Buchanan,and BongiornoJJA and Williams AJA) determined what the Crown was required to prove in relation to a charge of Blackmail.  1. The Crown was obliged to prove that M. did not have reasonable grounds for making the demand or did not believe that the use of menaces was a proper means of reinforcing the demand. Whilst the trial judge said at one point that the Crown was required to prove that M. did not believe he had reasonable grounds for making the demand, on two other occasions he said to the jury that it was sufficient for the Crown to prove that the accused did not have reasonable grounds for making the demand. The jury may well have taken the reiterated incorrect statement as being the law.  2. Accordingly, the trial judge erred in failing to direct the jury that M. would not be guilty of the offence if M. honestly believed that he had reasonable grounds for serving the demands which he did and that the use of menaces was proper. |
| **3** | **Natural justice – procedural fairness**  In *DPP (NSW) v Elskaf* MC03/12 a magistrate dismissed a traffic charge after ruling that the two police witnesses were unreliable.  HELD: Appeal allowed. Orders made by the Magistrate quashed. Proceedings remitted to the Local Court to be dealt with by another Magistrate.  1. The first ground of appeal was that the Magistrate had denied the prosecution procedural fairness because she did not permit the prosecutor to call such witnesses as he wished.  2. The obligation of a judicial officer hearing a defended case is to hear it fairly and to judge it according to law, upon such evidence as either party to the proceedings might wish to adduce, and which is admitted. It is no part of a presiding judicial officer's function to take over the conduct of the case of one or other party and, in effect, summarily to prevent the calling by the prosecutor of any evidence where the prosecutor considered the evidence to be relevant to making out the charge.  *DPP v Wunderwald* [2004] NSWSC 182 at [21] per Sully J, applied.  3. In the present case, it was clear that the Magistrate should have, but did not, permit the prosecution to call the witnesses who the prosecutor submitted were relevant. If the evidence of the witness was not relevant, then after the witness was called, it was a matter for the defendant's counsel to object to the evidence on the basis of a lack of relevance: s56 *Evidence Act* 1995 (NSW). Alternatively, if it was thought to be an appropriate course, the evidence could have been tested as to its relevance on a *voir dire*. Neither of these courses was adopted. Rather, the Magistrate peremptorily refused to permit the prosecutor to call one or more witnesses.  4. In that respect, the Magistrate's conduct of the matter fell short of the required standard of a trial judge acting properly and accordingly, there had been a denial of procedural fairness.  5. The Magistrate entirely confused the differences between determining whether there was evidence which if accepted, and taken at its highest, could amount to proof of the offences charged, a question of law, with a different question, namely one of fact, that is, whether she did or did not judge the evidence which was given to be reliable and acceptable. As well, she denied the prosecution procedural fairness.  6. The legal tests, at the *prima facie* case stage, refer to evidence being "inherently incredible" or "self contradictory". The phrases used by the Magistrate in the present case dealt with reliability of the evidence and its acceptability. These are questions of fact and not law. The phrases used were not the equivalent of the legal tests.  7. A magistrate is obliged as part of fulfilling their judicial function to give reasons which adequately explain their findings and the reasons for arriving at their findings.  *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247; and  *DPP (NSW) v Illawarra Cashmart Pty Ltd* [2006] NSWSC 343; 67 NSWLR 402, applied.  8. The mere statement that a witness' evidence was unreliable, without any analysis as to why that was so, or any analysis of, in this case, the nature and context of the challenge to the witness' evidence, was not sufficient to discharge a magistrate's judicial obligation to give reasons.  9. It is necessary for a judicial officer to explain why he or she has found the evidence of a witness to be unacceptable. The possible bases for such a finding would include (but are not limited to):  (a) contradictory evidence of the same events or incidents from another witness;  (b) contradictory evidence from contemporaneous documents;  (c) inconsistencies or contradictions within a witness' own evidence;  (d) the demeanour of a witness, including the manner of giving evidence; and  (e) evidence of conduct or behaviour which is inconsistent with mandatory practices of police officers, or else those practices which are regularly followed by police officers.  10. A party who has called evidence from a witness, which is relevant and apparently probative, and whose evidence is not accepted is entitled to know of the basis of that non-acceptance, in order, at least, to be able to assess the prospect of a successful appeal.  11. In the present case, the Magistrate provided no basis for disbelieving the police officers, and did not fulfil her obligations to give reasons.  12. Accordingly, the errors of law committed by the Magistrate were:  (a) a denial of procedural fairness in that the Magistrate did not permit the prosecution to call such witnesses as the prosecution wished;  (b) the ruling by the Magistrate that the prosecution had not established a *prima facie* case; and  (c) that the Magistrate failed to give adequate reasons for her ruling that no *prima facie* case had been established.  13. For the legal principles to be applied by a Magistrate at the conclusion of the evidence called by the prosecution in a summary proceeding see para 47. |
| **4** | **Contract and whether certainty of terms and parties**  In *Tonissen-McGrath v Hughes and Anor* MC04/12, Beach J dealt with an appeal against a Magistrate’s decision in a civil matter whereby he made an order in favour of a claim for payment of amounts owing in relation to a sale of shares. His Honour held:  HELD: Appeal dismissed.  1. The shareholders' agreement attached to the email of 4 November provided that H. would sell her shares in Burter and the purchasers would be R. and T-McG. Recital B provided that “The purchasers have agreed to buy and the vendor has agreed to sell the vendor’s shares in the company [Burter] on the terms hereinafter set out”. The terms provided that the purchase price of $90,000 would be paid by 12 equal monthly instalments of $7,500 payable on the first of each month commencing on 1 November 2009 and that share transfers to R. and T-McG. would be executed and released to them over time as the purchase price was paid.  2. The unsigned shareholders agreement set out the terms as R. understood and represented them to be. Nothing in the subsequent emails suggested that the fundamental terms in the unsigned document were relevantly disputed. To the contrary, the evidence disclosed a meeting of the minds where it was not thought necessary for lawyers to have any further involvement. The fact that H. gave evidence that she did not sign the shareholder agreement because it contained some terms with which she was not happy did not tell against the conclusions reached by the Magistrate. By the end of 23 November 2009, the purchase price had been agreed, the fact that the purchase price was payable in 12 monthly instalments was agreed, the parties to the agreement were known and the provision of progressive share transfers was agreed.  3. There was evidence which the Magistrate was entitled to accept and which, having regard to the relevant principles, entitled his Honour to conclude that the agreement contended for by H. came into existence following the emails of 23 November 2009. The evidence was in the emails referred to and the conduct of the parties. The ultimate conclusions made by the Magistrate were open.  4. Accordingly, it followed that the appellant failed to make out the errors of law as alleged. |
| **5** | **Claim by Solicitors for Professional Costs**  In *Baldsing v Voitin Walker Davis Pty Ltd* MC05/12, solicitors VWD issued proceedings on behalf of B. The proceedings were later settled but B. failed to pay the solicitors’ claim for professional fees. The Magistrate upheld the claim and dismissed the counterclaim. On appeal, Macaulay J held:  1. In relation to the claim that the solicitors' services were worthless, on instructions, VWD engaged experienced counsel to draw a claim seeking damages for the things B. claimed to be entitled to yet deprived of – the export business, the financial records and the email address. With B.'s knowledge, VWD spent considerable time and costs, seeking discovery from the vendors, and trying to obtain financial evidence verifying the existence and value of the export business. Whilst it is true that by October 2008 – the time of the mediation – it appeared that (despite attempts) little evidence had been obtained to verify B.'s instructions, nonetheless, there was advice at that time from counsel urging B. to instruct VWD to obtain independent financial analysis of the business records to try and tie the reason for the business’ underperformance to the cause asserted by B. Those instructions were not forthcoming.    2. In those circumstances, there were ample grounds for the Magistrate to conclude that the contract claim had sufficient apparent merit and that the solicitors' services were not worthless and that their claim was not lacking in merit.  3. In relation to B.'s claim that there was a potential for a conflict of interest in VWD acting for both B. and C., both B. and C. gave instructions on numerous occasions that they were ‘in it together’ and wanted the solicitors to act for them both. Each, but particularly C. were advised to obtain independent legal advice.  4. It is not the law that a solicitor can never act for parties who have a potential conflict of interest. The law imposes obligations upon solicitors to ensure that if they do, they only do so having made full disclosure of the material facts and with properly informed consent. Here the magistrate found that such informed consent had been obtained – a finding of fact open to him to make.  5. In any event, B.'s pleaded claim was that by acting for both of them VWD was negligent and caused him loss and damage. Assuming that VWD had been negligent, B. needed to establish that the negligence caused him some loss. None was found. Nor was it at all evident what that loss was or could have been. And as the magistrate correctly pointed out, even if the conflict had materialised and VWD was thereafter precluded from acting for B. or C. or both, even that circumstance did not render the work done to date ‘valueless’. |
| **6** | **Bailment – does a bailee have a duty to warn about the absence of insurance?**  In *All Covers and Accessories Pty Ltd v Sidawi* MC06/12, S.’s property was damaged when it was at the bailee’s premises which caught fire and destroyed all the property thereon. The bailee was not at fault and did not have insurance to cover the loss. S.’s claim for damages was upheld by the Magistrate. Upon appeal:  HELD: Appeal allowed. Magistrate's order set aside and the Complaint dismissed.  1. Under the common law, it is established that a bailee is not an insurer of goods and is not under a duty to insure. If the bailee is not an insurer and is under no duty to insure, how can there be a duty to warn about the absence of insurance?  2. In the present case, there were no unusual risks or hazards to the goods whilst they were in the bailee's safekeeping that might possibly have aroused a tortious duty to warn. The bailee was accepted to be blameless for the fire. In those circumstances, there was nothing on the facts of this case giving rise to an obligation on the bailee to warn that it was not insured for the destruction of the goods. The law of bailment called for the dismissal of the claim.  3. The special circumstances exception that the magistrate applied for “unusually high value goods” has no authoritative basis under the Australian law of bailment, and there is no principled basis to find such a general legal proposition. Whilst decisions of the Canadian Court of Appeal like any precedents of other legal systems are not binding, they are to be afforded a status depending on the degree of the persuasiveness of their reasoning. The Magistrate erred in applying the reasoning of *Punch v Savoy's Jewellers Limited* (1986) 26 DLR (4th) 546because that case stood for no such general proposition. Moreover, what deserved greater attention was the earlier appellate decision in *Mason v Morrow's Moving and Storage Limited* [1977] 2 WWR 738; 87 DLR (3d) at 234 which was squarely on point, and which also illuminated the question of a duty to warn under the general law of negligence. |
| **7** | **Speeding charge – essential requirements of the charge**  In *DPP v Kirtley* MC07/12, a Magistrate dismissed a speeding charge because it did not state what the speed limit was that applied to the defendant driver. Upon appeal-  HELD: Appeal allowed. Dismissal quashed. Remitted for hearing and determination according to law.  1. The common law requirement of a charge is that it should identify sufficiently the essential ingredients. Notwithstanding the rule of strictness required of prosecutors in drafting criminal charges, a charge should be interpreted in the manner a reasonable defendant would understand it, giving reasonable consideration to the words of the charge, in their context.  *DPP Reference No 2 of 2001* [2001] VSCA 114; (2001) 4 VR 55, applied.  2. In relation to a charge under r20 of the *Road Rules – Victoria*, the two essential ingredients of a charge are (a) the driving of a motor vehicle and (b) in excess of the speed limit.  *Ciorra v Cole* (2004) 150 A Crim R 189; MC31/04; applied;  *Alwer v McLean* [2000] VSC 396; (2000) 116 A Crim R 364; MC17/02; distinguished.  3. It is clear from the charge in the present case that K. would have known that the offence involved:  (a) his driving of a motor vehicle;  (b) on 15 June 2009, on the Wimmera Highway, between Marnoo and Rupanyup, his vehicle was driven at a speed over the speed limit, which was alleged to be 100km/h;  (c) an allegation by the informant that he drove at 156km/h on that occasion; and  (d) an alleged breach of r20 of the *Road Rules*.  4. It is patent that the essential ingredients of his driving of a vehicle over the prescribed speed limit were contained in the charge and the other details set out in the charge informed K. satisfactorily of the circumstances of the offence.  5. Accordingly, the charge was good in law and the essential ingredients and the relevant facts and circumstances adequately set out. Whilst the reference in the charge to 100km/h being applicable to the road rather than the driver was unfortunate, it could not be doubted that K. was aware that he was being charged in relation to his driving of the motor vehicle, it being alleged that he exceeded the relevant speed limit of 100km/h by driving at 56km/h in excess of the prescribed speed.  *Obiter:*  (a) Whilst the charge was not in the words of the *Road Rules*, it was described in similar words so as to be sufficient for the purpose of s27)1) of the *Magistrates' Court Act*.  (b) A charge which lacks an essential element of the alleged offence is defective and, at common law, may be described as a nullity. If, however, the true nature of the offence is apparent from the face of the charge, and the defendant has not been misled or otherwise prejudiced by the omission, the charge may be amended under s50 of the *Magistrates' Court Act* (even out of time) to include the missing element on the basis that such an amendment does no more than clarify what is already apparent from the face of the charge.  *DPP v Kypri* (2011) 207 A Crim R 566; MC27/11, applied.  The nature of the offence was, or should have been, apparent to K.; he was not misled or prejudiced by the notion of the speed limit being applicable to the roadway. The essential elements of the offence were contained in the charge – accordingly it was capable of amendment. |
