NATURAL JUSTICE/PROCEDURAL FAIRNESS

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1. Definition of the Rules of Natural Justice/Procedural Fairness

(i) Natural justice involves the rules and procedure to be followed by any person or body charged with the duty of adjudicating upon disputes between, or the rights of others.

The chief rules are to act fairly, in good faith, without bias, and in a judicial temper; to give each party the opportunity of adequately stating their case, and not to hear one side behind the back of the other. A judge must declare any interest he/she has on the subject-matter of the dispute being heard and a person must have notice of what he/she is accused.

In short, not only should justice be done, but it should be seen to be done.
A Concise Law Dictionary. 5th edn, PG Osborn ed, Sweet & Maxwell, 1964, p217.

(ii) The English Queens Bench in *Voinet v Barrett* (1885) 55 LJQB 39 defined the phrase as "the natural sense of what is right and wrong."

(iii) The Latin phrase ***audi alteram partem*** means "Hear the other side" or "Hear both sides." That no one shall be condemned unheard, is one of the principles of natural justice.

2. Case Definitions of the Rule of Natural Justice

(i) "The duty to accord a person procedural fairness arises because the power involved is one which may "destroy, defeat or prejudice a person's rights, interests or legitimate expectations": *Annetts v McCann* [1990] HCA 57; (1990) 170 CLR 596 at 598; 97 ALR 177; (1990) 65 ALJR 167; 21 ALD 651. An intention to exclude the rules of natural justice must be clearly evident in the express words of a statute: *Johns v Australian Securities Commission* [1993] HCA 56; (1993) 178 CLR 408 at 470; 11 ACLC 1; 67 ALJR 850; 31 ALD 417; 11 ACSR 467; 116 ALR 567; see also *Cornall v AB* [1995] VICSC 7; [1995] VicRp 25; [1995] 1 VR 372 at 395. The content of the duty in a particular case depends upon the circumstances of the case and the nature of the power being exercised: *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 at 585 and at 612-615; (1985) 62 ALR 321; (1986) 60 ALJR 113; 9 ALN N28.

Where legislation provides for multiple stages in decision-making, the process should be viewed in its entirety in order to determine whether the obligation to accord procedural fairness has been complied with: *State of South Australia v O'Shea* [1987] HCA 39; (1987) 163 CLR 378 at 389; (1987) 73 ALR 1; 26 A Crim R 447; 61 ALJR 477; see also *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564; (1992) 106 ALR 11; (1992) 66 ALJR 271; 59 A Crim R 255 at 578 and *Cornall* at 395-400.

Whether legislation in fact provides for multiple stages in a single decision-making process or alternatively a series of discrete decisions at different times is itself a matter which requires careful attention. The traditional content of the rules of procedural fairness is the right to be heard, and the right to be heard by an unbiased tribunal."
Per Ashley J in *Director of the Asset Confiscation Office v Hien Van Nguyen & Anor* [2002] VSC 90; (2002) 128 A Crim R 531; MC 12/2002, 28 March 2002.

(ii) "18. Mr Waller submitted that although in a Magistrates' Court arbitration, the Court is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks fit, it is expressly bound by the rules of natural justice. The rules of natural justice require that if the tribunal or court is to draw an adverse inference from a particular document, the document should be put squarely before the party affected, to enable the party to deal with it by way of argument or evidence.

19. In this context, he relied on *Kioa & Ors v West & Anor* [1985] HCA 81; (1985) 159 CLR 550; (1985) 62 ALR 321; (1986) 60 ALJR 113; 9 ALN N28 in which Gibbs CJ stated that

> "if the rules of natural justice were applicable, the appellants were entitled to a fair opportunity to correct or contradict any relevant material prejudicial to them."

20. Mason J also acknowledged that a fundamental rule of natural justice required that a party "is entitled to know the case sought to be made against him and to be given an opportunity of replying to it", and

> "if in fact the decision-maker intends to reject the application by reference to some consideration personal to the applicant on the basis of information obtained from another source which has not been dealt with by the applicant in his application there may be a case for saying that procedural fairness requires that he be given an opportunity of responding to the matter".

21. Brennan J observed :

> "A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters to his interests which the repository of the power proposes to take into account in deciding upon its exercise."

22. Although *Kioa v West* involved a consideration of the requirements of natural justice in the context of the exercise of ministerial power under a particular statute, a general and fundamental requirement of procedural fairness is that a party subject to the possibility of an adverse determination to be made on the basis of particular documents or material, should know the case against it, and be afforded an opportunity to respond.

23. In the present case, the learned Magistrate had apparently derived adverse information concerning National Exchange from vaguely identified source documents which were not produced, nor their contents disclosed, to National Exchange's legal representative. No opportunity to read or answer the adverse material was afforded.

24. In my opinion, the learned Magistrate's approach, and his reference to and apparent reliance on such material, did not accord with the requirements of natural justice. The first question of law should be answered in the affirmative."
Per Dodds-Streeton J in *National Exchange Pty Ltd v Foster* [2004] VSC 125; MC 20/2004, 5 April 2004.

(iii) ... "Prohibition may lie if it is established that there has been or will be a denial of natural justice. The law is so stated in de Smith, *Judicial Review of Administrative Action* 3rd ed. at p209 in this sentence:

> "Depending on the circumstances of the case, a decision reached or proceedings conducted in breach of the *audi alteram partem* rule will be reviewable by means of *certiorari*, prohibition, mandamus, an injunction or a declaration."

And it had earlier been stated that among other things the rule *audi alteram partem* includes as stated at p172 "Prior Notice" and the passage is in these terms:—

> "Natural justice generally requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed, so that they may be in a position: —
>
> (a) to make representations on their own behalf; or
>
> (b) to appear at a hearing or inquiry (if one is to be held); and
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> (c) effectively to prepare their own case and to answer the case (if any) they have to meet."

In *Halsbury*, 4th ed. vol. 1 para. 77 under the heading "Effect of Breach of the Rule", the rule being right to notice and opportunity to be heard, it is stated:

> "An act or decision consequential upon contravention of the rule may be restrained by prohibition or an injunction, or set aside by *certiorari* or a statutory application to quash."

The authority referable to prohibition is *R v North; Ex parte Oakey* [1927] 1 KB 491 a decision of the Court of Appeal, and that is one of the authorities cited in support of the passage in de Smith with reference to prohibition, the other authority there cited being *R v Kent Police Authority; Ex parte Godden* [1971] 2 QB 662; [1971] 3 All ER 20.

However, for the informants it was submitted, contrary to what was submitted for the defendant, that the failure to order the supply of the particulars did not constitute a denial of natural justice.

In *B. Surinder Singh Kanda v Government of the Federation of Malaya* [1962] UKPC 2; [1962] AC 322; [1962] 2 WLR 1153, Lord Denning, giving the judgment of the Privy Council, said at p337:

> "In the opinion of their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo judex in causa sua* and *Audi alteram partem*. They have recently been put in the two words, Impartiality and Fairness. But they are separate concepts and are governed by separate considerations. In the present case inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard."

That statement appears to me to be authority in support of the view that in certain circumstances the non-observance of the rule *audi alteram partem* can constitute a denial of natural justice, and as I have said, the failure to order particulars to be supplied is an aspect of the rule *audi alteram partem*."
Per Menhennitt J in *R v Magistrates' Court At Heidelberg; ex parte Karasiewicz* [1976] VicRp 73; [1976] VR 680; MC 73/1976, 21 June 1976.

(iv) "72. It is trite law that the rules of natural justice and procedural fairness are 'neither standardized nor immutable': *Public Service Board (NSW) v Osmond* [1986] HCA 7; (1986) 159 CLR 656, 676; 63 ALR 559; (1986) 60 ALJR 209 (Deane J) cited in *MH6 v Mental Health Review Board* [2009] VSCA 184; (2009) 25 VR 382, 391 [29] and that their content may vary, requiring adjustment according to the circumstances of the particular case: *Heatley v Tasmanian Racing and Gaming Commission* [1977] HCA 39; (1977) 137 CLR 487, 514; (1977) 14 ALR 519; (1977) 51 ALJR 703; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1, 16 [48]; (2003) 195 ALR 502; (2003) 77 ALJR 699; (2003) 72 ALD 613; (2003) 24 Leg Rep 8.

Importantly, an evaluation of the realities rather than the legalities of the situation is required when dealing with the question of what fairness demands in the circumstances: *MH6 v Mental Health Review Board* [2009] VSCA 184; (2009) 25 VR 382, 391 [30]. The procedural consequences of the rules of procedural fairness depend on the particular statutory framework within which they apply and upon the exigencies of the particular case."
Per Emerton J in *Taha v Broadmeadows Magistrates' Court & Ors; Brookes v Magistrates' Court of Victoria & Anor* [2011] VSC 642; MC 43/2011, 16 December 2011.

3. Failure to hear a Party/Witness/Counsel

(a) Intimation to counsel that cross-examination of defendant and witness not necessary – defendant's evidence rejected on demeanour – no reasons given for rejection of witness' evidence – whether denial of natural justice

At the completion of examination-in-chief of the defendant and a defence witness, the presiding magistrate said to counsel that he need not bother cross-examining them. In giving his decision for the plaintiff, the magistrate said he disregarded the defendant's evidence because of his demeanour but gave no reasons for rejecting the evidence of the other witness. Upon appeal—

HELD: Appeal allowed. Order set aside. Remitted for hearing before another magistrate.
1. Having regard to the intimation to counsel and the rejection of the defendant's evidence because of the way in which he displayed himself and took the oath, the case was one of ostensible, if not actual bias in the sense of prejudgment and a denial of natural justice or procedural fairness.

R v Watson; ex parte Armstrong [1976] HCA 39; (1976) 136 CLR 248; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11, applied.

2. The defendant could not be taken to have waived the right to complain of the magistrate's apparent prejudgment because the magistrate's prejudice was not fully apparent until the reasons for decision had been stated.