| **8** | **Driving offence – whether voluntariness an element of the offence**  In *Dover v Doyle* MC08/12, Bell J dealt with an appeal in relation to a finding of guilt in respect of charge of refusing to allow a doctor to take a sample of blood. In allowing the appeal, Bell J held:  1. On the authorities, it is a basic and fundamental principle of the common law that a person is criminally responsible only for their conscious and voluntary acts. The prosecution must therefore establish beyond reasonable doubt that the act constituting the alleged crime was done in the exercise of the accused’s will to act. As there is an evidentiary presumption of voluntariness, it is not usually necessary for the prosecution to supply express proof of this element. But where the issue is legitimately raised, the prosecution must prove beyond reasonable doubt that the accused’s acts were conscious and voluntary. These general principles apply equally to statutory offences, including driving offences, subject to contrary provision.  *Ryan v The Queen* [1967] HCA 2; (1967) 121 CLR 205;  *R v O'Connor* [1980] HCA 17; (1980) 146 CLR 64; applied.    2. The provisions of s56(2) of the Act do not expressly abrogate the principle of voluntariness. Nor do the provisions implicitly abrogate that principle. There is nothing in the language of s56(2), the context of the section or the legislation as a whole or the legislative purpose to suggest unmistakably and unambiguously that the provisions should be interpreted so as to abrogate the principle. In s56(2), the word ‘allow’ is a verb meaning ‘permit’. The person ‘must allow’ the sample to be taken, which compels them actively to permit the sample to be taken. The active step of allowing, in the sense of permitting, a sample to be taken can only be taken by someone acting consciously and voluntarily. Their intention is not relevant, but their acts must be conscious and voluntary.  *Meertens v Falkenberg,* unreported, Supreme Court of South Australia – Full Court, King CJ, Sangster and Legoe JJ, 13 March 1981, applied.  3. It is an element of the offence specified in s56(2) of the Act that the accused consciously and voluntarily refused to allow the taking of the sample. Where the matter is not legitimately in issue, the prosecution may prove that element by relying on the evidentiary presumption of voluntariness. Where the matter is legitimately an issue, as it was in the present case, the prosecution was required to prove the element on the evidence beyond reasonable doubt. The trial judge erred in law on the face of the record in deciding otherwise.  *R v Carter* [1959] VicRp 19; [1959] VR 105, applied.  4. The issue was legitimately raised in the present case. The medical evidence of both the prosecution and the defence suggested D. refused to allow the doctor to take a sample of her blood by reason of the severe head injury which she suffered in the accident. It was therefore necessary for the trial judge to consider this evidence and to determine whether the prosecution had established beyond reasonable doubt that D.'s refusal had been conscious and voluntary. His Honour erred in law in failing to do so.  5. The County Court will not be ordered to dismiss the charge against D. It is for the trial judge to determine whether the charge should be dismissed. An order will be made in the nature of *certiorari* quashing the orders of the judge and remitting the matter back to his Honour for hearing and determination according to law. |
| **9** | **Sentencing – whether power to order defendant to transfer his own motor vehicle**  In *Koeleman v Nolan* MC09/12, an appeal was lodged against a Magistrate’s order that where a defendant had been found guilty of theft of a motor vehicle he was ordered to transfer his own motor vehicle to the victim. Almond J in allowing the appeal and setting aside the order held:  1. Section 84(1) of the *Sentencing Act* 1991 contemplates the making of court orders to restore stolen goods to the person entitled to them; to deliver or transfer goods that directly or indirectly represent the stolen goods; and to require that a sum be paid to another person out of money taken from an offender’s possession on his or her arrest.  2. An order for delivery or transfer of goods made pursuant to s84(1)(b) of the *Sentencing Act* 1991 can only be made with respect to “goods that directly or indirectly represent the stolen goods”.  3. The section properly construed is confined to dealing with goods that are the proceeds of the disposal or realisation of the whole or part of the stolen goods or (goods that are the proceeds of the disposal or realisation) of goods representing the stolen goods. On this construction, there is no confusion, no question of redundancy and no grammatical issues arise.  4. In the circumstances, unless it could be demonstrated that the goods (Ford sedan) in this case were the proceeds of disposal or realisation of the whole or part of the Toyota Prado, or (were the proceeds of the disposal or realisation) of goods representing the Toyota Prado, then the section could not engage.  5. It is clear that Parliament intended to enable orders for the delivery or transfer of goods to be made where those goods were traceable either as the proceeds of disposal or realisation of the stolen goods or of goods representing the stolen goods. The discretion under s84(1) is intended to be exercised in straightforward cases, otherwise a more appropriate remedy can be sought in the civil courts.  6. In this case, it was common ground that K. acquired the Ford sedan several years prior to the date of the commission of the offence. It could not be concluded on any basis that the Ford sedan comprised goods that directly or indirectly represented the goods later stolen.  7. Further, there was no relevant nexus or connection between the stolen goods and the Ford sedan arising from the fact that K. travelled to the football ground in the Ford sedan. There was no evidence to suggest that K. had formed any intention to commit an offence or the offence prior to wandering off on foot from the oval to the staff car park at the rear of the venue. The theft of the vehicle seemed to have occurred impulsively when K. failed to resist the temptation to drive away in a vehicle which had keys in the ignition.  8. Accordingly, the Magistrate made an error of law because he had no power under the section to make the order. |
| **10** | **Practice and procedure – Magistrates required to give reasons for decision**  In *Murphy v McMillan* MC10/12, a Magistrate’s reasons for decision disclosed no reason for the result other than the preference of one set of witnesses over the other. Grove AJ (NSW SC) held:  Appeal allowed. Judgments and orders made by the Magistrate set aside. Remitted to the Local Court for re-hearing before another Magistrate.  1. As was said in *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110, the giving of adequate reasons lies at the heart of the judicial process. Failure to provide sufficient reasons promotes a sense of grievance and denies both the fact and the appearance of justice being done.  See also *Beale v GIO* (1997) 48 NSWLR 430 and;  *Mifsud v Campbell* (1991) 21 NSWLR 725, applied.  2. When a ground such as was raised in the present case is advanced, authority requires that a number of matters be borne in mind. For example, it is necessary to determine whether the primary judge had canvassed the issues and explained why one case was preferred over another. Significantly, if an issue of credit was determined, explanation was required as to why a witness or witnesses were preferred to another or others. Accordingly it is not appropriate for a first instance tribunal merely to set out the evidence on each side and then assert that the evidence of one and not the other is preferred.  *Jones v Bradley* [2003] NSWCA 81;  *Palmer v Clarke* (1989) 19 NSWLR 158; and  *Goodrich Aerospace Pty Ltd v Arsic* [2006] NSWCA 187; [2006] 66 NSWLR 186, applied.  3. A reading of the Magistrate's judgment as a whole disclosed no reason for the result other than the preference of one set of witnesses over the other. Although his Honour described the plaintiff as reliable and the defendant as unconvincing, there was no statement that these findings derived from observations of respective demeanours nor for any other disclosed reason. The only reference to the presentation of a witness was to Ms Doyle who testified about alleged pre-accident damage to the plaintiff's vehicle of whom he said he found her to be a "convenient and dutiful (?)" witness who was uneasy and whose evidence "offended commonsense". How such offence was detected was not recorded.  4. The issue of contributory negligence by the plaintiff was dealt with in a bald statement that "the plaintiff was not negligent in failing to avoid the collision" on which basis, apparently, the cross-claim was dismissed.  5. This was not a case where the outcome was inevitable and to the extent that discretion needs to be exercised, a new trial should take place.  6. In the circumstances the litigation should be returned to the Local Court to be heard afresh by a magistrate other than the one who constituted the court at the previous hearing. |
| **11** | **Driving offences – requirement to report accident to police station**  In *Emirhussein v Radovanovic* MC11/12, the defendant appealed against a finding of guilt in relation to his failure to report an accident to the police station. Bell J allowed the appeal:  1. Time was an element of the offence in that the obligation was to report as soon as possible after the accident (s61(1)(e) and (f) of the *Road Safety Act* 1986). That time was pleaded in the charge by reference to the date of the accident, 20 November 2006, and the requirement to report as soon as possible after that. The charge was properly pleaded in that way. Like all charges, it had to be interpreted and understood as a reasonable defendant would and in the context of the surrounding circumstances. The charge as pleaded gave E. everything he needed to be able to mount a defence, which he did.  2. The second ground on which the application for judicial review was made was that the trial judge erred in deciding the offences in s61(1)(e)and (f) were absolute in nature. Although His Honour used those words to describe the offences, he was not meaning to say that the offences were committed whatever the circumstances. After so describing the offences, His Honour went on to refer, correctly, to the need ‘to take into account the surrounding circumstances, including time and the driver's physical and mental capacity’ when considering the phrase ‘as soon as possible’. What His Honour was meaning to say was that a person who consciously and voluntarily failed to report as soon as possible having regard to those considerations could be guilty of the offence without having any intention to breach the obligation to report. Taken as a whole, His Honour's reasoning was consistent with the correct legal position, which is that s61(1)(e) and (f) create strict liability offences of which intention to offend is not an element but to which the defence of honest and reasonable mistake of fact is applicable.  3. The difficulty with his Honour's finding of guilt was that, the circumstances being relevant to determining whether a report was made as soon as possible, it was necessary to take into account an arrangement with the police as to when the report should or could be made. An arrangement with the police to make a report at and to a specified time, station and investigating officer is just as relevant a circumstance as the physical or mental state of the accused. That follows from the proper interpretation of the words ‘as soon as possible’ in s61(1)(e) and (f).  4. The judge proceeded on the basis that the arrangement was an irrelevant consideration. His Honour decided E. could be convicted whether or not the arrangement had been made. As to whether the arrangement had been made, he made no express findings either way. This reasoning betrayed an error of law and not an error of fact. On the proper interpretation of the words ‘as soon as possible’ in s61(1)(e) and (f), whether E. attended to report at the police station on 23 November pursuant to an arrangement with the police made by Mr Abdullah for Mr Emirhussein on the day of the accident or later adopted by E. was a relevant consideration in determining whether the report had been made as soon as possible.  5. In s61(1)(e) and (f), 'as soon as possible' means as quickly as the task in hand is capable of being done in the circumstances. In reaching a determination on this question, all of the circumstances have to be taken into account. The task in hand was reporting an accident to the police. On the evidence relied on by E., an arrangement was made for him as the driver with the police within hours of the accident, or at least adopted by him later that day, for the report to be made in three days to the investigating police officer (who was working night shift at the time) at a specified time and station. If established, those facts formed part of the circumstances which had to be taken into account in determining whether the report was made as soon as possible. It was an error of law for the trial judge to exclude this body of evidence from consideration when determining that question. In this regard, it was also necessary to consider whether E.'s report formed part of one continuing transaction beginning with Mr Abdullah's telephone call on 20 November and ending with E.'s attendance on the informant on 23 November. The question of what happened and whether there had or had not been a report as soon as possible was for the trial judge to consider and determine on the evidence.  6. There will be an order in the nature of *certiorari* quashing the orders of the trial judge and the matter will be remitted back to his Honour for hearing and determination in accordance with law. |