Vakauta v Kelly [1989] HCA 44; (1989) 167 CLR 568; (1989) 87 ALR 633; (1989) 63 ALJR 610; (1989) 9 MVR 193; [1989] Aust Torts Reports 80-277, referred to.

Per Mandie J:

> "... The learned Magistrate then gave his decision. He said that he had to decide whose account of evidence to accept. He said that if he was to accept the appellant's version of the accident he would have to accept that the respondent was negligent. He said that if he was to accept the version of the respondent and his passenger it would be sufficient to establish negligence on behalf of the appellant in that the collision was caused by the inattentive driving of the appellant, driving too fast and a misconception that a possibility of something untoward was to occur. He said that he had to consider whose evidence he was able to accept. He said that he had noticed both parties in court, both prior to and whilst giving evidence. He said that he was impressed by the respondent and his friend in the unflamboyant way in which they gave evidence and that they presented as young men telling the truth. He said that the appellant displayed himself with casual indifference almost bordering on offensive and that the appellant took the oath as if buying a ticket to a Saturday afternoon matinee, inviting the bench to give him no credit and disregard his evidence. The Magistrate then said, "I do give him no credit and disregard his evidence". He said that he found that the respondent had established his claim and the counterclaim would be dismissed. At no stage, in giving his reasons, did the Magistrate refer to the evidence of Ms Fedden or give any reason for his implicit rejection of her relevant evidence.

... In an oft-quoted passage in *R v Sussex Justices; Ex Parte McCarthy* [1924] 1 KB 256 at 259; [1923] All ER 233; 93 LJKB 129, Lord Hewart CJ said that:

> "A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done ... nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

In *R v Watson; Ex Parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11, Barwick CJ, Gibbs, Stephen and Mason JJ said (CLR 262-3):

> "The view that a judge should not sit to hear a case if in all the circumstances the parties or the public might reasonably suspect that he was not unprejudiced and impartial, and that if a judge does sit in those circumstances prohibition will lie, is not only supported by the balance of authority as it now stands but is correct in principle. It would be wrong to regard the observations of Lord Hewart CJ in *R v Sussex Justices; Ex Parte McCarthy* [1924] 1 KB 256 at p259; [1923] All ER 233; 93 LJKB 129 as meaning that the appearance of justice is of more importance than the attainment of justice itself: cf. *R v Camborne Justices; Ex Parte Pearce* [1955] 1 QB 41 at p52; [1954] 2 All ER 850; (1954) 3 WLR 415. However, his statement of principle, which was recently reaffirmed in this Court in *Stollery v Greyhound Racing Control Board* [1972] HCA 53; (1972) 128 CLR 509, at pp518-519; [1972-73] ALR 645; 46 ALJR 602 does go to the heart of the matter. It is of fundamental importance that the public should have confidence in the administration of justice. If fair-minded people reasonably apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in the decision. To repeat the words of Lord Denning, MR which have already been cited, "Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased' ..."
>
> The fact that prerogative writs did not lie to a superior court did not mean that the rule that a judge who might reasonably be suspected of bias should not hear the cause was not applicable to superior courts; it meant only that a particular remedy was not available to redress a departure from the rules of natural justice if it occurred in a superior court. It would be absurd to suggest that the administration of justice should be less pure in a superior than in an inferior court, or that the confidence upon which justice rests is less necessary in the case of the former than in the latter. The rule that a judge may not sit in a cause in which he has an interest has been applied to the most eminent of judicial officers: *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HLC 759 [10 ER 301]. In the same way, the rule that a judge may not sit to hear a case if it might reasonably be considered that he could not bring a fair and unprejudiced mind to the decision applies to every court in Australia, subject only to the exceptions (statutory authority, necessity and waiver), mentioned by Isaacs J in *Dickason v Edwards* [1910] HCA 7; (1910) 10 CLR 243, at pp259-260; 16 ALR 149 none of which has any application to the present case."

... In my view, however, once the Magistrate had gone on to reject the need to cross-examine Ms Fedden, had failed to express reasons for rejecting her evidence and had also emphasised in his reasons his reaction to the manner in which the appellant displayed himself and took the oath, fair-minded people would have reasonably apprehended or suspected on a consideration of all of those matters that the Magistrate had indeed made up his mind in favour of the respondent's case by the time that the appellant had taken the oath and before he gave evidence or, certainly, before Ms Fedden had given evidence. The case is therefore one it seems to me of ostensible, if not actual, bias in the sense of pre-judgment and a denial of natural justice or procedural fairness.

In this case the reasonable apprehension of bias or pre-judgment ultimately stems not simply from the conduct of the learned Magistrate during the hearing but upon a consideration of his conduct during the hearing as illuminated by his stated reasons for decision. I do not consider that the solicitor for the appellant was sufficiently or so clearly apprised of the relevant circumstances as to have been able to formulate an appropriate objection prior to the Magistrate stating his reasons for decision.

To put it another way, I do not think that the appellant can be taken to have waived the right to complain of the apparent pre-judgment because his solicitor had insufficient knowledge of the matters relevant thereto until the reasons had been stated and final orders made. Although the decision was not reserved, there was no realistic opportunity to question its contents. If I am wrong about this aspect, the appellant is entitled in any event to rely upon the Magistrate's failure to state adequate reasons for his decision as an independent ground of appeal which I consider has been made out.

Furthermore, I think that it was in all the particular circumstances of this case a denial of natural justice or procedural fairness (as was submitted on behalf of the appellant) for the Magistrate to rely upon the manner in which the appellant had taken the oath and displayed himself as a critical

basis for the rejection of his evidence without giving the appellant an opportunity to explain that behaviour. It may have been attributable to many causes including nervousness (as was submitted before me) ... "

Per Mandie J in *Croft v Peterson* [1994] VicSC 275; MC 16/1994, 24 May 1994.

(b) PERIN system – application for revocation – applicant prevented from presenting case – Magistrate declined to read written submissions – whether denial of natural justice

R. applied to the Magistrates' Court for revocation of enforcement orders made under the PERIN system. At the hearing, R., who was not legally represented, sought to hand to the magistrate written submissions. However, the magistrate declined to read the submissions and, following questioning of R., concluded that R. had forfeited his right to a hearing and refused the application on the basis that R. had failed to notify Vic Roads of his change of address. Upon originating motion—

HELD: Magistrate's decision and dismissal quashed. Remitted for hearing by another magistrate.
1. Whatever the precise content of the requirement of courts to accord litigants natural justice or procedural fairness, the right to a fair hearing in which each party to proceedings is given the opportunity to properly present their case is an irreducible minimum.

2. In the present case, there had been a denial of natural justice, whether it may be said to flow from a failure to accord the plaintiff a fair hearing by preventing him from fully presenting his case or by the creation in fair-minded people of a reasonable apprehension that the case was pre-judged.

3. The types of matters a magistrate should take into account in applications of this nature will parallel those which arise for consideration in a normal application for rehearing.

Per Coldrey J:

"... There are another 12 grounds set out by the plaintiff which range from the alleged failure of the first defendant to consider the duties imposed upon Australia as a signatory to the International Covenant on Civil and Political Rights as impacting upon municipal law, to grounds which, on one view may be seen to relate back to the alleged failure of the first defendant to accord the plaintiff natural justice, or as it is frequently called procedural fairness.

The Law Reports abound with references to the concept of natural justice in its various manifestations. One general statement is to be found in the case of *Kioa & Ors v West & Anor* [1985] HCA 81; (1985) 159 CLR 550; (1985) 62 ALR 321; (1986) 60 ALJR 113; 9 ALN N28. At CLR p582 Mason J (as he then was) stated:

> "It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it: [cases cited] ... The reference to 'right or interest' in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests."

Later in the same judgment Mason J observed that it had been said on many occasions that "natural justice and fairness are to be equated." In the earlier decision of *R v Watson, Ex Parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248 at 262; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11, Barwick CJ, Gibbs, Stephen and Mason JJ, in approving comments made by Lord Hewart CJ in *R v Sussex Justices; Ex Parte McCarthy* [1924] 1 KB 256; [1923] All ER 233; 93 LJKB 129, at KB 259 went on to remark:

> "It is of fundamental importance that the public should have confidence in the administration of justice. If fair-minded people reasonably apprehend or suspect that the tribunal has pre-judged the case they cannot have confidence in the decision. To repeat the words of Lord Denning MR which have already been cited, 'Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased"' ..."

Whatever be the precise content of the requirement of courts to accord litigants natural justice or procedural fairness, the right to a fair hearing in which each party to proceedings is given the opportunity to properly present their case is an irreducible minimum. In the instant case the plaintiff, who was unrepresented, far from being accorded assistance in presenting his case was initially interrogated by the first defendant and, when he sought to provide written submissions prepared by his absent counsel, the first defendant refused to accept or read them. On the latter aspect of the matter, Mr Mueller, who appeared on behalf of the second defendant, conceded:

> "... that it is somewhat unfortunate the Magistrate did not read the submissions since ... there would be no doubt that that creates a perception on the face of it of a degree of unfairness."

In my view that observation is clearly correct. The first defendant pursued the reason for the non-payment of the original fines and having received the explanation from the plaintiff that he had not received courtesy letters or infringement notices because he had changed addresses a number of times, the first defendant, (according to Mr Somerville's affidavit), elicited an admission which on the materials before me now, may have been erroneously made by the plaintiff, that he had not notified Vic Roads of the change of addresses.

Had this concession been correct it would, no doubt, depending on the reasons for the failure to notify, have been one factor to be taken into account in determining the revocation application. The first defendant however appears to have regarded it as conclusive and on one view determined on the basis of it that the plaintiff had "forfeited" his right to any further hearing of the revocation application. On another view the right "forfeited" was to an ultimate hearing of the parking infringement matters on their merits. Whether it may be said to flow from a failure to accord the plaintiff a fair hearing by preventing him from fully presenting his case or by the creation in fair-minded people of a reasonable apprehension that the case was pre-judged, there has in this instance, been a denial of natural justice.