| **12** | **Animal cruelty – sentencing considerations**  In *Holding v Parkin* MC12/12, the question of whether a sentence of imprisonment was manifestly excessive in relation to a case where the defendant had killed a chicken. Hall J (SCWA) held:  Appeal allowed. Sentence quashed.  1. Section 6 of the *Sentencing Act* 1995 (WA) requires that sentences be commensurate with the seriousness of the offence. This requires consideration of the circumstances of the commission of the offence. The relevant factors in assessing the circumstances of an offence of animal cruelty pursuant to s19 of the *Animal Welfare Act* (WA) are:  1. the nature of the harm inflicted on the animal (see definition of 'harm' in s5);  2. the length of time during which the animal suffered;  3. the amount of suffering caused, that is the extent of any injury or the degree of pain or the amount of distress;  4. the vulnerability of the animal, both in general and in relation to the particular offender;  5. whether the conduct that caused the harm was a single act or a course of conduct; and  6. whether the conduct was deliberate, intentional or planned, or was neglect of a duty to animals (one will not necessarily be more serious than another, it will depend upon the circumstances).  2. In any particular case it will also be necessary to take into account any mitigating factors, including those factors that are personal to the offender.  3. When all of the circumstances of the offence were considered, this was a case which was clearly distinguishable from those that have attracted immediate imprisonment. In any event, such a sentence could not properly be imposed unless all other available sentencing options were found to be inappropriate: s39 *Sentencing Act*.  4. The range of options available to the magistrate was reduced because s19 of the *Animal Welfare Act* provided for a minimum fine: s42(2a) *Sentencing Act*. However, his Honour still had options which, whilst recognising the seriousness of the offence, did not require that the appellant serve a term of immediate imprisonment. It was not open to the magistrate to come to the view that no other sentence but one of immediate imprisonment was appropriate. Other possible sentences were clearly open and entirely appropriate in this case. |
| **13** | **Suppression order – matters to take into account when making**  In *Lew v Priester (No 2)* MC13/12, an application was made for a suppression order because of alleged misreporting of the case in the media. Davis J refused the application and held:  1. Sections 18 and 19 of the *Supreme Court Act* 1986 ('Act') provide an exception to the open justice principle regulating the conduct of proceedings in the Court. Ordinarily, proceedings in the Court are held in public and the corollary of conducting proceedings in open court is that anybody may publish a fair and accurate report of the proceedings, including the names of the parties and witnesses, and the evidence that has been given in the proceedings. The rule is not absolute, however, as there may be occasions where the public conduct of proceedings may not be in the interests of justice, as ss18 and 19 statutorily recognise.  2. The power conferred by s18 of the Act to make such an order is enlivened if the order is “necessary” in the opinion of the Court by reference to the matters set out in s19. In this regard, s19 reflects the position at common law that the exercise of the power to prohibit or restrict the publication of proceedings must be justified by reference to the necessity to make that order in the interests of the administration of justice.    3. The word “necessary” is a strong word and that the collocation of necessity to prevent prejudice to the administration of justice suggested Parliament was not dealing with trivialities. An order is not “necessary” because a party may wish to avoid publicity or media scrutiny or keep affairs confidential. Nor is it sufficient to justify the making of an order because it is convenient, reasonable or sensible, or to serve some notion of public interest. It is not a balancing exercise.  *Hogan v Australian Crime Commission* [2010] HCA 21; (2010) 240 CLR 651, applied.  4. Furthermore, the cases make it clear that there must be material before the Court upon which the Court can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. A real risk of serious interference with the administration of justice must be demonstrated and an application for a non-publication order requires some cogent evidence to support the basis on which the application is made. A belief that the order is necessary is insufficient.  5. In relation to the plaintiffs' reliance on the rights of the grandchildren to be free from public harassment and the duty of the Court to protect the best interests of the children in order to engage the Court’s power to make a non-publication order, it was undoubted that these considerations, in an appropriate case, may bear on the Court’s exercise of power but the power was only enlivened by the plaintiffs showing that the order was necessary in order to prevent prejudice to the administration of justice or to prevent endangering the physical safety of any person (which are the two possible grounds open to the plaintiffs). To put it another way, the jurisdiction of the Court to make orders restricting publication of any proceeding was not founded in the rights of the grandchildren but in s18 of the *Supreme Court Act* and the Court’s inherent jurisdiction.  6. Accordingly, asserting the rights of the grandchildren as the basis for the exercise of power amounted to no more than asserting the conclusion that an order should be made, without demonstrating why the exercise of power was justified by reference to the necessity for that order in the administration of justice.  7. The application was not supported by probative evidence that further publication of the proceeding would have a detrimental emotional effect on the grandchildren. The concern to that effect expressed by L. and the children was an insufficient basis upon which the Court could reasonably reach the conclusion that it was necessary to make an order restricting publication. Mere belief that the order was necessary was insufficient. It was regrettable that the grandchildren had been subjected to gossip and hurtful comments at school arising from the publication of the proceeding to date which had caused them distress. However, that was not a sufficient reason to make a non-publication order. |
| **14** | **Committal proceeding – no power to give a sentencing indication**  In *Jeffrey v Schubert & Anor* MC14/12 a magistrate decided not to give a sentence indication whilst conducting a committal proceeding. J Forrest J held: Application dismissed. Notwithstanding the wording of s60 of the *Criminal Procedure Act* 2009 (Vic), the power to provide a sentence indication is only engaged where the Magistrates’ Court is empowered to exercise summary jurisdiction in respect of the relevant offence(s). The Magistrate was, therefore, correct to hold that she did not have the power to give a sentence indication absent the power to deal with the charges. |
| **15** | **Assault occasioning bodily harm – sentencing**  In *Closter v Humphreys* MC15/12, a magistrate’s sentence of 10 months’ imprisonment for an assault charge was appealed. Hall J held: Appeal allowed. Sentence imposed by Magistrate set aside. Appellant resentenced to a 12-month Intensive Supervision Order with a programme condition.  1. Relevant sentencing matters included that:  (a) the glass bottle had been not used deliberately by the appellant as a weapon.  (b) there was no suggestion that the defendant had deliberately targeted the head of the crowd controller.  (c) the nature and extent of the injuries caused was significantly less serious than in the other cases.  (d) whilst it was difficult to determine with exactness the degree of force which was used, the extent of the injuries tended to indicate that it could not have been great.  (e) this was an offence that occurred on the spur of the moment.  2. To describe this as an offence of 'glassing' dangerously obscured the fact that the glass bottle in this case was not deliberately used. Whilst the magistrate recognised this as being an important mitigating factor and characterised the defendant's conduct as reckless, he nevertheless imposed a sentence which was more consistent with offences involving the deliberate use of a glass as a weapon. While the Court does not detract from the seriousness of this offence, it was clearly not one which, in all of the circumstances, required the imposition of a sentence of imprisonment to be immediately served.  3. Having considered all of the relevant factors, the appropriate sentence was an Intensive Supervision Order of 12 months duration with a programme condition under s73 of the *Sentencing Act* 1995 (WA). The programme condition will ensure that the appellant continued with the counselling. |
| **16** | **Application for costs refused – whether breach of the rules of procedural fairness**  In *Zigouris v Sunshine Magistrates’ Court & Anor* MC16/12, Zammit AsJ dealt with an application to review a magistrate’s decision to refuse an application for costs. HELD: Application for judicial review dismissed.  1. In relation to the alleged denial of procedural fairness, the Magistrate determined to refuse Z.'s application for costs against the prosecution without hearing oral argument from Z.'s counsel. However, the Magistrate did consider the affidavit material filed on Z.'s behalf, and listened to the tape of the hearing on 25 May 2011 when by her own motion she issued the warrant. Further, the Magistrate identified at the hearing on 1 June 2011 why she issued the warrant. Her reasons were because of Z.'s failure to appear at the hearing on 25 May 2011. Z. had ample opportunity to put evidence before the Court as to why there was no appearance on 25 May 2011 and this was not done when the costs issue was determined.  2. While there may have been a technical breach of procedural fairness by the Magistrate on 22 August 2011, in that she did not entertain oral argument, there was no basis for *certiorari* because the Magistrate had considered the argument in that she had read the affidavit material. On close analysis, Z. was not denied an opportunity to put forward his argument but rather was denied an opportunity to say it again.  3. Further, there was no injustice in what occurred because ultimately there was nothing the prosecution did which could have attracted a costs order against the prosecution. The Magistrate was at pains to stress that she issued the warrant at her own motion and that she stopped the prosecution from continuing to read from the letter dated 28 April 2011.  4. Whilst a failure to give reasons can amount to an error of law, it is not necessary for a court such as a Magistrates’ Court to deliver extensive and expansive reasons for its decision. In the present case, the Magistrate’s reasons were concise. Z. submitted that the Magistrate failed to explain how the fact that she issued the arrest warrant on her own motion affected her decision. The Magistrate set out in her reasons that she issued the arrest warrant of her own motion on the basis that there was no correspondence with the Court on 25 May 2011. In her reasons, the Magistrate identified how Z.'s failure to communicate with the Court affected her decision.  5. Accordingly, the Ground which alleged that the Magistrate failed to give sufficient reasons for her decision failed. |
| **17** | **Dog bite charge – whether victim trespassing**  In *Johnson v Buchanan* MC17/12, the owner of a dog which bit a neighbour whose arm protruded over the fence was charged with an offence under the *Domestic Animals Act* 1994. The magistrate dismissed the charge. Upon review, HELD: Application for judicial review dismissed.  1. Section 29(9)(b) of the Act creates a defence where ‘the incident occurred because ... a person was trespassing on the premises on which the dog was kept’. The defence is available in respect of all the offences specified in s29. As the defence applies if the incident occurred ‘because’ of the circumstances specified in s29(a)-(d), there must be a causal relationship between those circumstances and the attack or other criminalised conduct. The trespass defence in s29(9)(b) of the Act is available where the offence occurred because the person was trespassing in a criminal or civil sense.  2. The word ‘because’ in s29(9) of the Act operates to require a causal relationship between the incident (here the dog bite) and the trespassing of the person on the premises. The magistrate approached that question in a straightforward and common sense manner as a question of fact. On the facts which his Honour found, he concluded there was a ‘sufficient nexus’ between the victim’s trespassory intrusion or encroachment and the bite. On that basis, he concluded that the bite had occurred ‘because’ of the trespassing. There was no legal error in that approach. His Honour interpreted and applied the causation test in the correct manner.  3. The proper interpretation of s29(9)(b) of the Act is that ‘trespassing’ means trespassing according to the common law of trespass. According to the common law of trespass, E. was trespassing when he allowed his arm partially to go over the dividing fence and down into the defendant’s property. The magistrate did not err in law in so deciding. That conclusion was consistent with the common law right of persons to protect their property with a dog.  4. On the unchallenged findings which the magistrate made, the victim E. allowed his arm to go over the chest-high dividing fence and down into B.'s premises when he was leaning on that fence. E.'s action was casual and inadvertent, but it was conscious and voluntary. The incursion was very minor, but even minor physical incursions into someone else’s property amount to trespass, unless authorised. It was not contended E. had express or implied permission to do what he did. The incursion was into B.'s airspace, but that too was a trespass. The incursion of E.'s arm into B.'s premises did not cause the defendant any damage, but damage is not an element of the tort of negligence. Applying the common law principles which governed the situation, the magistrate did not err in deciding that the victim had trespassed on the defendant’s premises.  5. Neither did the magistrate err in law in deciding that E. was bitten because he was trespassing on the premises. B. kept the dog in the secure front yard of his home. On the found facts, the dog was too small to reach the top of the dividing fence with its snout or its paws. E. was bitten when he allowed his arm to go over and down into B.'s premises when he was leaning on the fence. On those facts and on the proper interpretation of the statutory provisions, the magistrate was entitled to find that there existed the necessary causal link between the bite and the trespass and to conclude that the charge must be dismissed because the defence applied.  6. Accordingly, the application for judicial review was dismissed. |
| **18** | **Costs of successful defendant in summary proceedings** |