Mr Mueller submitted that it was not every case in which there had been a denial of natural justice that required the reviewing court to intervene by making the orders sought by the plaintiff. In this regard he cited the case of *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141; (1986) 67 ALR 21; (1986) 60 ALJR 662; [1986] Aust Torts Reports 80-054; (1986) 4 MVR 542; (1986) 11 ALN N80. In particular he relied on a passage contained at CLR p145 in the joint judgments of Mason J (as he then was), Wilson, Brennan, Deane and Dawson JJ that:

> "... not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial."

That judgment goes on, however, to state that where a denial of natural justice affected the entitlement of the party to make submissions on an issue of fact it was more difficult for an appellate court to conclude that compliance with the requirements of natural justice would have made no difference. Whilst it may be accurate to observe that a number of the legal issues set out in the plaintiff's submissions (Ex. 8 to the plaintiff's affidavit sworn 13 November 1995), refer to matters of law previously considered by other Courts, for example in *Cameron v the Secretary to the Department of Justice* [1994] VicSC 649, Byrne J, 28 October 1994, there are matters of fact raised in the legal context which are said to give rise to possible defences on the merits.

Moreover the remarks of the High Court must necessarily be placed in the context of the nature and extent of the breach of natural justice which has occurred. Accordingly I do not think this aspect of the matter assists the second defendant.

Before departing from this aspect of the case I should indicate that the types of matters a Magistrate should take into account in applications of this nature will parallel those which arise for consideration in a normal re-hearing situation. They will, for example, include such matters as the reasons for a failure to adopt the procedure set out in the courtesy letter, and whether any and what prejudice may be occasioned to the enforcement agency by reason of delay. No doubt a Magistrate would also bear in mind the criminal nature (in a broad sense) of any subsequent Court proceedings as well as the ultimate sanction potentially faced by an unsuccessful applicant.

Certainly, if the applicant were to convince a Court that, for reasons not attributable to any fault of the applicant, pertinent documentation, such as a courtesy letter, had not been received, enforcement orders should normally be revoked and hearing on the merits ordered. This would accord with the provisions for re-hearing contained in s95 of the Act. There is, I think, nothing in the PERIN procedures which require any different approach, particularly bearing in mind that the procedure envisages a trial on the merits if the recipient of a courtesy letter requires it.

It was argued by Mr Kenyon that the refusal of a Magistrate to revoke an enforcement order necessarily meant the denial to the applicant of a right to a fair trial. Consequently it was said to be contrary to the provisions of the International Covenant on Civil and Political Rights and such cases as *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292; (1992) 109 ALR 385; (1992) 67 ALJR 1; 64 A Crim R 176. If this be so, the discretion apparently residing in the Magistrate pursuant to clause 13 is illusory. The short answer to such a submission is that a right of fair trial is not denied by the PERIN procedure which specifically provides for it at the election of the recipient of a courtesy letter.

> ... The conclusion at which I have arrived based upon the reasons previously set out in this judgment, is that the plaintiff has made out ground 1(ii) and (iii) and ground 2 of the originating motion. Insofar as the appropriate relief is concerned I do not regard the declaration sought as being warranted given that the application was not the subject of a proper hearing. For the same reason this Court should not grant relief in the nature of mandamus to compel the first defendant to grant the revocation application and proceed to hear and determine the matters of the alleged offences the subject of the enforcement orders. ..."

Per Coldrey J in *Randall v Golden & City of Port Phillip* [1995] VicSC 726; (1995) 23 MVR 417; MC 07/1996, 19 December 1995.

(c) Committal proceeding held – application to examine additional witness – application refused – applicant deprived of opportunity to appear on hearing of application – whether denial of natural justice

Section 125(1) of the *Magistrates' Court Act* 1989 provides;

> "All proceedings in the Court are to be conducted in open court, except where otherwise provided by this or any other Act or the Rules."

1. Upon an application for an order for the examination of a witness who was not examined at the committal proceedings, a magistrate was in error in dealing with the application otherwise than in open court.

2. Depriving the applicant of an opportunity to be present at the hearing of the application, to call relevant evidence and make submissions amounted to a denial of natural justice.

Per Beach J:

> "... The decision sheet for the court register reads:
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> > "Upon reading a Notice of Examination of Witnesses by Way of Committal dated 20.12.91, and the affidavit of Robert Melasecca sworn 20.12.91, and not being satisfied that the persons sought to be examined are able to give material evidence or that it is in the interests of justice that the evidence of the witnesses be taken, the order sought under Schedule 5 of the *Magistrates' Court Act* 1989, is refused."
>
> ... In my opinion, the Magistrate was in error in dealing with the Appellant's application, otherwise than in open court and on that ground alone the appeal should succeed. But that is by no means the end of the matter.
>
> In my opinion, the principles of natural justice require that an applicant who is making an application pursuant to Clause 13 for an order for the examination of a person who was not examined as a witness at the committal proceeding, be present before the Magistrate dealing with the application, and be given the opportunity to present his case in support of the application and, where necessary, to call *viva voce* evidence. Clause 13 of Schedule 5 is an important aspect of the committal procedure, designed by the legislature to ensure that persons charged with criminal offences are fully aware of the nature of the evidence to be called by the Director of Public Prosecutions at trial. The application is one of substance which may require full debate before an informed decision can be made in the matter.
>
> The result which may follow if an accused person is not given an opportunity to cross-examine material Crown witnesses who were not called at the committal, is well demonstrated by the case of *R v Ngalkin* (1984) 71 FLR 264; (1984) 12 A Crim R 29. In that case, Ngalkin was committed for trial on a charge of causing grievous bodily harm and an indictment was subsequently presented. Prior to the commencement of the trial, however, an application was made on behalf of Ngalkin for a stay of proceedings on the ground that it would be an abuse of the process of the court to allow the trial to proceed. In support of the application it was submitted that whereas only one eyewitness had been called at the committal proceedings the Crown proposed to call a further four eyewitnesses at the trial and the accused had thereby suffered serious detriment in three particular respects. He had been deprived of full knowledge of what the Crown witnesses would say on oath, he had been deprived of the opportunity of cross-examining them and he had lost a distinct possibility that the magistrate would hold that no *prima facie* case had been made out against him. The trial judge, O'Leary J, held that the proceedings on the indictment should be stayed since by reason of the failure of the prosecution to call the witnesses at the committal proceedings, the accused had suffered substantial detriment. The Court has power to stay proceedings on the indictment if that course be considered necessary to ensure a fair trial of the accused. At p34, His Honour said:
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> "The importance and significance of committal proceedings in the criminal process have been

highlighted and stressed in a number of cases over recent years, mostly in cases where *ex officio* indictments have been filed and where, therefore, there have been no committal proceedings at all. The principles laid down in those cases, however, are of general application, and are relevant to a case such as the present."

... In my opinion it is essential that an applicant for an order under Clause 13, either be given the opportunity to be present in person at the hearing of the application, or be represented by his legal adviser, and be afforded the opportunity to debate the matter with the presiding Magistrate, and to call such relevant evidence as is appropriate. It will only be in this way that an applicant has an opportunity to answer any queries the Magistrate may have concerning the application, and to address submissions to the Magistrate in relation to any matters viewed by the Magistrate as justifying the dismissal of the application. The Appellant was denied such opportunities and in my opinion that denial amounted to a denial of natural justice. ..."

Per Beach J in *Paven v DPP & Anor* [1992] VicSC 580; MC 20/1993, 16 November 1992.

(d) Re-hearing of civil proceedings – complaint struck out – not reinstated – matter later heard – defendant not notified of hearing date – order made against defendant

When a civil proceeding came on for hearing, the plaintiffs (Sollner Pty Ltd) did not appear, the matter was struck out with an order for costs in favour of the defendants (Guss). Subsequently, without the matter having been reinstated or Guss being notified, the case came on for hearing and an order was made in favour of the plaintiff plus costs. By letter dated the following day, Guss was notified that an order had been made. Subsequently, the plaintiff served Guss with an application to set aside the original order striking out the complaint which was granted. Some 12 months later, after being served with a bankruptcy notice, Guss applied to have the order made set aside and the matter reheard. This application was refused by the magistrate mainly on the ground of the delay by the applicant Guss. Upon appeal—

HELD: Appeal allowed. Dismissal of application set aside. Order that judgment in plaintiff's favour be set aside and complaint be re-heard.

1. Proceeding to judgment in a matter which had not been reinstated after being struck out or notice given of its date of hearing was a denial of natural justice and was the sort of irregularity which rendered the judgment obtained a nullity.

2. If this conclusion is incorrect, the judgment was obtained irregularly and should have been set aside as of right unless the defendant had waived the irregularity. In the circumstances, the defendant's behaviour was equivocal and insufficient to show a waiver of objection to the irregularities leading to the judgment.

3. In considering the application to set aside, the magistrate had a discretion involving the question of balancing prejudice. Whilst there was delay on the defendant's part, the plaintiff also contributed to the delay. In view of the prejudice to the defendant, the existence of an arguable defence on the merits and the denial of the opportunity of a trial, the magistrate should have granted the application and set the judgment aside.

Per Smith J:

"... In the reasons that he gave, the learned Magistrate said that he did not consider himself to be a "court of review" regarding orders which had been previously issued in the proceedings. He stated that he was entitled to assume that the order of 23rd May 1988 had been validly made. It appears to me that it is open to a person seeking to have a judgment set aside to, *inter alia*, raise issues as to the regularity of the judgment. It would be remarkable if this were not so. Accordingly I am satisfied that the learned Magistrate erred in failing to consider whether the judgment was regularly obtained. Further, I am satisfied that the learned Magistrate erred in the exercise of his discretion of failing to consider that issue in the exercise of that discretion.

... I have come to the conclusion that the irregularity in all the circumstances of this case is the sort of irregularity that should render the judgment obtained a nullity. The Court had struck the matter out so that it was not, in the absence of a court order, to proceed to hearing. The fact that it had been struck out was patent on the record, and the plaintiff ought to have realised that the defendants were under the impression that the summons had been struck out. The hearing should not have proceeded in the absence of an application to set aside the striking out order and reinstate the matter. If such an application had been made, the defendants would have been put on notice because such an application would have been served upon them. Instead, the case was moved to Sandringham, brought on for hearing without notice to the defendants, and consequently judgment entered in the absence of the defendants. The irregularities resulted in a denial of natural justice.

Applying the above authorities, the judgment is a nullity.

If, on the other hand, I am in error in concluding that the judgment is a nullity, it was clearly obtained irregularly and accordingly should have been set aside *ex debito justitiae* unless, as was argued for the respondent, the defendants had waived the irregularity. Waiver in the relevant sense cannot, in my view, be demonstrated by the respondent. It is true that the defendants were present at a hearing in September of 1988 at which the plaintiff applied to set aside the order striking out the summons. What happened at that proceeding is not entirely clear. At its highest, for the respondent, the attendance of the appellants at that hearing and participation in it is equivocal behaviour and insufficient to demonstrate a waiver of objection to the irregularities leading to the judgment. The failure of the defendants to do anything until approximately twelve months later when a bankruptcy notice was served is again at its highest equivocal behaviour. It either points to the defendants occupying the high ground and saying the judgment was a nullity and not enforceable (Mr Guss's stated position), or it may point to a decision to do nothing until the respondents tried to enforce the judgment. It is not conduct which, in my view, would indicate a waiver of the irregularities that led to the judgment.

It follows from the foregoing that I find the questions of law raised in paragraphs (b) and (d) should be answered in the affirmative – in essence that the learned Magistrate erred in that the judgment was obtained irregularly and was either a nullity or voidable on application by the appellants. There remain the questions of law relating to the discretionary aspects of the learned Magistrate's discretion, assuming that the judgment was not a nullity or should not have been set aside *ex debito justitiae*. I have come to the conclusion that here the learned Magistrate also erred. The learned Magistrate was not referred to the Full Court decision of *Kostokanellis v Allen* [1974] VicRp 71; [1974] VR 596. In that case the Full Court said that in considering an application to set aside a judgment of the County Court:

> '... what the judge is required to do is to determine what, in his opinion, is the just way in which the court's discretion' should be exercised. To do this must involve weighing up the extent to which the defendant is prejudiced by allowing the order and judgment to stand and the prejudice to the plaintiff in setting them aside. In many cases the situation will be that the plaintiff will not suffer any prejudice that cannot be remedied by an appropriate order as to costs. So far as the defendant is concerned, if he is unable to comply with Rule 14(b) (which requires an affidavit disclosing the grounds of defence) the order and judgment cannot be set aside and there would appear to be little purpose in doing so.
>
> On the other hand, if the defendant does show on affidavit a *prima facie* defence on the merits it would seem that usually he will be seriously prejudiced if he is debarred from being able to present his defence at a trial of the action. One cannot tell until this has been done whether or not the defendant will succeed in such a defence. While it is undoubtedly relevant to the judge to consider what explanation the defendant has for not appearing on the return of the summons for final judgment, the weight to be attached to his explanation will depend upon the circumstances. Thus, for example, where the explanation shows that his non-appearance was due to some mistake or to his being misled, this may well assist the court in deciding to exercise its discretion in his favour. Again the explanation given may reflect on the question whether the defendant has made out a *prima facie* defence on the merits. However, it does not necessarily follow that if the explanation does not amount to something which can be categorised as 'sufficient reason' the defendant's application should fail. It must all depend on the circumstances.'"

Per Smith J in *Guss & Anor v R Sollner Pty Ltd* [1991] VicSC 316; MC 02/1992, 9 July 1991.

(e) Witnesses ordered out of court – defendant's brother remained in court – application subsequently made by defendant to call brother as a witness – leave refused – witness' evidence capable of supporting defendant's case – whether magistrate in error in refusing to hear witness' evidence

At the start of proceedings against H., the presiding magistrate made an order that witnesses leave the court. H.'s brother remained in court. During the prosecution case, H. stated that he intended to call his brother as a witness. Counsel for the prosecution submitted that because of the brother's non-compliance with the order to leave court he should not be allowed to give evidence. The magistrate told H. that if his brother remained in court he could not be called as a witness. H. said that he would not call his brother unless the magistrate gave leave. Near the close of H.'s case, H. sought leave to call his brother as a witness which was refused. H. was later convicted on each charge and fined. Upon appeal—

HELD: Appeal allowed. Convictions set aside. Remitted for re-hearing before a different magistrate. In both civil and criminal cases there is no discretion to exclude the evidence of a witness who has disobeyed an order to leave the court. Further, it was not open to the magistrate to put H. to

his election. However, the magistrate could have told H. that his brother might be punished if it later appeared he had flagrantly disobeyed the magistrate's order. Furthermore, if the magistrate had heard the witness' evidence, the magistrate would have been entitled to take into account the witness' disobedience and his continued presence in deciding what weight should be attached to his evidence.

Per Gray J:

> "... In refusing to hear the evidence of Robert Halliday, the learned Magistrate was in error. It was, in my view, an error brought about by the misconception that the witness' disobedience of the order that he leave the Court justified a refusal to hear his evidence. This misconception was clearly shared by counsel for the prosecution whose submissions probably misled the learned Magistrate. The authorities to which I was referred show that in earlier times the Court had a discretion to refuse to hear a witness who had disobeyed an order to leave the Court. See the discussion in *Cross on Evidence*, 5th Australian Edition at p390 and the cases there referred to. But it has long been the law that in both civil and criminal cases there is no discretion to exclude the evidence of such a witness. See *R v Guthridge & Anor* [1878] VicLawRp 89; (1878) 4 VLR (L) 77 where the Full Court quashed a conviction where the Justices had declined to hear the evidence of a defence witness who had disobeyed an order. The Court did so despite evidence from the Justices that the evidence which the witness would have given "would not have altered their decision".
>
> In the course of the Court's judgment delivered by Stawell CJ, it was pointed out that the proper course for the Justices was to punish the witness for disobedience. That comment is equally applicable here. It was not open to the learned Magistrate to put Halliday to his election as she did on 20 May 1993. She could have told Halliday that she could not refuse to hear Robert Halliday as a witness but that he might be punished if it later appeared that he had flagrantly disobeyed the learned Magistrate's order. Furthermore, if the learned Magistrate had heard Robert Halliday's evidence she was, of course, entitled to take into account his disobedience and his continued presence in Court in deciding what weight should be attached to his evidence.
>
> But as things stand, it is impossible to say what might have been the effect of Robert Halliday's evidence on the outcome of the prosecution. In cases of the erroneous rejection of defence evidence it is almost inevitable that the conviction must be quashed. Neither my researches nor those of counsel have revealed any case where a Court has dismissed an appeal in such a case. The error is of a fundamental character and the possibility of a miscarriage of justice cannot be disregarded. As Fullagar J said in *Mraz v R* [1955] HCA 59; (1955) 93 CLR 493 at p514; [1955] ALR 929:
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> > "Every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice".
>
> A fairly recent instance of an erroneous rejection of evidence leading to the quashing of a conviction is *R v Ransom* (1979) 22 SASR 283 where the Court of Criminal Appeal pointed out the difficulty in applying the proviso in such a case. Mr Wilson clearly felt the weight of the difficulty created by the learned Magistrate's unfortunate error. Although he initially contended that Halliday's conduct amounted to an abuse of process which should lead to the dismissal of the appeal, he did not feel able to strenuously oppose the inevitable conclusion adverse to his interest. For the reasons I have endeavoured to express, I consider that the appeal must be allowed and a new trial ordered. Subject to anything which the parties may wish to say, I propose the following orders:
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> Appeal allowed with costs to be taxed. Order that the orders below made on 8 September 1993 be set aside. Direct that the information be remitted for re-hearing before a different Magistrate. An indemnity certificate under the *Appeal Costs Act* is granted in respect of the respondent's costs."

Per Gray J in *Halliday v Arnol* [1996] VicSC 392; MC 01/1997, 27 August 1996.

(f) Drink/driving – witness as to element of offence on holidays – adjournment refused – whether accused unable properly to present defence – whether a denial of natural justice

Whilst driving his motor car, M. was involved in a single-car accident. He was later taken to hospital where a blood sample was taken which when analysed showed an excessive concentration of alcohol. M. was charged under s49(1)(g) of the *Road Safety Act* 1986 ('Act') and at the hearing, evidence of a circumstantial nature was given as to the time when M. had been driving. When the police prosecutor sought to tender the relevant certificates in relation to the blood sample, M.'s counsel objected on the ground that copies that had not been served on M. The magistrate decided to conduct a *voir dire* as to the question of service, proceeding on the basis that M. carried the burden of proving that service had not been effected. After evidence had been

called on both sides, M.'s counsel sought and was granted an adjournment of one month (approx.) in order to lead further evidence on the question of service. After M. had left the Court but whilst in the precincts, the prosecutor handed M. a copy of the relevant certificates, whereupon M.'s counsel went to the Magistrate's Chambers and, in the presence of the prosecutor, apprised the Magistrate of what had occurred. When the adjourned hearing resumed, M.'s counsel sought a further adjournment on the ground that a witness (who had been present on the first day of hearing) was unavailable on holidays. The magistrate refused to grant the adjournment stating that there had been ample time to subpoena the witness and that a further adjournment would lead to difficulty in recalling the evidence already given. As to the *voir dire*, M.'s counsel called no further evidence, the prosecutor gave evidence as to service of the documents on the first day of hearing and the Magistrate refused to rule on the *voir dire* stating that it was not necessary because, in his view, service had been properly effected. The charge was found proved and M. convicted. Upon order nisi to review—

HELD: Order absolute. Conviction quashed. Remitted for re-hearing *de novo*.
(1) Whilst the magistrate was in error in stating that the onus of proof of service of the certificates was on M., in view of the prosecutor's evidence as to personal service, the magistrate was not in error in concluding that it was not necessary to rule on the *voir dire* as to whether or not service had been effected in the first place. Further, the magistrate was not in error in ruling that service of the certificates had been properly effected for the purpose of enabling their tender in evidence pursuant to s57(5) of the Act.