|  | In *Brown v Glen Eira City Council* MC18/12, Daly AsJ dealt with an appeal against a Magistrate’s award of costs following the dismissal of 88 charges. His Honour held:  Appeal allowed. Orders made by the Magistrate set aside. Adjourned to consider whether the application for costs should be referred to the Costs Court of the Supreme Court.  1. From the authorities concerning the costs to be awarded to a successful defendant in a criminal proceeding, the following principles can be distilled:  (a) a successful defendant in summary proceedings has a reasonable expectation of obtaining an order for costs against the informant;  (b) generally speaking, a successful defendant should not be out of pocket as to costs reasonably incurred and reasonable in amount;  (c) the issue of costs should be looked at from the perspective of the successful defendant;  (d) a party entitled to an order for costs must, if challenged, show that particular costs were in fact incurred or that the professional work charged for was done, that the work was necessary or at least reasonably required for or reasonable to the defence of the proceedings or that the costs or charges were reasonable in amount and not excessive;  (e) contested criminal proceedings are not to be equated with contests between civil litigants given the element of compulsion and the different consequences of such proceeding;  (f) a magistrate may have regard to scales of costs relevant in civil proceedings but is not bound or limited by them;  (g) it is open for a magistrate, in an appropriate case, to exercise his or her discretion to award costs on a global basis, or, in fixing costs, take into account the reasonableness not only of the individual items but also of the total amount;  (h) there is no general principle requiring a magistrate to order against an informant whatever amount a defendant’s legal practitioner may have chosen to charge the client or whatever costs the solicitor and client may have agreed between themselves;  (i) the relevant enquiry is what the unsuccessful party may reasonably be required to pay the successful party at the conclusion of the litigation;  (j) any order for costs must always exclude any costs which have been unreasonably incurred or which are unreasonable in amount; and  (k) the governing principle to be applied is one of reasonableness.  *Norton v Morphett* [1995] VSC 211; [1995] VICSC 211; (1995) 83 A Crim R 90; and  *R v Sobh* 74 A Crim R 453, applied.  2. The authorities make it clear that while a successful defendant should not generally be out of pocket as a result of being required to defend the proceeding, this does not provide a “blank cheque” to a defendant to run up legal costs unreasonably, secure in the knowledge that if they are successful they are fully indemnified for costs. The touchstone is one of reasonableness. Therefore, while the actual scales of costs in civil proceedings may be of assistance in reviewing the quantum of costs claimed in respect of particular items of work, or the applicable hourly rates for different types of work, it is difficult to reconcile the principles applicable to the assessment of costs claims in criminal proceedings with the different bases of costs upon which a party may be ordered to pay in civil proceedings.  3. In the current case, the obligation on the Council to demonstrate that its costs claim was reasonable did not necessarily require the Magistrate to order that the Council prepare a bill in accordance with the equivalent civil scale. It did not require the Magistrate to undertake an item by item assessment of each of the items objected to by VicRoads, or otherwise undertake the detailed and painstaking exercise of a taxation of costs. However, given the challenge to the Council’s costs claim by VicRoads, it would have been appropriate to directly engage with and rule upon the submissions made by VicRoads with respect to such issues as the appropriateness of time based billing, the assertions by VicRoads that the hourly rates charged were excessive, that the bills contained charges for non-legal work, there was duplication of effort and charges, and some of the charges for particular items of work were excessive. It may well be that the Council could demonstrate that many or all of the tasks done by its solicitors, and the time taken to do so, was necessitated by the conduct of VicRoads in its prosecution of the proceeding, and accordingly, the amounts charged by its solicitors were reasonable in all of the circumstances. However, in the current case, there was no onus placed upon the Council to do so, even in a broad sense.  4. To the extent that the order for indemnity costs was based upon the Magistrate’s finding that VicRoads’ conduct of the prosecution unnecessarily prolonged the primary proceeding (in its entirety, rather than just the final hearing), that finding was one the Magistrate was uniquely placed to make, was clearly open on the material before her, and in any event neither VicRoads’ oral or written submissions directly addressed the Council’s criticisms of VicRoads’ conduct, which were spelt out in some detail in the Council’s written submissions.  5. The authorities confer a broad and flexible discretion upon magistrates in criminal proceedings with respect to costs, and expressly allow magistrates, in appropriate cases, to make an award of costs on a “global” basis, such that there is certainly no obligation upon a magistrate to undertake an item by item assessment akin to a taxation of costs. The Magistrate certainly did not make an error of law in that respect. However, to the extent that the authorities require an assessment of the reasonableness of the costs claimed by the Council, the Magistrate erred in not requiring the Council to demonstrate, even in a relatively broad brush sense, the reasonableness of the work undertaken by its solicitors and the rates charged for that work.  6. In relation to the awarding of costs fixed at 80% of professional costs, by fixing the Council’s costs in an apparently arbitrary sum, without any explanation as to the reason for the percentage figure reached, the Magistrate failed to exercise her discretion in a judicial manner.  7. In relation to the award for the total cost of two counsel, the Magistrate's finding was justified and that the rates claimed were appropriate.  8. In relation to the appropriate remedy, the matter would be best dealt with by the Costs Court of the Supreme Court. However, the parties were given an opportunity to make submissions as to whether the Costs Court would have jurisdiction to determine the question of costs in this proceeding. |
| **19** | **Breach of contract – mitigation – adequate reasons**  In *Werner Motoring Group Pty Ltd v NMX Pty Ltd* MC19/12, an appeal against a Magistrate’s decision upholding a claim for damages for breach of contract was heard by McMillan J. Held:  Appeal allowed but for reasons given by McMillan J, the Magistrate's judgment and orders upheld.  1. In relation to the submission that the Magistrate did not provide adequate reasons for the decision that NMX did not have a duty to mitigate its loss, the Magistrate failed to provide a path of reasoning which formed the basis upon which the issue of mitigation was decided. Whilst the Magistrate made findings of fact throughout her reasons, she did not provide a connection between the findings of fact that she made and the conclusion that she ultimately reached. As a result, the Magistrate did not provide the reader with an understanding of the basis upon which she concluded that there was no duty to mitigate on the part of NMX and accordingly, was in error.  2. In relation to the submission that the Magistrate failed to correctly apply the legal principles in that the Magistrate did not consider or determine when the breach of the contracts occurred, for how long the offer for the new contracts was open and whether the offer was a reasonable one in the circumstances, it was open to conclude that the Magistrate failed to identify and apply the legal principles with respect to mitigation and this failure constituted an error of law.  3. The delivery date as specified in the contracts was “as soon as possible” which meant that the vehicles should have been provided to NMX upon presentation of the cheques by NMX for the balance of the purchase price. By refusing the cheques, WMG breached the contracts and this breach occurred prior to the offer being made. However, it is a long standing principle that the duty to mitigate does not arise until a contract has been repudiated.  4. The offer was not reasonable as it required NMX to pay a higher purchase price for the vehicles than that to which it had already agreed under the contracts and it would have resulted in NMX having to enter into costly and complex litigation to recover its loss. Additionally, it could not be said that NMX acted unreasonably or failed to mitigate its loss by insisting that WMG honour the contracts. NMX’s insistence merely demonstrated its desire to receive the vehicles that were promised to it under the contracts.  *Payzu Ltd v Saunders* (1919) 2 KB 581, distinguished.  5. Accordingly, the appeal was allowed but for the above reasons, the Magistrate’s judgment and orders were upheld. |
| **20** | **Award of Interest on Judgment sum**  In *Hodgson v Amcor Limited (No 9)* MC20/12, Vickery J dealt with an application by a successful claimant for interest under the provisions of the *Penalty Interest Rates Act* 1983 and s58 of teh *Supreme Court Act* 1986.  HELD:  1. When H. was given judgment in his favour, he became a judgment creditor and was entitled to a sum certain – the Judgment Sum – by reason of the operation of the *Supreme Court Act* 1986 ('Act'), s58(3).  2. The question in dispute was whether there was any “good cause to the contrary” as to why H. the claimant should not have been entitled to the interest provided for by the statute, or interest at the rate so prescribed. A second question was whether, assuming that H. was entitled to statutory interest under s58 of the Act, the interest so awarded was to be calculated on the full Judgment Sum amounting to $917,695, or some lesser amount, after taking into account and deducting any amount that was properly found due and payable to the ATO.  3. Delays in the litigation on the part of a defendant do not generally constitute good cause. This is because the defendant suffers no disadvantage while continuing to have the use of the money to which the plaintiff has been held entitled.  4. As to the delay submissions generally, such delay as there was did not detract from the fundamental that Amcor had the use of H.’s money since the commencement of the proceeding. Further, and in each case, no calculation or estimate of the delay alleged to have been caused by H. was advanced by Amcor, resulting in the Court being ill-equipped to make an assessment of statutory interest other than on the basis provided for in s58.  5. All of the factual matters relied upon by Amcor in its submissions on the question of statutory interest were matters arising in respect of Amcor’s counterclaim, not H.’s claim upon which the Judgment Sum was founded. His entitlement to interest arose because the Court found that as a matter of law he was entitled to a significant sum of money which had been denied to him for a long period. At the same time, Amcor had the use of that money for its own purposes.  6. For these reasons, no good cause to the contrary was demonstrated by Amcor to justify withholding the payment of interest from H. at all or to allow interest on terms which were less onerous to Amcor than those prescribed by s58, namely, the date of commencement of the period for interest.  7. On its proper construction, s58 of the Act requires interest to be allowed on the “sum recovered” by judgment in the proceeding, not some lesser sum paid following payment according to law of sums due to the ATO. The sum recovered in the proceeding, in this case was the Judgment Sum, free of any deductions which might take into account a tax liability.  *Whitlam v IAG Ltd* [2005] NSWSC 200; 214 ALR 703; 52 ACSR 637, followed.  8. Accordingly, the amount of interest was to be calculated by reference to the Judgment Sum in the amount of $917,695 making a total sum of interest of $771,341.32 and continuing at the rate of $263.99 per day thereafter until the Court pronounced judgment on the question. |
| **21** | **Application for payment of a judgment debt by instalments**  In *Davidson v Walters & Anor*, MC21/12, Mukhtar AsJ dealt with an application for an instalment order. HELD: Application for instalment order refused.  1. The accrual of interest means the judgment debt is ever increasing and when the Court comes to consider the appropriateness of making an instalment order, the Court has to be satisfied that the instalment amount being proposed by the judgment debtor not only covers the accruing interest but is of a reasonable amount to ensure that the judgment debt can be recovered within a reasonable time. Also, it would not be realistic or proper to make an order if there was a question whether the debtor would be able to adhere to the instalment order.  *Cahill v Howe* [1986] VicRp 62; [1986] VR 630, applied.  2. It was an irrelevant consideration that the applicant could be pushed into bankruptcy which could result in W. losing his employment. Also, the Act does not contemplate "see-how-we-go" interim instalment orders.  3. Having regard to the fact that the proposed instalment payment did not meet the interest payment on the judgment debt, the application was refused. |
| **22** | In *Velissaris v Yang* MC22/12, a party to the proceeding alleged that the Magistrate showed apprehended bias when the party was not allowed to speak at certain times during the hearing. McMillan J HELD: Appeal dismissed.  1. In relation to the allegation by V. that the Magistrate was biased, the test for apprehended bias is whether “a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide”.  *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337; (2000) 176 ALR 644; (2000) 75 ALJR 277; (2000) 63 ALD 577; (2000) 21 Leg Rep 13, applied.  2. The fact that V. considered that he was not allowed to speak at certain times during the hearing did not substantiate the ground that the Magistrate was biased against him. In considering the transcript of the proceedings before the Magistrate there was no basis to support these submissions. A fair-minded lay observer would not reasonably apprehend that the Magistrate did not bring an impartial or unprejudiced mind to the resolution of the dispute between V. and Y. The test for bias was not met.  3. The Magistrate was entitled to allow, and accept, the evidence of the both insurance assessors. Although V. alleged a conspiracy between the assessors, the Magistrate did not accept his submission on that point. No other evidence was put forward in the Magistrates’ Court to support a submission that the insurance assessors’ evidence should not have been accepted. Further, the Magistrate’s acceptance of their evidence was not done in isolation. The Magistrate had the benefit of seeing each of the assessors give oral evidence, and be cross-examined by V.  4. In any event, the evidence of the assessors was only one factor that weighed in favour of the decision reached by the Magistrate. The Magistrate was entitled on the evidence, to prefer the version of the collision given in evidence by Y. to that of V., where their evidence conflicted. In turn, Y.'s evidence was supported not only by the evidence of the two assessors, but also by the evidence of V.'s witnesses.  5. On the basis of all the evidence, the Magistrate correctly concluded that V. was claiming the same damage in respect of both collisions and that V.'s vehicle had not been repaired.  6. Accordingly, V. failed to demonstrate any error of law on the part of the Magistrate in accepting the evidence of the two insurance assessors and in dismissing V.'s claim. |