(2) In deciding whether to grant an application for an adjournment, a magistrate must carefully weigh the interests of the accused, the Crown, witnesses and generally the administration of justice. In view of the fact that:

(i) the absent witness could give evidence as to an ingredient of the offence;
(ii) the application was made for *bona fide* reasons;
(iii) the evidence already given was of a straightforward nature and could be recalled without difficulty;
(iv) there was no inconvenience to the prosecution witnesses; and
(v) the prosecution took advantage of the first adjournment period to effect service, the magistrate, in refusing the application for an adjournment failed to allow M. to present his case fully thereby resulting in a denial of natural justice.

McInnis v R [1979] HCA 65; (1979) 143 CLR 575; 27 ALR 449; 54 ALJR 122, applied;
Bloch v Bloch [1981] HCA 56; (1981) 180 CLR 390; (1981) 37 ALR 55; (1981) 55 ALJR 701;
McColl v Lehmann [1987] VicRp 46; [1987] VR 503; (1986) 24 A Crim R 234;
R v McGill [1967] VicRp 79; (1967) VR 683;
R v Cox [1960] VicRp 102; (1960) VR 665; and
Humphrey v Wills [1989] VicRp 42; (1989) VR 439, referred to.

Per McDonald J:

"... I am of the view that in the result that the Magistrate refused the application he either gave no or insufficient consideration to the importance of permitting a party to present his case fully as an essential element of ensuring a fair trial. In the circumstances of this case that consideration far outweighed any inconvenience that may flow from the granting of an adjournment. In the result, I conclude that the exercise by the Magistrate of his discretion miscarried. Counsel for the respondent submitted that if it was found that the discretion had miscarried, then he did not contend that in the circumstances of this case it did not result in a denial of natural justice to the Applicant.

I am of the view that by refusing the application for adjournment and precluding the Applicant from being able to call the proposed witness it did constitute a denial of natural justice to the Applicant. It follows, therefore, that this ground of the Order Nisi is made out with the result that the order must be made absolute, the conviction quashed and the information remitted to the Magistrates' Court for re-hearing. For these reasons I order that the Order Nisi be made absolute with costs, including costs reserved by the Master, that the conviction be quashed, the penalties imposed be set aside and the Information remitted to the Magistrates' Court for re-hearing *de novo*."

Per McDonald J in *Mooney v Edwards* [1990] VicSC 255; (1990) 11 MVR 333; MC 47/1990, 8 June 1990.

(g) Intention of counsel to make a submission of law at close of case – counsel not given opportunity to make submission due – whether defendant denied procedural fairness.

At the end of the cross-examination of the defendant, the magistrate asked the defendant's counsel if he intended to call other witnesses. When counsel indicated that he did not intend to do so, the magistrate

told the defendant to leave the witness box and return to his seat. The magistrate then announced his decision and found the charge proved. The defendant's counsel then objected that he had not been given an opportunity to make a submission in law. The magistrate replied that the case was not a question of law but of fact. Counsel was then given an opportunity to make a plea as to sentence. Upon appeal—

HELD: Appeal allowed. Order set aside. Remitted for hearing by another magistrate.
1. On the facts of the case, a question of law arose as to what were the duties and the extent of the duties of the attending police officers when the defendant was first grabbed. Depending on the findings of fact to be determined by the magistrate, the principles of law stated in the decision of Hedigan J in *Nguyen v Elliott* [1995] VicSC 28 (VSC, 6 February 1995) may well have been relevant to the ultimate issue to be decided by the court namely, whether the defendant was guilty of the offence charged.

2. It should not be part of the duty or function of a magistrate in the conduct of a trial before the court on each case to enquire, before announcing the decision of the court, whether a party appearing before the court or his or her legal representative wishes to address the court on a matter of law relevant to the evidence. If a party or legal representative wishes to make such a submission, that fact should at an appropriate point in the trial be brought to the attention of the magistrate in order that the submission may be heard before the court gives its decision.

3. However, in the present case, events occurred too rapidly between the defendant being told to resume his seat and the magistrate announcing his decision for counsel to inform the court that he wished to address the court on a matter of law. In those circumstances, given that it was the intention of counsel to make a submission of law relevant to the evidence, there was a failure to accord the defendant procedural fairness on his trial. Accordingly, the decision and order must be set aside.

Per McDonald J:

> "... 22. I propose to deal first with the third question of law raised by this appeal, that is, whether the appellant was denied procedural fairness on his trial by the Magistrate refusing or omitting to give his Counsel the opportunity to make submissions of law before announcing his findings, including that he found the charge proved. In order to address this question it is necessary to have regard to the evidence given before the Magistrate and matters which occurred during the hearing of the trial.
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> ... 48. In my view it is important to be reminded of and to repeat that which was said by Barry J in *Mooney v James* [1949] VicLawRp 6; [1949] VLR 22 at p29; [1948] 2 ALR 369 where his Honour said –
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> > "Courts of Petty Sessions are Courts of summary jurisdiction, but a summary hearing does not mean that the inferior Court is to dispense with the aids that superior courts find substantial protections against injustice. Courts of Petty Sessions occupy a place of great importance in the hierarchy of Courts; the matters committed to them are of vital significance to the community; they are the Courts best known to a large section and such knowledge as a great many members of the public have of the administration of the law is drawn from the experience of those Courts. It is necessary that the business should be done with dispatch, dispensing with needless details, but magistrates should bear in mind when seeking to do 'ideal justice, fair and fast' the next and concluding line of the late Sir Frank Gavan Duffy's poem, *A Dream of Fair Judges* (19 ALJ at pp43-4), 'But less fast were more fair'. In a great many of cases, addresses by counsel will be unnecessary, but where the case is complicated (and the enlarged jurisdiction of Courts of Petty Sessions means that difficult cases not within the jurisdiction of Petty Sessions when they were originally set up now come frequently for decision) the Bench should avail itself of the assistance that can be had from the Bar."
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> 49. Those words of his Honour are equally applicable to Magistrates' Courts today as they were applicable to the Courts of Petty Sessions at the time they were written.
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> 50. In *Simon Parsons & Co v Batt & Falls* [1996] VicSC 362 (unreported, 13 August 1996, Batt J) the court had before it proceedings in which the plaintiff sought relief by way of judicial review under Order 56 of the *Rules of the Supreme Court*. The plaintiff sought to have set aside an order made by a Magistrates' Court on the grounds that the plaintiff had been denied procedural fairness during the course of proceedings before the lower court. In that case the Magistrate, when a solicitor sought to address him with respect to a question of costs, pre-emptorily stopped hearing the submission being made and then made an order as to costs in the case before him. Batt J in his judgment set aside the order and remitted the matter for re-hearing before the Magistrates' Court. In the course of his judgment his Honour said –

"I am not unmindful of the need from time to time, and perhaps more so than in the past, for a judicial officer to stop unnecessary or repetitive cross-examination or argument, but, in my view, it was necessary for the Magistrate at least to allow the solicitor to indicate the argument, that is to state the cases by name or at the very least by topic or genus. Otherwise there is, in my view, a want of procedural fairness in that part of the case has not been heard."

51. His Honour further said –

"It seems to me to decline to hear part of an argument is to deny a proper hearing. I make it clear that I am not talking about repetition of an argument already advanced or exemplification of a point already made or some minor branch or twiglet of an argument. Nor am I suggesting that if the cases had been identified individually or by genus it would not have been open to the Magistrate to say, if this was his view, that he did not want to hear them for some reason which he then advanced ... .

I am, then, sensible to the difficulties facing all judicial officers, but I do think here that the solicitor should have been allowed to refer to the authorities at least until, if at all, the Magistrate formed the conclusion, when he actually knew what they were, that they were inapplicable for some stated reason or other."

... 54. However, in this case being satisfied that it was always the intention of Counsel to address the court on a matter of law and having acquainted the prosecuting officer of that fact and informed her of the authority on which he intended to rely, I have reached the conclusion that whereas the Magistrate sought in the conduct of this trial to give "ideal justice fair and fast", Counsel was not given the opportunity before the decision of the court was announced to inform the court that he wished to address it on a question of law and to advance argument to the court on a question of law relevant to the evidence before the court. Events occurred too rapidly between the appellant being told to resume his seat and the Magistrate announcing his decision for Counsel to inform the court of that matter. As said by Deane J in *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23 at 56; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307 and agreed with in its terms by Mason and McHugh JJ in *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292 at 299; (1992) 109 ALR 385; (1992) 67 ALJR 1; 64 A Crim R 176, an accused person has a right not to be tried unfairly and has "an immunity against conviction otherwise than after a fair trial" which "right is manifested in rules of law and of practice designed to regulate the course of the trial". Having reached the conclusion that in the circumstances of this case that at the close of evidence events took place too quickly to give to the appellant's Counsel the opportunity to inform the court that he wished to address it on a question of law relevant to the evidence before the court announced its decision and being satisfied that it was the intention of Counsel to make such submission, I have further concluded that in the circumstances of this case there was a failure to accord the appellant procedural fairness on his trial. Such failure strikes at the decision and order of the Court. The decision and order must be set aside.

55. I am comforted in reaching such conclusion by authorities drawn to my attention by Senior Counsel for the respondent after the hearing of this appeal had concluded, where in each case events occurred not dissimilar to the present. In *R v Middlesex Crown Court, ex parte Riddle* [1975] Crim LR 731, the Divisional Court (constituted by Lord Widgery CJ, O'Connor and Lawson JJ) had before it an application for an order of *certiorari* to quash a conviction on the ground of the judge's refusal to allow the applicant to address the Crown Court, which was hearing an appeal by the applicant from a conviction before Magistrates, before it announced its decision, was a breach of natural justice. Not unlike the events that occurred in the present case, at the close of the applicant's evidence before the Crown Court he was asked whether he wished to call more evidence. The applicant answered no and was about to make a speech when the judge announced that the applicant's appeals were dismissed. The applicant complained that he had been deprived of the opportunity of making a final speech. When asked what the speech would include and on informing the court, the judge dismissed the appeal without hearing the speech. The Divisional Court on allowing the application held that there had been a breach of the rules of natural justice.