| **23** | **Motor Vehicle collision – owner entitled to compensation**  In *Zogiannis v Stevens* MC23/12, the defendant admitted liability for the motor vehicle accident but the Magistrate dismissed the plaintiff’s claim on the basis that the claim had not been proved. HELD: Appeal allowed. Magistrate's orders set aside. Remitted to the Magistrate for determination in accordance with the law.  1. It is trite law that when goods are damaged by the negligence of a tortfeasor, the owner of the goods suffers an immediate and direct loss in consequence of the damage sustained and a cause of action accrues to the owner to recover that loss. The basic pecuniary loss recoverable by an owner in that circumstance is the diminution in the value of the damaged goods, on the principle that the owner is entitled to be put back, so far as money can do it, into the same position as if the damage had not occurred.  2. In the case of negligent damage to a car, the authorities establish that if the car is wrecked completely as the result of the collision, the loss that the owner is entitled to recover from the tortfeasor will normally be measured by the cost of replacing the car with another car of comparable type and condition, with an allowance in favour of the tortfeasor for the value of the car in its damaged condition. If the car is repairable, the measure of loss will usually be the costs of repair but if the costs of repair exceed, or would exceed, the market value of the car, a question arises as to whether it is reasonable for the owner to incur the expenditure in repairing the car or whether the reasonable option is to replace the car. Ordinarily, the owner can recover the cost of repairs or the value of the car, whichever is the less. In each case, the onus is on the owner to satisfy the Court on the evidence as to which of the measures of damages is reasonable in the circumstances and as to the amount of damages to which the owner is entitled by the application of that method.  3. The Magistrate applied the wrong legal principles in concluding that the onus of proof on quantum was not discharged by reason of the finding that the plaintiff still remained the owner of the car. That fact, whilst relevant, was insufficient of itself to engage the legal principles governing the assessment of the damages that the plaintiff was entitled to recover. What the plaintiff had to prove was the extent of the damage to his car caused by the defendant's negligence (as this was in issue) and satisfy the Magistrate that the appropriate measure of damages was the market value of his car immediately before the accident, less its post-accident value, on the basis that this measure of damages was less than the cost of repairs. The question for the Magistrate was whether he should be satisfied on the evidence on the balance of probabilities that the loss should be quantified on that basis and not by reference to the cost of repairs. The Magistrate did not address that question at all and the failure to address that question vitiated the decision. |
| **24** | **Drink/driving – post-driving consumption of alcohol to be corroborated**  In *DPP v Gibson* MC24/12, the defendant gave evidence (which was not corroborated) that she had consumed a quantity of alcohol after driving a motor car. The Magistrate dismissed the charges on the ground that a provision of the *Evidence Act* 2008 no longer required the evidence to be corroborated.  HELD: Appeal allowed. Dismissal quashed. Remitted to the Magistrates' Court for hearing and determination according to law.  1. Section 48(1A) of the *Road Safety Act* 1986 as a whole applied to proof of the charge brought against the defendant, with the effect that her evidence as to the timing of her consumption of alcohol was required to be corroborated by the material evidence of another person in order to displace the presumption in s48(1A) that the concentration of alcohol in her breath was not due solely to her consumption of alcohol after driving.  2. Section 8 of the *Evidence Act* 2008 requires s164(1) to be read down so that the provision does not affect other statutory provisions requiring the corroboration of evidence. Statutory requirements for the corroboration of evidence are unaffected by s164(1). As a result, s164(1) must be construed to be confined to abolishing common law requirements for the corroboration of evidence and not to requirements imposed by statute to deal with specific situations.  3. This is not a case where the rule about the implied repeal of an earlier provision by a later one should apply. The provisions in question are an earlier provision imposing a very specific requirement for corroboration in the context of complex legislation containing highly specific evidentiary provisions (including in respect of drug and alcohol related offences) and a later general provision dealing with evidence on which a party relies. Any inconsistency would be between a specific provision that was enacted to deal with a particular mischief and a provision dealing with the corroboration of evidence generally. Where there is a general provision that would neutralise a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, so far as it is inconsistent with the special provision, must be deemed not to apply. The general does not detract from the specific: *generalia specialibus non derogant*.  4. All of s48(1A) of the *Road Safety Act*, including the corroboration requirement, remained operative. The Magistrate erred in basing her decision to dismiss the charge on the uncorroborated evidence of the respondent. |
| **25** | **Procedure to be adopted when prisoner is to be transferred interstate**  In *Rodgers v Chief Commissioner of Victoria Police & Anor* MC25/12, a Magistrate in dealing with an application to transfer a prisoner interstate found that the warrant was valid and made the order as requested.  HELD: Application for review of the Magistrate's order dismissed.  1. Section 83 of the *Service and Execution of Process Act* 1992 (Cth) ('Act') requires a Magistrate to make orders upon the production of a warrant or copy of the warrant unless the warrant is shown to be invalid.  *R v Lavelle* (1995) 82 A Crim R 187; 125 FLR 110, followed.  2. Where a warrant is found to be valid a Magistrate must make one of the two orders specified in s83 of the Act upon production of the warrant leaving broader questions of abuse of process or a stay of proceeding to the courts of the state in which the warrant was issued.  3. The warrant as expressed was valid. The precondition for its issue was the revocation of parole upon the Board’s determination that the terms of the parole order had been breached. There was no occasion to go beyond the Board’s revocation of parole or the fact of its finding of breach as the relevant precondition to the issue of the warrant, to evaluate whether the underlying facts upon which the revocation and finding was made were correctly established.  4. Accordingly, the plaintiff's application was dismissed. |
| **26** | **Power of Magistrates to refer quantification of costs to the Costs Court**  In *Brown v Glen Eira City Council (No 2)* MC26/12, the question was raised before Daly AsJ whether Magistrates have the power to refer a question of costs to the Costs Court of the Supreme Court.  HELD: Appeal allowed. The quantification of the professional costs claimed by the Council for the defence of the primary proceeding be referred to the Costs Court for determination in accordance with these reasons.  1. Section 131A of the *Magistrates' Court Act* 1989 ('Act') confers powers upon Magistrates to refer the quantification of costs in a summary criminal proceeding to the Costs Court.    2. The powers conferred by and procedures introduced by the *Criminal Procedure Act* are not of themselves intended to derogate from the powers conferred upon the Magistrates’ Court by the Act. The reference to an “integrated” or “unified” system of criminal procedure in the Second Reading speech was intended to refer to there being greater uniformity and consistency in the procedures utilised by the different courts within the court system rather than confer upon the *Criminal Procedure Act* the status of a complete code governing criminal procedure. |
| **27** | **Costs upon dismissal of a criminal charge**  In *Hutchinson v Police* MC27/12, a Magistrate upon dismissal of a theft charge declined to award costs to the successful defendant.  HELD: Appeal allowed. Order dismissing appellant’s costs set aside. Appellant to have costs in the Magistrates' Court.  1. In the ordinary course the discretion as to costs upon the dismissal of a criminal charge is to be exercised in favour of a successful defendant.  2. It follows from that statement of general principle that there must be good reason not to award costs to a successful defendant. It has been authoritatively held that the unreasonable manner in which the defence has been conducted may warrant a refusal to award a successful defendant costs. Indeed, even conduct before charges are laid that brings the prosecution on the defendant, might also justify a refusal of costs. Moreover, if a defendant acts unreasonably it is of no moment that he or she did so in the exercise of his or her right to silence.  *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287, applied.  3. However, the judgment as to whether a defendant’s conduct was or was not unreasonable will necessarily be influenced by the common law conception of a criminal trial which includes, amongst its incidents, the right to silence.  4. The Magistrate made two errors which vitiated the exercise of the discretion not to award costs. First, the Magistrate had regard to an irrelevant consideration, namely, whether the material provided by the appellant’s legal practitioner to the police was in admissible form. There was no such requirement in the authorities. It is difficult to see why there should be such a requirement as a matter of principle. It would impose a very onerous burden on defendants in the course of negotiations with police. It cannot be said that it is unreasonable of a defendant not to go to the great trouble which would be necessary to put material in an admissible form. Secondly, the Magistrate asked herself the wrong question. The passages from the Magistrate’s reasons showed that the Magistrate addressed the question of the reasonableness of the police in proceeding to trial, and not whether some particular aspect of the defendant’s conduct was unreasonable.  5. Accordingly, the appeal was allowed and the matter remitted to the Magistrates' Court for an assessment of the quantum of the costs on dismissal, should the parties fail to agree them. |
| **28** | **Sentencing – whether S19B of the *Crimes Act* (Cth) Bond appropriate**  In *Scott v Chief Executive Office of Customs* MC28/12, the defendant was found guilty of importing air guns and failed to declare them. The Magistrate declined to release the defendant on a s19B Bond under the *Crimes Act* 1901 (Cth) but imposed monetary penalties instead.  HELD: Appeal dismissed.  1. Section s19B orders under the Act are exceptional in nature. They were so described in *Matta v ACCC* [2000] FCA 729 [3] (French J as he then was). In other cases they have been variously described as 'rare' (*R v Weller* (1988) 37 A Crim R 349; *McInnes v Global Imports Pty Ltd* [1992] FCA 590; (1993) ASC 56199); 'unusual' (*Kelton v Uren* (1981) 27 SASR 92; (1981) 52 FLR 232; 11 ATR 534); 'atypical' (*O'Brien v MR Norton-Smith* [1995] TASSC 78; (1995) 83 A Crim R 41; (1995) 31 ATR 128; *Paterson v Fenwick* [1994] ACTSC 25; (1994) 115 FLR 462); or 'special or singular' (*Uznanski v Searle* (1981) 26 SASR 388; (1981) 52 FLR 83).  2. In determining whether it is open to make a s19B order a court must first consider whether there is information that falls under any of the criteria listed in s19B(1)(b)(i), (ii) or (iii) of the Act. If there are, it is then necessary for the court to consider whether, having regard to those matters, it is inexpedient to inflict any punishment or to inflict only nominal punishment or to release the offender on probation without recording a conviction.  3. In this case the magistrate accepted that there was information before him that fell within s19B(1)(b)(i), in particular the prior good character of the appellant. However, he did not accept that the offences were committed under extenuating circumstances under s19B(1)(b)(iii).  4. Extenuating circumstances in s19B(1)(b)(iii) must be circumstances which excuse, to some appreciable degree, the commission of the offence. Such circumstances must contribute in some causative way to the offending conduct.  5. It was difficult to see how anything said in mitigation of the charges met that test. These were offences that involved some deliberate planning and forethought. They were not momentary lapses of judgment, even on the appellant's own account in his interview. The reasons given for posting the guns to Australia — that is, to blockmount one with a Tshirt and to give the others to friends — appeared to be entirely rational with no claimed connection to marital issues. No explanation for the false declarations or the false address details on the second package were provided. The marriage breakdown and the circumstances in which it occurred were unlikely to have been causative of offending having these characteristics.  6. In relation to the submission that the magistrate was obliged to make express reference to s16A of the *Crimes Act,* that section provides that a court must impose a sentence for a federal offence that is of a severity appropriate in all of the circumstances and provides a non-exclusive list of factors that must be taken into account. Section 16A does not constitute some technical checklist that judicial officers are required to mechanically recite. It is a mandatory requirement to consider the factors in s16A(2) but they do not need to be expressly referred to.  7. The appellant did not identify any factor listed in s16A(2) that was relevant here and that it is suggested that the magistrate overlooked. Indeed the evidence was to the contrary. On a careful reading of the whole of the magistrate's remarks, it is apparent that he took into account all of the relevant factors that could arise under s16A(2). In particular, his Honour referred to the nature and circumstances of the offence (s16A(2)(a)), that the appellant had pleaded guilty (s16A(2)(g)), the deterrent effect on the appellant (s16A(2)(j)), the need to ensure adequate punishment (s16A(2)(k)) and the character, antecedents, age, means and physical or mental condition of the appellant (s16A(2)(m)).  8. Accordingly, it was not possible to conclude that there was any error by the Magistrate, either express or implied. It was plain that the sentences imposed by the magistrate were open to him in the proper exercise of his discretion. |
| **29** | **Speed cameras – challenging servicing records**  In *State of Victoria v Lane* MC29/12, the accused was charged with several count of exceeding the speed limit and sought production of documents relating to the service history and calibration details of the three speed cameras involved. The Magistrate refused to set aside the summons for production of the records. HELD: Application for review dismissed.  1. The legal principles relevant to this proceeding were:  (a) Where an accused in a criminal proceeding seeks production of documents pursuant to a subpoena, the accused must satisfy the Court that he or she has a legitimate forensic purpose. That purpose must be identified expressly and with precision.  (b) In order to demonstrate a legitimate forensic purpose, the accused must show that ‘it is on the cards’ that the documents would materially assist the accused in his or her defence. The expression ‘on the cards’ means ‘reasonable possibility’. Accordingly, the test for determining whether there is a legitimate forensic purpose is whether a reasonable possibility exists that the documents would materially assist the defence.  (c) The reasonable possibility test should be applied flexibly and with common sense in order to give the accused a fair opportunity to test the Crown’s case and to take advantage of any applicable defences.  (d) Mere speculation that the documents might assist the accused’s defence is insufficient to satisfy the reasonable possibility test. This is because mere speculation amounts to a fishing expedition which can never constitute a legitimate forensic purpose. Mere relevance to an issue in the proceeding is also not sufficient to establish a legitimate forensic purpose.  (e) Where the accused wishes to rely on a statutory defence, the absence of evidence from which an inference can be drawn that the documents sought will satisfy the requirements of the defence does not necessarily mean that the reasonable possibility test is not met. This is particularly so where there is only one statutory defence available to the accused and that defence involves technical information exclusively in the possession of the Crown; insistence by the court that the accused present evidence which provides a basis for a positive inference that the documents sought will satisfy the requirements of the defence may effectively ‘eviscerate’ the defence. It follows that the importance of the requested documents to an accused’s ability to establish a defence can inform the application of the reasonable possibility test.  2. It was not in dispute that the Magistrate’s Reasons demonstrated that her Honour was aware that a fishing expedition was insufficient to satisfy the reasonable possibility test. At para 34 of her Reasons, the Magistrate concluded that L.'s proposed evidence and the uncontested facts that the alleged offences occurred at the same location over a short period of 19 days in September 2009 provided ‘some foundation’ for ‘Mr Lane’s concern that the [cameras] were not operating properly’. On the basis of this material, her Honour found that there was a reasonable possibility that the Documents would materially assist Mr Lane’s defence.  3. In the present case, there was material before the Magistrate which enabled her Honour to conclude that L. had a legitimate forensic purpose in seeking the Documents and that he was not engaging in a fishing expedition. Items 1 and 2 of the Summons were confined to documents relating to the three cameras that were relied upon to allege L.'s speeds.  *Glare v Bolster* (1993) 18 MVR 53, distinguished.  4. L. did not rely on a mere assertion of belief that he was not travelling at the speed allegedly detected by the three cameras but relied on a number of matters which, in combination, enabled the Magistrate to conclude that he had demonstrated a legitimate forensic purpose. It followed that the outcome of the present case, as in all cases of this type, depended on its facts.  5. It was open to the Magistrate to find that L.'s proposed evidence gave rise to a reasonable possibility that the three speed cameras had inaccurately measured his speeds and that this provided a proper legal basis for disclosure of the Documents. Clearly, if the Documents revealed any flaws in the operation of the speed camera, they would have improved L.'s prospects of displacing the evidentiary effect of the certified speeds and of establishing his defence that he was not travelling at speeds exceeding the applicable limit. |
| **30** | **Application by accused for several indictable charges to be dealt with summarily**  In *Strangio v Magistrates’ Court of Victoria and Anor* MC30/12, the accused was charged with several indictable offences including obtaining property by deception, make and use a false document and perjury in the Supreme Court. The Magistrate refused the application for a summary hearing. Upon appeal to the Supreme Court: HELD: Application refused.  1. The Magistrate in dealing with the application for summary jurisdiction, was required to take into account the matters set out in s29(2) of the *Criminal Procedure Act* 2009.  2. It is entirely inappropriate that a matter of perjury in the Supreme Court should be dealt with anywhere other than in the Supreme Court. The make and use false document charges were also serious in that they dealt with the use of a false power of attorney and using a false document to mislead VCAT.  3. It was entirely open for the Magistrate to reach the conclusion that she did and no error had been shown in her decision to refuse to deal with the charges summarily. |
| **31** | **Overloading – charges showed incorrect mass limits – informations amended by Magistrate – reasonable steps defence**  In *Contract Control Services Pty Ltd v Brown* MC31/12 a Magistrate agreed to amend informations which showed incorrect mass limits for trucks used by the defendant. The Magistrate found that the defendant failed to take reasonable steps to prevent the offences being committed.  HELD: Appeal in relation to the amendment made and the findings and orders made by the Magistrate quashed. The Appeal in relation to the reasonable steps defence rejected.  1. The validity of a charge is to be determined according to the contents of the summons and charge. A charge will be defective if it does not include an essential element of the alleged offence, or if the alleged offence is not known to law. Whether an amendment of a defective charge should be permitted is a matter of fact and degree.    2. The mass limit applicable to a vehicle was an essential element of an offence under s171(2) of the Act. The essence of such an offence was that the mass of a vehicle exceeded the mass limit applicable to that vehicle. The offence involved a comparison between two values, namely, the mass of the vehicle and the mass limit. Both values were essential elements of the offence because the absence of one of them prevented performance of the comparison that was required by s171(2). They both formed the foundation of the charge. Specification of the mass of the vehicle alone could not have established the offence because of the absence of the statutory standard by reference to which the offence was established. Likewise, specification of the mass limit alone simply provided the statutory standard but did not contain a vital fact by which infringement of that standard could be established.  3. The Act did not specify a single mass limit but set out a scheme under which the mass limit may vary. It followed that, in order for a defendant to have a proper understanding of the nature of the alleged offence, the charge must set out the mass limit that was allegedly applicable.  4. Specification of the mass limit was a matter of substance rather than form. A person who was charged with an offence under s171(2) of the Act was entitled to know the facts constituting the alleged offence and to be able to check the accuracy of those facts and to assess the strength of the prosecution case. The omission of a lawful mass limit from the charge would deprive the accused of these basic rights. Without knowing the lawful mass limit, the accused would not be able to make an informed decision about whether to contest the charge or to plead guilty and rely on mitigating circumstances.  5. The lawful mass limit applicable to the vehicle was an essential element of the offence and its absence from the charges rendered them defective. The charges did not set out offences upon which CCS could have been convicted. At no time prior to the expiration of the 12 month limitation period did VicRoads provide to CCS particulars of the lawful mass limit. Accordingly, the power to amend the charges did not apply after the limitation period had expired.  6. It followed that the magistrate erred in ruling that the mass limit was a mere particular rather than an essential element of an offence under s171(2) of the Act and that it was permissible to amend the charges to specify the mass limit after the expiration of the limitation period. His Honour should have refused the amendment and dismissed the charges.  7. In relation to the reasonable steps defence, an offence under s171(2) of the Act was one of strict liability, subject to CCS establishing, on the civil standard of proof, a defence under s179. Section 179 placed the onus on CCS to satisfy the magistrate that it had taken all reasonable steps to prevent the offending conduct. CCS could have discharged this onus by reference to the non-exclusive factors set out in s179(2) of the Act.  8. It was for CCS, rather than VicRoads or the magistrate, to identify the steps upon which CCS sought to rely and to present evidence to satisfy the magistrate that they were all the reasonable steps that could have been taken to prevent the offending conduct and that it complied with industry standards.  9. CCS’ complaint that the magistrate rejected its reasonable steps defence without identifying standards and guidelines misconceived the purpose and effect of s179 of the Act. Section 179 itself – including s179(2)(b)(v) and (c)(i) – provided some guidance on what constituted reasonable steps. |
| **32** | **Accused charged with intentionally destroying property of a neighbour – elements of offence**  In *Powell v Olsen* MC32/12, the accused was charged with intentionally and without lawful excuse destroying a fence belonging to a neighbour. The Magistrate found the charge proved. Upon appeal: HELD: Appeal allowed. Magistrate's order quashed. Not remitted to the Magistrates' Court for hearing and determination according to law.  1. In the present case in order to prove a charge of intentionally damaging property under the *Crimes Act* 1958 it was necessary for the prosecution to prove beyond reasonable doubt:  (a) that the property belonged to another person or to the accused and another person; and  (b) that the accused did so without lawful excuse.  2. In relation to element (a) the Magistrate erred in law in failing to find that the prosecution was obliged to prove that the electric fence was not a fixture, and in not finding that the prosecution had failed to do so.  3. In relation to element (b) the prosecution was required to prove beyond reasonable doubt that the accused had no lawful excuse for destroying the property. It was for the accused to elicit or point to evidence that could give rise to a “lawful excuse.” The onus then lay on the prosecution to negative or rebut that excuse.  4. The Magistrate did not identify the issue of element (b) correctly. Rather, he found that P. honestly believed that he owned the land where the fence was located and that W. was a trespasser. He held, however, that he was not satisfied that when P. destroyed the fence he honestly believed it was his property. That was not the question that he was required to address and the Magistrate thereby erred in law. Rather, the question was whether he was satisfied beyond reasonable doubt that P. did not believe it was his property. |
| **33** | **Drink/driving – refuse to accompany police officer for a breath test**  In *DPP v Blango* MC33/12, the defendant was intercepted whilst driving a motor vehicle and underwent a PBT which proved positive. When requested by the police officer to accompany him to the police station for a breath test, the defendant said he would only do so if the officer showed him the reading. The charge was dismissed. Upon appeal-  HELD: Appeal allowed. Dismissal quashed.  1. To establish an offence under s49(1)(e) of the *Road Safety Act* 1986 ('Act'), the prosecution must prove that—  (a) a requirement was made under s55(1) of the Act; and  (b) the offender refused to comply with the requirement.  2. The only issue in the present case was whether B. refused to comply with the requirement, there being no issue as to whether the requirement was in fact made.  3. The evidence led before the magistrate, and accepted by her, showed that B.'s response to the four requests put to him by the police was, in substance: ’I will accompany you to the police station only if you show me the reading of the preliminary breath test’.  4. Section 49(1)(e) of the Act does not admit any conditions to compliance with a s55(1) requirement. And the law is clear that police are not obliged to show, and in fact may be unwise to show, the result of a preliminary breath test to drivers. Yet the magistrate seemed to conclude there was an alternative inference available on the facts, consistent with innocence – that is consistent with B. not refusing to comply with the requirement. Her Honour formulated that alternative inference as being that B. was being ‘argumentative with the police’, mistakenly ‘asserting a right’ and ‘he wanted to see the [preliminary breath test] reading’.  5. Such a position cannot reasonably be seen to be consistent with innocence at all: it is entirely inconsistent with lawful compliance and consistent only with refusal.  6. The only reasonable inference available from the accepted fact that, after four requests, B. was being argumentative with police, asserting a mistaken view of the law and wanting to see the reading, as a condition of complying with the informant’s requirement, was that he refused to comply with that requirement.  7. It followed that the Magistrate erred in law. The nature of that error was that her Honour wrongly treated B.'s particular reasons for not being willing to comply as supporting the inference that he had not refused to comply. In so doing, her Honour either failed to apply an objective test for assessing refusal as required, or took into account irrelevant matters, or both.  *Hrysikos v Mansfield* [2002] VSCA 175; (2002) 5 VR 485; (2002) 135 A Crim R 179; (2002) 37 MVR 408, applied. |
| **34** | **Criminal damage and the Victorian Charter of Human Rights and Responsibilities**  In *Magee v Delaney* MC34/12, Kyrou J dealt with an appeal against a conviction for damaging property belonging to another. The question was whether the defendant had a lawful excuse for his actions. Held:  HELD: Appeal dismissed.  1. The natural meaning of ‘lawful’ depends on the context in which the word is used. In the context of ss197, 199 and 201 of the *Crimes Act*, ‘lawful excuse’ may be interpreted as being used in the sense of an excuse ‘supported by law’, that is, an excuse that the law recognises as a valid excuse.  2. ‘Lawful excuse’ is an expression of wider import than ‘lawful authority’. The defence of ‘lawful excuse’ can be sufficiently proved even though no ‘lawful authority’ exists for the conduct the subject of the charges. In proving a ‘lawful excuse’, it is the excuse or exculpatory reason put forward by the accused, rather than the conduct the subject of the charges, that must be shown to be lawful.  3. The right conferred by s15(2) of the *Charter of Human Rights and Responsibilities Act* 2006 ('Victorian Charter') is the right to ‘freedom of expression’. The section does not provide an exhaustive definition of the contents of that right or the form in which it may be exercised. Rather, it sets out very broadly-worded examples of both. In particular, the reference to ‘by way of art’ in para (d) makes it clear that the ‘impart[ing] [of] information and ideas’ for the purposes of s15(2) is not confined to forms that convey fixed, objective meanings but also includes forms that may involve subjective interpretation.  4. Any act which is capable of conveying some kind of meaning falls within the words ‘impart information and ideas of all kinds’ in s15(2) of the Victorian Charter, without the need to prove that it actually conveyed a particular meaning to a specific person.  5. In the present case, whether an act was capable of imparting information or ideas was to be judged by its impact on reasonable members of the public who were exposed to it, without the benefit of any extraneous information about the purposes of the person who committed the act. If some reasonable members of the public perceived that the act sought to convey one or more messages, then the act was capable of imparting information or ideas, even if they did not know, or were uncertain about, the precise message or messages sought to be conveyed.  