56. In *Ex parte Kent, Re Callaghan and Anor* (1969) 90 WN (pt 1) (NSW) 40, Herron CJ with whom Sugerman and Mason JJA agreed, held, that in circumstances where after the close of evidence in a children's court, Counsel for the defendant and the prosecutor had addressed the court as to guilt or innocence but not as to penalty, at the conclusion of which the Magistrate said that he was satisfied that the case was established and then proceeded to sentence the applicant, that there had been no opportunity given to Counsel for the applicant to address on the question of penalty and that this amounted to a denial of natural justice. It was ordered that the rule nisi for prohibition be made absolute. See also *Ex parte Kelly; Re Teece* (1966) 85 WN (pt 1) (NSW) 151. ..."

Per McDonald J in *Bao Duc Chu v Henham* [1999] VSC 139; (1999) 105 A Crim R 528; MC 10/1999, 4 May 1999.

(h) Charge dismissed – non-party required to show cause why costs should not be ordered against it – non-party refused leave to lead evidence and cross-examine witnesses – costs ordered against non-party – whether non-party denied procedural fairness

G. was convicted in his absence of driving whilst disqualified and his licence cancelled. Three days later Roads Corporation issued a licence to G. apparently in ignorance of the order made three days earlier. Subsequently, G. was charged with driving whilst disqualified and successfully defended the charge on the ground that he honestly and reasonably believed that he was licensed to drive. G. applied for costs on the dismissal and this question was adjourned for the Roads Corporation to show cause why it should not pay G.'s costs. On the adjourned date, Roads Corporation sought leave to cross-examine witnesses and to lead evidence about whether the Roads Corporation caused G. to believe that he was licensed to drive. Leave was refused and an order for costs was made against the Roads Corporation. Upon the return of an originating motion to quash the refusal and the order—

HELD: *Certiorari* granted. Decision quashed.
It may be unjust to make an order against a non-party without affording that person a proper hearing. In the present case, one could not say that Roads Corporation had a proper hearing given the denial to it of the ability to cross-examine the relevant witnesses and to lead evidence going to the question of whether or not Roads Corporation was in any relevant way connected with the belief held by G. as to his entitlement to drive a motor vehicle.

Per Chernov J:

> "... The principal ground on which the relief is sought is that the plaintiff was denied natural justice in that it was refused the opportunity to test the evidence upon which the Magistrate said he found that the plaintiff should pay the costs, and he also failed to allow the plaintiff to lead evidence about whether or not any honest and reasonable belief held by the first defendant was caused by action or inaction of the plaintiff. It is clear that the Magistrate was "functus officio" so far as the case of the prosecution was concerned whereby the first defendant was charged with driving a vehicle whilst unlicensed, but it seems to me that there was no reason why the evidence on which the Magistrate chose to proceed to make his finding that the plaintiff should pay the costs of the first defendant should not have been permitted to be challenged by cross-examination and by the leading of further evidence.
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> The issue before him, when Mr Judd appeared on 25 February, was whether or not the plaintiff was causative of any relevant belief held by the first defendant as to his entitlement to drive a motor vehicle. The opportunity of properly dealing with that was denied to the plaintiff. I need not go through the material in detail that is set out in the affidavit of Mr Judd, but it is quite plain that Mr Judd could have cross-examined Mr Green in relation to the matters set out in paragraphs 11.2.1 to 11.2.4 of Mr Judd's affidavit and also on the important question of whether or not the court informed the first defendant of his disqualification of 24 January 1995. Similarly, Mr Judd could have led evidence as to whether or not the court did, in compliance with s28(3) of the *Road Safety Act* in fact inform VicRoads of the conviction of the first defendant. Similarly, he could have led evidence as to whether or not the court informed the first defendant of his conviction. The ability to do this was denied to the plaintiff.
>
> It is plain that where there is such denial in procedural fairness an order in the nature of *certiorari* will go, and the recent High Court case of *Craig* is ample authority for that. Also the case of *Bischof v Adams* [1992] VicSC 10; [1992] VicRp 61; [1992] 2 VR 198, which was referred to His Worship, makes it clear at page 205 that it would be unjust to make an order against a non-party without affording that person a proper hearing. One could not say that the plaintiff had a proper hearing given the denial to it of the ability to cross-examine the relevant witnesses and to lead evidence going to the question of whether or not the plaintiff was in any relevant way connected with the alleged belief held by the first defendant as to his entitlement to drive a motor vehicle. For these reasons it is my view that relief in the nature of *certiorari* quashing the decision should go. ..."

Per Chernov J in *Roads Corporation v Green & Anor* [1997] VicSC 242; (1997) 25 MVR 426; MC 38/1997, 17 June 1997.

(i) Suppression order – request to be heard on making of – temporary order made until arrival of legal practitioner – practitioner informed order was final – whether practitioner entitled to be heard – whether breach of rules of natural justice

When a magistrate indicated that he proposed to make a suppression order, a court reporter informed the magistrate that a legal practitioner was coming to the court to be heard on the suppression order. The magistrate made the order "for the time being" and said words to the effect: "We will revisit the issue if need be when the time comes." When the practitioner later arrived at court, the magistrate ruled that the

practitioner had no right to challenge the suppression order on the basis that it was a final order which could not be varied.

HELD: Originating Motion dismissed.
1. When the practitioner sought to challenge the suppression order, no final order had been made in the matter. The practitioner had every entitlement to make the application and to have it dealt with on the merits. Accordingly, the applicant was denied natural justice and ordinarily, would be entitled to have the decision quashed.

2. In the circumstances of the case, if the identity of the principal was published it would almost certainly lead to the identification of the school, the victim's teacher and highly likely the victim. In those circumstances it was open to the magistrate to make the suppression order in the terms indicated in the order.

Per Beach J:

> "... It is my opinion that in the circumstances of this case, if the identity of the principal was published it would almost certainly lead to the identification of the school and the victim's teacher and it is highly likely that it would lead to the identification of the victim. In so far as the identity of the school is concerned, that could be ascertained by a simple enquiry of the Department of Education or of schools in the general area of the Ringwood Magistrates' Court. Once one ascertained the identity of the school, a simple enquiry of students or staff at the school would be sufficient to enable a person so minded to establish the identity of the teacher of the preparatory grade in 1996. Once one established the identity of the teacher or, for that matter, the identity of any of the students who were in the class in 1996, it would be a simple enough matter to ascertain which student who attended the preparatory class in 1996 had a brother in Grade 1 that same year.
>
> In my opinion, to disclose any information which would be likely to lead to the identification of the victim in this case would not only cause undue distress or embarrassment to the victim within the meaning of s126(d) of the *Magistrates' Court Act* 1989, it would also breach the provisions of s4(1A) of the *Judicial Proceedings Reports Act* 1958. The latter section reads:
>
> > "A person who publishes or causes to be published any matter that contains any particulars likely to lead to the identification of a person against whom a sexual offence is alleged to have been committed is guilty of an offence, whether or not a proceeding in respect of the alleged offence is pending in a court."
>
> In my opinion this was an appropriate case in which to grant a suppression order in the terms of the order of the Ringwood Magistrates' Court and I find that the learned magistrate made no error in that regard. The plaintiff's originating motion is dismissed with costs to be taxed and paid by the plaintiff."

Per Beach J in *Herald & Weekly Times Ltd v Hassard & Anor* [1998] VicSC 3; MC 12/1998, 20 January 1998.

(j) Summary hearing – prosecution evidence not finished – after long hearing magistrate dismissed charges – whether magistrate in error in dismissing the prosecution case before it had been closed.

S. was charged with assaulting and hindering a police officer in the execution of his duty. The case was booked in for a one-day hearing. When the hearing was in its 27th day, the magistrate asked the prosecutor whether the evidence yet to be called would strengthen the prosecution case. The magistrate was told that it would. The following day, without inviting or receiving submissions on the future course of the proceeding and without giving notice of intention to do so, the magistrate dismissed the case against S. on the ground that the interests of justice were not being served by its continuance. The reasons given by the magistrate included:

(1) the length of time the hearing had taken
(2) the personal attacks on the prosecutor and defence counsel
(3) the evidence which had been led
(4) the expectation that the case could continue for a further inordinate time.

Upon appeal—

HELD: Appeal allowed. Remitted for hearing and determination by another magistrate.
1. The magistrate was in part, undoubtedly correct that the conduct of the hearing was not such as to advance the interests of justice. It is an inescapable duty of a magistrate to ensure that a trial does not continue for an inordinate time when judged against the nature of the charges before the court. No time is inordinate if the administration of justice according to law requires

that such time be consumed. In other words, both prosecution and accused are entitled to a fair trial according to law and to the time required to achieve such an outcome.

2. Only one of the reasons (No. 3) given by the magistrate had any relevance to the question whether the prosecution case should be treated as at an end. When the case was dismissed, there were other witnesses to be called for the prosecution. There was nothing inherently incredible in the evidence given by the informant about the circumstances which gave rise to the charges faced by S. Even if the matters mentioned by the magistrate impacted adversely on the informant's credit, it did not follow that the magistrate would then necessarily be unable to be satisfied beyond reasonable doubt of the guilt of S. In any event, at this stage of the proceeding the question was not whether the magistrate was satisfied beyond reasonable doubt of S's guilt; it was whether or not the prosecution case should be summarily terminated.

3. It necessarily follows that the magistrate did not act in accordance with the law in stopping the prosecution case before it had been closed. Had the case proceeded, there was further evidence which was relevant to an issue raised by the defence. When the charges were dismissed the magistrate was not in a position to form a view about the prosecution case as would justify its dismissal.

Per Harper J:

> "... 13. It is clear that, by the time the hearing had dragged itself into its 27th day, the magistrate had come to the same view. On 29 April 1999, without giving either party an opportunity to put to her submissions concerning her proposed course of action, she announced that the charges against Mr Sarosi would be dismissed. She had reached the conclusion, she said, that the case was "exceptional", and required "an immediate decision". She was, she said, "accordingly effectively treating the prosecution case as at an end."
>
> 26. Even if the doctrine of estoppel were applicable in criminal proceedings, the prosecution cannot be estopped from calling persons whose attendance as witnesses was notified to, and sought by, the respondent. In my opinion, the estoppel point has no substance.
>
> 27. It was also argued on behalf of the respondent that, even if believed, Mr Barlow's evidence did not cover each of the elements of each charge. Again, I disagree. In my opinion, a police officer is clearly hindered in the execution of his or her duty when a request to search a suspect is met by a push to the shoulder and a fist poised as if ready to strike. Such actions, in my opinion, also (if proved) amount to an assault.
>
> 28. The magistrate's position on this point is unclear. She said, in her reasons for judgment, that she could not "be satisfied beyond reasonable doubt that the prosecution can prove that Detective Sergeant Barlow's duty was made substantially more difficult of performance due to Mr Sarosi's conduct." She may by this mean that, even if believed, Mr Barlow's evidence does not amount to evidence of all the elements of the charge of hindering police; or she may mean that, while Mr Barlow's evidence would if believed beyond reasonable doubt prove each element of the charge, she did not accept that that evidence reached that standard. Either way, the magistrate was at that point in the hearing not in a position to form a view about the prosecution case such as would justify its dismissal.
>
> 29. It follows that the appeal must succeed. Not only was her Worship not justified in stopping the prosecution case without giving either party the right to be heard on whether or not it should be stopped, but she also failed to act in accordance with law in proceeding to dismiss the case against the respondent. It must, I think, be said that there was as little justification for either course as there was for the hearing to take the grotesque path which it did. The proceeding must be referred back to the Magistrates' Court to be dealt with, by another magistrate, in accordance with these reasons for judgment and in accordance with law."

Per Harper J in *DPP v Sarosi* [2000] VSC 71; (2000) 110 A Crim R 376; MC 18/2000, 10 March 2000.

(k) Application for compulsory procedure – person not given notice of application nor present when order for compulsory procedure made – whether person denied natural justice

Section 464T(4) of the *Crimes Act* 1958 provides that a Magistrates' Court must not make an order directing a person to undergo a compulsory procedure unless the person is present. The person should be given notice of the application and the order should not be made until the person is present at Court. Where an order for a compulsory procedure was made in the absence of the

person to whom the order was directed, the person was denied natural justice and the failure to comply with the express terms of s464T(4) amounted to jurisdictional error.

Lednar v Magistrates' Court of Victoria & Anor [2000] VSC 549; (2000) 117 A Crim R 396, Gillard J, 22 December 2000, referred to.

Per Gillard J:

> "... 10. The provisions in sub-division 30A substantially encroach upon the rights of the individual. The legislation has been carefully drawn to ensure that the interference with the rights of the individual are kept to a minimum. It is absolutely vital that members of the force and Magistrates ensure that, before any orders are made under any of the sections in sub-division 30A, all statutory requirements have been satisfied. This present matter is another example where insufficient attention was paid, by both the defendant and the Magistrates' Court, in respect of the application concerning the plaintiff.
>
> 11. The plaintiff should have been given notice of the application, and the order should not have been made until he was present at the Court.
>
> 12. Indeed, this is made very clear by s464T(7)(d) which requires the Court, making the order, to inform the person ordered to undergo the procedure, that a member of the force may use reasonable force to enable the procedure to be carried out.
>
> ... 16. The order was made in the absence of the plaintiff, and contrary to the express provision of s464T(4). Accordingly, the plaintiff has been denied natural justice to which he was entitled pursuant to the Act. Further, the failure to comply with the express terms of s464T(4) amounted to a jurisdictional error. ..."

Per Gillard J in *Kirsch v Dolman & Anor* [2001] VSC 234; 123 A Crim R 331; MC 47/2001; 19 July 2001.

(l) Party not given adequate opportunity to be heard in relation to one of the orders made

1. It is a long-recognised fundamental principle which requires that courts be open. However, in relation to committal proceedings, courts have recognised that the right of the public to know, through reporting in the media, may not be as significant as the need for the media to be able to fully report proceedings which finally adjudicate a particular matter.

2. Where a magistrate made an order prohibiting publication of any report which named or tended to identify certain prosecution witnesses in a committal proceeding, the magistrate was not in error in making the order so as not to prejudice the administration of justice or to endanger the physical safety of any person.

3. Where a legal practitioner appeared before the court to decide whether an application might be made to oppose the making of a suppression order in relation to the Prosecution Opening but was not given an opportunity to peruse the document, the party was not accorded natural justice and accordingly, the order made in relation to the document was quashed.

Per Kaye J:

> "... 19. Before considering this question in the above light, it is first important to acknowledge the long recognised fundamental principle in our system of justice which requires that our courts be open: see *Scott v Scott* (1913) AC 417 at 434, 437-8 (per Viscount Haldane LC); [1911-1913] All ER 1; 29 TLR 520. Further, as part of the system of open justice, the courts have always recognised that it is important that the media have the ability to responsibly report to the public on the proceedings before it; see, for example, *R v Denbigh Justices; ex parte Williams* (1974) QB 759 at 765 (per Lord Widgery CJ); (1974) 2 All ER 1052. Thus, the due publication of court proceedings has not only been seen as a matter of public interest in itself, but also as an important part of the administration of justice. This consideration was clearly articulated by Mason CJ in *Hinch v Attorney-General (Victoria)* [1987] HCA 56; (1987) 164 CLR 15 especially at 25-26; 74 ALR 353; 28 A Crim R 155; 61 ALJR 556, in a passage heavily relied upon by counsel for the plaintiffs.
>
> ... **Natural Justice: suppression of prosecution witness names**
> 33. The second basis upon which the plaintiffs seek to impugn the decision of the magistrate is that she failed to accord them natural justice or, as it is now called, "procedural fairness". In particular, it is put that the magistrate failed to provide to the plaintiffs a proper opportunity upon which they might be heard.
>
> 34. As a matter of technicality, I note that Ms Milovanovic only announced that she sought for the

matter to be stood down on behalf of *The Age*. When Ms Byrne later came to the court, she stated that she was representing *The Age* and the Australian Broadcasting Corporation. No representation was made to the magistrate on behalf of the second plaintiff, The Herald and Weekly Times Limited. Quite properly, no point was made about this by either Mr Rapke or Mr McMahon. I do not consider that that affects the outcome of my considerations.

35. As I have already set out above, after announcing the decision to suppress publication of the seven names, Ms Milovanovic announced that she was from *The Age*, and stated the following:

> "I request this proceeding to be stood down briefly so we could get legal advice regarding a challenge to the suppression order please."

36. As I set out above, her Worship stated that she would not stand down the proceedings, the order could be made, and that *The Age* had its right which it may exercise. After the order was pronounced, the matter was stood down for other reasons. After the adjournment Ms Byrne, solicitor for *The Age* and the ABC, then announced her appearance "in relation to the applications that have been made to suppress the identity of some witnesses and also the opening of the prosecution." Her Worship noted that orders had already been made. Ms Byrne acknowledged that the orders had been made in relation to the witnesses, but that her Worship was still to make a decision in relation to the opening and that she sought a copy of the opening under the procedures in the Magistrates' Court, so that she might make an application to oppose a suppression of the opening.

37. The plaintiffs contend that in the above circumstances they were denied the opportunity to make appropriate submissions to her Worship in relation to the first two orders concerning the suppression of the names of the prosecution witnesses. In response, Mr Rapke makes the point that neither Ms Milovanovic nor Ms Byrne clearly sought to be heard in relation to those two orders. I have come to the conclusion that Mr Rapke's submission is correct.

38. ... If Ms Byrne had made such a request, then she would, at an appropriate time, have had a full right to be heard. Any denial of that right, without justification, would have been a breach of the rules of procedural fairness. However, I do not consider, in the circumstances, that it has been established that the plaintiffs did seek to exercise that right on 19 January, and that they were thus denied that right. Accordingly, I have reached the conclusion that the plaintiffs did not suffer a denial of procedural fairness as they have contended for.

... 44. It is clear that Ms Byrne did attend at court and announce that she wished to oppose the suppression of the document characterised as the opening. She was then at a disadvantage because she did not understand its characterisation, and that characterisation was not pointed out to her while she was addressing the magistrate. On reading the transcript, it does seem to me that Ms Byrne was not given an appropriate opportunity to address submissions in relation to the suppression of the document. In reaching that conclusion I do not make any criticism of any of the parties or of the magistrate. The document came into her Worship's hands in order that her Worship might be able to rule, prospectively, whether the oral opening to be made by Mr Rapke should be suppressed. Obviously, having read the opening, her Worship felt it was unnecessary for it to be read in open court. She was faced with a lengthy committal and her reading of the document had no doubt enlightened her as to the context in which particular witnesses were to be called and cross-examined. However, in those circumstances, the critical question is whether the first and third plaintiffs were given an adequate opportunity to be heard in relation to any suppression order to be made in relation to the document. It is clear that they so wished to be heard. It is also evident that, while she was on her feet, Ms Byrne was, quite understandably, unclear as to any proposed suppression of the document. Thus she was not in the position to make proper submissions in relation to any proposed suppression of the document. I have reached the conclusion, accordingly, that the first plaintiff and the third plaintiff were not given an adequate opportunity to be heard in respect of the suppression of the opening. Accordingly, an order should be made quashing clause 3 of the Order made on 19 January. In reaching that conclusion, I express and convey no views at all whether her Worship should or should not make such a suppression order. That decision is entirely one for her Worship and not for me. ..."