6. As the Victorian Charter was enacted to underpin and support our free and democratic society and the rule of law, rather than to undermine or fracture them, s15(2) of the Victorian Charter does not protect all forms of expressive conduct. It certainly does not protect expression in the form of damage to a third party’s property or a threat of such damage.  7 Accordingly, M's act of painting over the advertisement did not fall within the right to freedom of expression in s15(2) of the Victorian Charter.  8. The focus of the inquiry is upon the nature and scope of the lawful restriction, rather than upon its impact on the conduct of the person challenging the restriction. That is, the question to be asked under s15(3) of the Victorian Charter is not whether the manner in which the lawful restriction affects the conduct of the person impugning the restriction is reasonably necessary for the two identified purposes. The ultimate question is whether, having regard to its nature and scope, the lawful restriction is reasonably necessary for the two identified purposes. The answer to that question does not vary depending on the facts of a particular case.  9. The reference to ‘the rights and reputation of other persons’ in s15(3)(a) is not confined to the rights of human beings conferred by the Victorian Charter. Rather, it is a generic reference to rights enjoyed by natural persons as well as legal persons, irrespective of whether those rights are incorporated in the Victorian Charter.  10. Section 15(3)(a) of the Victorian Charter is not confined to lawful restrictions reasonably necessary to respect the human rights conferred by the Victorian Charter. It follows that the magistrate erred in so concluding.  11. Sections 197(1) and 199(a)(i) of the *Crimes Act* impose lawful restrictions reasonably necessary to respect property rights within the meaning of s15(3)(a) of the Victorian Charter. Accordingly, insofar as M's conduct may have otherwise engaged the freedom of expression in s15(2), that engagement was negated by ss197(1) and 199(a)(i) of the *Crimes Act* operating under s15(3)(a) of the Victorian Charter.  12. The expression ‘protection of ... public order’ means, in broad terms, giving effect to rights or obligations that facilitate the proper functioning of the rule of law. This is a wide and flexible concept and includes measures for peace and good order, public safety and prevention of disorder and crime. Without limiting the lawful restrictions that may be reasonably necessary for the protection of public order, they obviously include laws that enable citizens to engage in their personal and business affairs free from unlawful physical interference to their person or property.  13. The magistrate concluded that ‘public order’ involved regulating the actions of individuals and groups so as to ensure that they do not impact inappropriately on other members of the community. The magistrate’s interpretation of ‘public order’ was too wide and uncertain and should not be accepted. The magistrate also erred by considering the application of s15(3)(b) of the Victorian Charter by reference to the peculiar facts relating to M., including his prior convictions. The issue was not whether M.'s conduct had undermined public order, but whether the statutory provisions under which he was charged were reasonably necessary for the protection of public order. However, the Magistrate was correct in his overall conclusion that ss197(1) and 199(a)(i) of the *Crimes Act* imposed lawful restrictions on M's right to freedom of expression for the protection of public order.  14. Having regard to public policy considerations that inform the scope of the protected forms of expressive conduct, the reasonableness of the restrictions in ss197(1) and 199(a)(i) of the *Crimes Act* for the purpose of protecting the property rights of third parties, the reasonableness of the restrictions in ss197(1) and 199(a)(i) of the *Crimes Act* for the protection of public order, the compatibility of the restrictions in ss197(1) and 199(a)(i) of the *Crimes Act* with s15(2) of the Victorian Charter and the factors set out in s7(2) of the Victorian Charter, the conclusion is irresistible that the restrictions in ss197(1) and 199(a)(i) of the *Crimes Act* constitute reasonable limits which are demonstrably justified in a free and democratic society based on human dignity, equality and freedom, within the meaning of s7(2) of the Victorian Charter. |
| **35** | **Drink/driving – detail required when person requested to undergo blood sample**  In *DPP v Novakovic* MC35/12, Williams J dealt with an appeal against a Magistrate’s dismissal of a drink/driving charge on the grounds that when the police officer requested the driver to undergo a blood test, the officer did not comply with the requirements of s55(A) of the *Road Safety Act* 1986. HELD: Appeal dismissed.  1. From the authorities the following principles can be distilled:  (a) the statutory purpose of Part 5 of the Act is to combat a recognised social evil, necessitating the provision of powers to police and others to make requirements including those under ss55 (1) and (9A);  (b) the Act, nevertheless, is of a penal nature, requiring a person to provide potentially incriminating material, and must be strictly construed and ambiguity resolved in favour of that person;  (c) the powers to require a sample of breath or of blood under s55 are subject to a temporal limit of three hours from driving;  (d) the requirement for a sample of breath or blood to be furnished need not be expressed in any particular form of words, so long as what is required is made clear;  (e) the requirement to furnish a sample of breath under s55(1) need not be expressed in imperative terms;  (f) the powers to make requirements in relation to breath samples under s55(1) are permissive;  (g) the powers under s55(1) to require a person ‘to furnish a sample of breath’, ‘to accompany’ and ‘to remain’ are discrete and need only be exercised where the circumstances dictate;  (h) a requirement ‘to remain’ made under s55(1) must specify its purpose and the applicable temporal limit in relation to its exercise;  (i) when exercising the power to require a person to furnish a breath sample under s55(1), there is no general duty or obligation to inform the person about the further subsidiary (or machinery) powers under sub-s (1) to require the person ‘to accompany’ or ‘to remain’ for the purpose of satisfying the requirement to provide the sample of breath.  2. The Magistrate’s decision to dismiss the charge was correct, because the informant had failed to communicate to N. the essential fact that he was only required to allow a registered medical practitioner or approved health professional to take a sample of his blood.  3. N. would only have offended under s49(1)(e) of the Act if he had refused such a requirement. When his refusal could have constituted a criminal offence, it was critical that the informant should have conveyed to him exactly what was being required of him.  4. Under s55(9A), the informant could not have been required to allow anyone other than a registered medical practitioner or an approved health professional to take a blood sample. Yet, what the informant said gave no indication that the requirement was limited to allowing such a person to take his blood. This was in circumstances where the informant himself had conducted the two unsuccessful breath tests in the presence of another officer.  5. The fact that the requirement was one to allow a sample to be taken only by a registered medical practitioner or an approved health professional was not an ancillary logistical detail that could be communicated to a driver at some later stage. As an essential part of the permissible requirement, it should have been communicated to N. at the time he was asked to undergo a blood test. This was not to prescribe a form of words that must be used, but rather to insist that the requirement under s55(9A) was properly made. |
| **36** | **Power of the Coroner in relation to a report prepared by a party to the Inquest**  In *Danne v Coroner* MC36/12, a Coroner allowed a surgeon access to a post-mortem CT scan and photographs of the deceased’s body on the condition that a copy of any report prepared by the surgeon would be provided to the Coroner. HELD: The condition imposed by the Coroner was invalid. Order that the Coroner re-decide the surgeon's application for access to the requested items in accordance with law.  1. Although the powers in ss55(2)(e) and 115(3) of the *Coroners Act* 2008 are expressed widely, they are not unfettered. In order to be valid, any condition that is imposed pursuant to these provisions must, at a minimum, be referable to the purposes of the Act, not be inconsistent with any provisions of the Act or any common law rights that have not been excluded or modified by any applicable statute, and not be vitiated by bad faith or improper purpose.  2. In the present case, the cause of the Deceased’s death and any contribution by the plaintiff to the cause of death were central issues in the Inquest. There was no dispute that the Requested Items were relevant to the Coroner’s consideration and determination of these issues and that the Coroner was likely to rely upon them. The Requested Items contained technical information that may have been open to differing interpretations by experts. In these circumstances, the hearing rule required that the plaintiff be given a fair opportunity to inspect the Requested Items, under conditions that preserved the integrity of those items, for the purpose of being informed of the contents of the Requested Items and their meaning and effect. Given the technical nature of the Requested Items, fairness required that the plaintiff be able to involve his lawyers and medical experts in the inspection process.  3. The Coroner's Ruling did not involve an outright denial of access to the plaintiff to the Requested Items. Rather, it involved conditional access, whereby the plaintiff was required to undertake to provide to the Coroner any expert reports that were prepared for the plaintiff in relation to the Requested Items. The Ruling made it clear that access would be denied if the undertaking was not provided. This fettering of the plaintiff’s right of access to the Requested Items pursuant to the hearing rule significantly undermined the plaintiff’s ability to use the Requested Items to protect his interests in the Inquest and constituted an effective denial of natural justice. The plaintiff had the right to obtain access to the Requested Items in a manner that facilitated the receipt of frank and confidential advice from his lawyers and experts, so as to enable him to make informed forensic decisions about the best way to protect his interests in the Inquest. The Impugned Condition deprived him of this right.  4. Accordingly, in imposing the Condition, the Coroner breached the hearing rule of natural justice.  5. The plaintiff sought the Requested Items in order to obtain legal and expert medical advice to enable him to make forensic decisions in relation to the Inquest. Legal advice that was provided to the plaintiff by his lawyers would have been privileged under the common law and under the *Evidence Act* 2008. Likewise, advice provided by an expert to the plaintiff or to his lawyers at the plaintiff’s request for the dominant purpose of the lawyers providing legal advice to the plaintiff would also have been privileged.  6. If the plaintiff tendered at the Inquest any advice received from his lawyers or from an expert, the privilege in that advice would be waived. However, if the plaintiff kept the contents of the advice confidential and simply used it to inform forensic decisions regarding the Inquest – including the nature of the questions to be put to witnesses such as the pathologist Dr Parsons – privilege would not have been waived.  7. The effect of the Impugned Condition was to significantly undermine any privilege that would have arisen in relation to expert advice provided to the plaintiff. This was because it would have deprived the plaintiff of the right, as the beneficiary of the privilege, to decide to whom to disclose a privileged document and whether to waive the privilege.  8. It is well established that legal professional privilege (and client legal privilege) is a fundamental right which can only be abrogated by clear words or by necessary intendment in a statute. Rather than abrogating privilege by clear words or by necessary intendment, the Act expressly preserves privilege.  9. It followed that the Impugned Condition was beyond the power of the Coroner insofar as its effect would have been to undermine the privilege in any report obtained by the plaintiff in relation to the Requested Items. |
| **37** | **Sentencing of a person who was subject to a supervision order.**  In *Actg Secretary to the Department of Justice v McKane* MC37/12, an appeal was lodged in relation to sentences of imprisonment imposed by a Magistrate on a person who committed further charges whilst on a Supervision Order.  HELD: Appeal allowed. Sentences varied.  1. The sentence to be imposed should reflect the need for both general and specific deterrence in relation to breaches of supervision orders. A supervision order may only be made if a court is satisfied that an offender poses an unacceptable risk of committing a relevant offence if such an order is not made and that person is in the community. It is essential to the effectiveness of the statutory scheme that offenders subject to supervision orders be aware of the significance of their obligations under the conditions of those orders and the seriousness with which breaches will be viewed by the courts.  2. Specific deterrence was clearly required in this case. During the hearing of the application for a detention order, there was a focus upon the adequacy of measures to control the threat the appellant's behaviour posed to the community and the need to prevent him from re-offending, for its protection. The appellant must have been aware of the concern about his re-offending (especially in light of his extensive criminal record) and yet he committed the breaching offences so soon after the supervision order was made.  3. The breaches of Condition 7(p) were criminal offences, rather than more trivial contraventions. The appellant not only engaged in prohibited contact with children but that contact had also been of a sexual nature. The first breach was more serious than the other two, given the explicit and confronting nature of the request to a young person. Even though the Magistrate imposed different sentences in relation to the offences constituting the second and third breaches, it was the Court's view that they should attract the same penalty.  4. Bearing in mind the relevant sentencing considerations, the appellant was sentenced to:  • seven months’ imprisonment for the first breach (charge 1); and  • six months’ imprisonment for each of the second and third breaches (charges 2 and 3, respectively).  5. It was directed that one month of the sentence imposed for the second breach (charge 2) and one month of that imposed for the third breach (charge 3) be served cumulatively upon the sentence for the first breach (charge 1) making a total effective sentence of nine months' imprisonment which shall commence on 20 January 2013, which was five months before the expiration of the non-parole period in relation to the sentence the appellant was presently serving.- |
| **38** | Sentencing of a person for theft of a truck and various items  In *Lucas v The Queen* MC38/12, the defendant who suffered from a psychiatric disorder was sentenced in relation to his theft of a truck and various other items.  HELD: Leave to appeal granted. Appeal allowed. L. sentenced to be imprisoned for three years and six months with a non-parole period of two years and three months.  1. The additional psychiatric evidence enabled the Court of Appeal to find that L. did have a delusional disorder and that there was a causal association between that disorder and the commission of the offences. The state of the evidence at the time of the plea did not enable the sentencing judge to make such finding. The existence of this delusional disorder reduced L.'s moral culpability in a significant way and bore upon the extent to which he was an appropriate vehicle for the application of the principle of general deterrence.  *Verdins v R* [2007] VSCA 102; (2007) 16 VR 269; (2007) 169 A Crim R 581, applied.  2. In proposing a new sentence, the following matters were taken into account. Firstly, treatment for delusional disorders is often not particularly fruitful given the lack of insight inherent in the disorder and the general non-responsiveness to anti-psychotic medication. Secondly, L. will continue to pose a risk to the community until he has received some effective treatment for this disorder. Thirdly, L.’s conduct caused severe financial loss to the victim and his family and ensuing pain and suffering, including hospitalisation of the victim’s wife due to the resultant anxiety. |
| **39** | **Sentencing - whether County Court Judge had power to transfer a matter to the Magistrates’ Court for sentencing**  In *DPP v Batich* MC39/12, an appeal was lodged in respect of a County Court Judge’s order transferring a serious charge to the Magistrates’ Court because the Judge did not have power to impose a suspended sentence.  1. Under s168 of the *Criminal Procedure Act*, a judge of the County Court or the Supreme Court has the discretionary power to transfer a criminal proceeding for summary hearing and determination by the Magistrates’ Court. Certain mandatory criteria must be taken into account, including the adequacy of sentences available in the Magistrates’ Court (s29(2)(b)).  2. The transfer discretion does not enable a proceeding to be transferred to the Magistrates’ Court where, according to the governing sentencing principles and current sentencing practices, that court does not have the jurisdiction to impose an appropriate sentence for the offence in the circumstances. However, the judge in the present case transferred the proceeding to the Magistrates’ Court after concluding that, according to those principles and practices, it was open to the Magistrates’ Court to impose an appropriate sentence for the offence which the accused pleaded guilty to committing.  3. In this application, the issue before the Supreme Court was not whether the judge would have made the same decision as the County Court judge but whether his Honour committed an error of law on the face of the record or a jurisdictional error in making the decision which he did. The County Court judge did not commit any such error. Taking into account that the Magistrates’ Court could not impose a sentence of imprisonment of greater than two years, it was open to his Honour to decide that that court could impose an appropriate sentence in the circumstances. In reaching that conclusion, it was relevant for his Honour to take into account that the Magistrates’ Court could suspend a sentence of imprisonment, even though the County Court could not do so. He did not err in law on the face of the record by misinterpreting the transfer provision, exercise the transfer discretion for the improper purpose of circumventing the prohibition on the County Court suspending a sentence of imprisonment, take into account irrelevant considerations or fail to exercise the jurisdiction of that court. |
| **40** | **Criminal Proceeding dismissed – quantum of costs**  In *Bobby v Daniliuk* MC40/12, two charges were dismissed by the Magistrate. Upon an application for costs by the defendant, the Magistrate made an order against the Chief Commissioner of Police for the sum of $6,600 plus lost income as against the solicitor’s claim for $83,909.40. Upon appeal by the defendant. HELD: Appeal dismissed.  1. It was well open to the Magistrate to conclude on the evidence that the defendant had no liability to pay his lawyers any more than $6,600 in respect of the Magistrates’ Court proceeding.  2. One does not determine whether an agreement is a conditional costs agreement by reference to the subjective intention of the parties or – even worse in this case – by the subjective intention of one of the parties. The first step is to construe the costs agreement, remembering it is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party, by words or conduct, would have led a reasonable person in the position of the other party to believe. The meaning of the terms of the costs agreement is to be determined by what a reasonable person would have understood them to mean. The second step is to determine whether the costs agreement, as properly construed, satisfies the definition of “conditional costs agreement” in s3.4.2 of the *Legal Profession Act* 2004.  3. While there was much force in the Magistrate’s analysis on this issue, in the end, it was unnecessary for the Supreme Court to form any concluded view. The Magistrate concluded on the evidence that the defendant had no liability to his lawyers beyond the sum of $6,600. That conclusion was open to the Magistrate. In the circumstances, it was unnecessary to determine whether a different construction of the costs agreement may have led to the conclusion the costs agreement was made in breach of s3.4.27(2) of the *Legal Profession Act*.  4. Once it was concluded that the Magistrate was entitled to find that the defendant had no liability to his lawyers for costs beyond the sum of $6,600, the Magistrate was not required to conduct an item-by-item assessment of the bill of costs because of the determination that the defendant was not liable to his lawyers for any amount greater than $6,600. Having made that conclusion, the Magistrate then took the most favourable approach that could be taken to the defendant and made an order in his favour for the total amount of his liability to his lawyers. |
| **41** | **Payment of arrears of Council rates**  In *Guss v Boroondara City Council* MC41/12, the ratepayer was sued in the Magistrates’ Court for arrears of rates. The ratepayer claimed that when the new rate notice was sent out, the date for the payment of the arrears was extended until the due date for the new rates. In dismissing this defence, the Magistrate found that the ratepayer was liable to pay the rates together with interest and costs.  HELD: Appeal by ratepayer dismissed.  1. Although the initial details in the Rate Notice might have suggested that the current rates and arrears were payable in full by 15 February 2012 or by the designated instalments, the Rate Notice contained a number of statements which made it clear that the amount of the arrears remained immediately due and payable. The second page of the Rate Notice drew a distinction between rates for the current year and arrears. It stated that ‘[t]he current rates and charges due are required to be paid on or before 15 February 2012’ and that ‘[a]ny arrears ... are due immediately to avoid further interest’. The Rate Notice stated more than once that arrears that were not paid immediately would continue to accrue interest and may be subject to legal action without further notice.  2. Read as a whole, the Rate Notice did not contain any ambiguity about the ratepayer’s obligations in relation to the payment of arrears. Any arrears that were due for payment prior to the issuing of the Rate Notice continued to be due and payable and continued to accrue interest, and nothing in the Rate Notice affected the ratepayer’s obligations in relation to the arrears.  3. Once the Magistrate correctly rejected the contention based on the effect of the Rate Notice, he was obliged to find on the evidence that the arrears were due and payable as at the date of the filing of the Complaint and as at the date of the making of the order. Accordingly, the Magistrate did not err in law in ordering the ratepayer to pay to the Council the amount of $5,833.14 in respect of arrears.  4. The Magistrate was entitled to determine the Complaint on the basis that the sole issue in dispute between the parties was whether the Rate Notice had the effect of extending the due date for payment of the arrears. Having correctly concluded that the Rate Notice did not have this effect, the Magistrate was not required to consider whether the *Local Government Act* 1989 had been complied with or to make any finding in respect of this. |
| **42** | **Application to take evidence via video link**  In *RSPCA (VIC) Inc v Burwood Developments Pty Ltd* MC42/12, an application was made to take evidence from a witness overseas via video link. The application was opposed by the other party. HELD: Application for evidence to be given by video link refused.  1. There are provisions in the *Evidence Act* ('Act') which indicate that the normal and usual course for the Court to follow is to conduct a case by way of oral evidence. The calling of evidence by video link pursuant to s42E of the Act is simply evidence called orally in a different form.  2. Central to the issue as to whether or not it was appropriate for the witness overseas to give evidence by way of video link was the nature of his evidence. The witness was referred to in the pleadings and it was submitted that his evidence was not peripheral but that his state of mind was directly relevant to an important issue raised in the pleadings.  3. It was expected that the witness' evidence and cross-examination would take up to half a day and that was a factor to be taken into account in assessing the application and exercising the Court's discretion.  4. On the balance, the inconvenience to the witness and indeed the cost, was outweighed in this case by the need to ensure that the RSPCA had adequate and full opportunity to cross-examine the witness, who appeared to be central to one element of the pleaded case on the part of the RSPCA. Accordingly, the application for the video link was refused. |
| **43** | **Children’s Court – two young children – whether mature enough to give instructions.**  In *A & B v Children’s Court of Victoria and Ors* MC43/12, a decision by a Children’s Court Magistrate was subject to appeal. HELD: Orders of the Children's Court quashed. Remitted to the Children's Court to reconsider the legal representation of the children.  1. On its ordinary and grammatical meaning, s524(4) of the *Children, Youth and Families Act* 2005 ('Act') requires the Court to adjourn the hearing of a proceeding, to allow a child to obtain representation, if three conditions are met. Those conditions are:  (a) there are exceptional circumstances;  (b) in the Court’s opinion the child is not mature enough to give instructions; and  (c) the Court determines that it is in the best interests of the child for the child to be legally represented in the proceeding.  2. The scheme of representation in ss524 and 525 provides for a child who is mature enough to give instructions to have direct legal representation. It also provides where a child is not mature enough to give instructions for the child to be represented by a legal practitioner who must act in accordance with what he or she believes to be in the best interests of the child. To the extent that it is practicable to do so, the legal representative must communicate to the Court the instructions given or wishes expressed by the child.  3. Both types of legal representation give effect to the principle that the best interests of the child must always be paramount and the need to act in the best interests of the child, to protect the child from harm and to protect the child’s rights.  4. Both the context and language of the Act, and the guidance available from authority and jurisprudence demonstrate that the concept of “maturity” does not involve assumptions based on age alone. It is the concept of maturity that is found in s524 of the Act and not the age of the child alone. The Act recognises the need to have reference to each individual child’s development as well as age in determining the child’s best interests.  5. Approaching the construction of the expression “mature enough to give instructions” as used in ss524(2) and (4) in accordance with its ordinary and grammatical meaning, the phrase requires a court to have regard to considerations wider than the child’s age alone. The phrase requires an assessment of the child’s development and capacity to give instructions. This is dependent on whether the child can understand the nature of some or all of the issues in the proceeding and is able to appreciate the consequences which may follow from the instructions that are given, and the decisions being made.  6. The construction of the expression “mature enough to give instructions” as found in ss524(2) and (4) is clear and means mature enough to give instructions to a legal representative relevant to a proceeding, or to one or more issues that arise or may arise in a proceeding, having regard to the child’s development and capacity. This inquiry may include consideration of a child’s chronological age, but is significantly wider and includes for example, consideration of the child’s general maturity, capacity, insight, and ability with language. In appropriate cases, it may also include consideration of any intellectual disability or developmental issue affecting the child.  7. The reasons for decision showed that the Court misdirected itself in law as to the meaning of the expression “mature enough to give instructions” found in ss524(2) and (4), and failed to apply the correct test. The Court confined its inquiry to the chronological age of the girls and misconceived its function as confined to a conclusion as to the maturity of the girls based on chronological age alone.  8. The Court wrongly concluded that because the girls were in its view too young to be informed of the sexual abuse allegations, they were not mature enough to give instructions on any matter. The test was of a different character and involved consideration of each child’s development and capacity to give instructions including consideration of the evidence as to each child’s general maturity, capacity, insight and ability with language.  9. The plaintiffs were denied procedural fairness and natural justice. In refusing leave under s524(5) the Court fell into error by failing to give consideration, or make any proper investigation as to whether or not there was a conflict of interest which would preclude a legal representative from acting for both of the girls. The girls had been directly represented by the same legal representative over the preceding five months and on five or six occasions.  10. In the circumstances it was appropriate if the Court was minded to consider withholding leave under s524(5) for the Court to have given notice of its intention to the legal representative acting for the girls, and afforded the legal representative a proper opportunity of calling evidence and making submissions to the Court so as to permit the Court to arrive at an informed view as to whether or not there was a conflict of interest.  11. By failing to do so, there was a denial of procedural fairness and natural justice. Given the reports and information that were available to the Court, it was apparent that there was evidence and material from experts and from legal advisers that could have been called and considered and would have assisted the Court in making an informed decision. |