Per Kaye J in *The Age Company Ltd & Ors v The Magistrates' Court of Victoria & Ors* [2004] VSC 10; MC 06/2004, 28 January 2004.

4. Self-represented Litigant

(a) Visiting justice at prison – dealing with offences committed by prisoner whilst in prison – whether prisoner has a right to legal representation – prisoner denied legal representation

HELD: Order nisi discharged. Not a proper case for the grant of *certiorari*.

1. Members of the Victorian legal profession were entitled to a right of audience before certain courts and persons. This right was a statutory right, which was established by the *Legal Profession Practice Act* 1958, s5(3). That sub-section provided, so far as was material, that: "every person duly admitted as a barrister and solicitor" of the Supreme Court of Victoria was "entitled to practise in or before the courts or persons mentioned" in s111 of the Act. The courts and persons mentioned in that section were: "the Supreme Court, County Court, Court of Mines, Court of General Sessions, or Court of Petty Sessions or before any judge or chairman of any of such Courts or before any warden, justice or justices".

2. The position of a visiting justice was exceptional. He did not sit in open court. There was no right of access by a legal practitioner to the room in which the visiting justice sat within the prison. Thus the defendant before the visiting justice could not be ensured legal representation by the exercise by his barrister or solicitor of a right of audience, because the legal practitioner could not get there to assert his right, although if the legal practitioner were permitted to be present, he would be entitled to assert his right of audience under the *Legal Profession Practice Act* 1958. It did not follow from the existence of the statutory right of the legal practitioner to be heard, that there was to be implied a right, statutory or otherwise, in the prisoner who was a defendant before the visiting justice, to insist on being legally represented.

3. The authorities established that, at common law, a defendant to summary proceedings before justices had no right to demand that he be defended by a legal practitioner, because the justices had a discretionary power to regulate the proceedings of their own courts. This was a power which must also be possessed by the visiting justice and, consequently, it followed that the visiting justice was not obliged by any common law principle to allow the applicant in this case to be legally represented.

4. The position, so far as the visiting justice was concerned, was unless some other express statutory provision be found to cover the situation that the justice had a discretion as to whether or not he would permit an accused person to be legally represented in proceedings which he was hearing summarily under s137 or s138 of the *Social Welfare Act* 1970. In the present case the magistrate appeared to have regarded himself as not having any discretion about the matter.

5. Accordingly, there was no basis for interfering with the course taken by the visiting justice on the ground that the applicant was entitled to be legally represented in the proceedings before him, either by reason of s5(3) of the *Legal Profession Practice Act* 1958 or otherwise.

6. An examination of the facts and circumstances led to the conclusion that no injustice had been done to the applicant by the refusal of the visiting justice to allow him to be defended by a legal practitioner. The result was that no case of a denial of natural justice had been made out, so that this was not a case in which *certiorari* could go.

Per Harris J:

> "... Thus, the authorities establish that, at common law, a defendant to summary proceedings before justices has no right to demand that he be defended by a legal practitioner, because the justices have a discretionary power to regulate the proceedings of their own courts. This is a power which, in my opinion, must also be possessed by the visiting justice and, consequently, it follows that the visiting justice was not obliged by any common law principle to allow the applicant in this case to be legally represented.
>
> The true principle is that enunciated in *Collier v Hicks* [1831] EngR 686; (1831) 2 B & Ad 663; 109 ER 1290 and re-stated again in later cases including the decision of the Privy Council in *O'Toole v Scott* [1965] AC 939; [1965] 2 All ER 240 (PC); [1965] 2 WLR 1160. Thus the position, so far as the visiting justice is concerned, is unless some other express statutory provision be found to cover the situation that the justice has a discretion as to whether or not he will permit an accused person to be legally represented in proceedings which he is hearing summarily under s137 or s138 of the *Social Welfare Act* 1970. In the present case the magistrate would appear to have regarded himself as not having any discretion about the matter. Whether that affects the decision in this case will have to be considered again somewhat later. I point out that the proposition which I have just enunciated about the discretionary power of the magistrate is in accord with the primary submission put by Mr Graham in this case.
>
> The authorities which I have referred to relate expressly to the question of legal representation of parties in proceedings before justices or magistrates. There is another line of authority which deals with the situation where parties are entitled to be heard by statutory tribunals and domestic tribunals.

> ... Having now considered the arguments put on behalf of the applicant to support the proposition that he had a right to be legally represented before the visiting justice, it can be seen that I have come to the conclusion that none of those arguments sustain the proposition. There is, therefore, no basis for interfering with the course taken by the visiting justice on the ground that the applicant was entitled to be legally represented in the proceedings before him, either by reason of s5(3) of the *Legal Profession Practice Act* 1958 or otherwise.
>
> ... In my opinion, the authorities do show that proof of an irregularity in the proceedings in the lower court does not always amount to proof of a denial of natural justice. This, in my opinion, is shown by the passages from the two English cases cited above and from the approach of Lowe and O'Bryan JJ in *R v Chairman of General Sessions at Hamilton; Ex parte Atterby* [1959] VicRp 101; [1959] VR 800.
>
> In the present case, the refusal by the visiting justice to allow the applicant legal representation was something more than a mere error in procedure. Where a defendant had a right to legal representation, a conviction was quashed on appeal when the exercise of his right had been denied by a refusal to adjourn the trial, without any examination of the merits by the Court of Criminal Appeal (*R v Kingston* (1948) 32 Cr App R 183). Here, the visiting justice had a discretion whether he would allow the applicant to be legally represented.
>
> ... The plain fact of the matter is this. The applicant was given a fair opportunity to question the witnesses for the prosecution, to give evidence himself, and to put any submissions he wished to the magistrate. The evidence against him clearly established his guilt and that evidence was not challenged, either before the visiting justice, or in this Court. The submission made by the applicant that the information should be dismissed because it was not proved that he was a prisoner or that Pentridge was a prison, was properly rejected by the visiting justice, who was quite entitled, in the circumstances, to say that he had taken due notice of those matters.
>
> It was not seriously suggested in this Court that there was any substance in the points taken, in view of the place where the visiting justice sat and in view of the way in which the applicant was brought before the visiting justice and the way in which the witnesses referred to him in their evidence. It was not suggested that there was any other point involved. There is nothing to suggest that the penalties imposed are such that justice requires that the applicant should have the opportunity of seeking to address the magistrate on sentence. There is nothing to suggest that the visiting justice would have allowed the applicant to be legally represented in this case if he had appreciated that he had a discretionary power to allow him to be represented. Finally, the applicant has pending an application for leave to appeal out of time to the County Court. Such an appeal would be by way of rehearing and it cannot be said that the applicant will not be granted leave to appeal.
>
> Thus, an examination of the facts and circumstances leads to the conclusion that no injustice has been done to the applicant by the refusal of the visiting justice to allow him to be defended by a legal practitioner. The result is that, in my opinion, no case of a denial of natural justice has been made out, so that this is not a case in which *certiorari* could go. ..."

Per Harris J in *R v The Visiting Justice at Pentridge: Ex Parte Walker* [1975] VicSC 325; [1975] VicRp 86; [1975] VR 883; MC 23/1975, 24 June 1975.

(b) Duty of courts to assist self-represented litigant – whether judge applied incorrect test – whether rules of natural justice breached

1. A judicial officer has a fundamental duty to ensure a fair trial by giving due assistance to a self-represented litigant, whilst at the same time maintaining the reality and appearance of judicial neutrality. The duty is inherent in the rule of law and the judicial process. The human rights of equality before the law and access to justice specified in the *International Covenant on Civil and Political Rights* are relevant to its proper performance. The assistance to be given depends on the particular litigant and the nature of the case, but can include information about the relevant legal and procedural issues. Fairness and balance are the touchstones.

2. Where a judicial officer conducted a short hearing in which the informant's counsel was called on to say very little, the judge did not explain to the self-represented applicant the procedures that would be followed or the legal requirements that he had to satisfy, nor assist him to present his case nor mention exceptional circumstances or prejudice to the informant's case and the judicial officer rejected the application on the basis that the delay had been too great, the judge failed to properly perform his duty to ensure a fair hearing of the application and was in breach of the rules of natural justice.

Per Bell J:

"... 127. Every judge in every trial, both criminal and civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are fundamental human rights specified in the *International Covenant on Civil and Political Rights*. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected.

128. Most self-represented persons lack two qualities that competent lawyers possess – legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of grave disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to justice.

129. The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed. The Family Court of Australia has enunciated useful guidelines on the performance of the duty.

130. The judge cannot become the advocate of the self-represented litigant, for the role of the judge is fundamentally different to that of an advocate. Further, the judge must maintain the reality and appearance of judicial neutrality at all times and to all parties, represented and self-represented. The assistance must be proportionate in the circumstances – it must ensure a fair trial, not afford an advantage to the self-represented litigant.

... 141. Mr Tomasevic is qualified as a teacher, not as a lawyer. He represented himself in the hearing before the judge. The informant was represented by an experienced barrister, instructed by a solicitor. Mr Tomasevic was gravely disadvantaged, for he lacked the necessary legal skill and ability, and objectivity, to present his case.

142. The judge conducted a short hearing in which Mr Tomasevic did his best. The informant's counsel was called on to say very little. The judge did not explain to Mr Tomasevic the procedures that would be followed or the legal requirements that he had to satisfy. Nor did the judge assist Mr Tomasevic to present his case. Without mentioning exceptional circumstances or prejudice to the informant's case, his Honour rejected the application on the basis that the delay had been too great.

143. A judge has a fundamental duty to ensure a fair trial by giving due assistance to a self-represented litigant, whilst at the same time maintaining the reality and appearance of judicial neutrality. The duty is inherent in the rule of law and the judicial process. The human rights of equality before the law and access to justice specified in the *International Covenant on Civil and Political Rights* are relevant to its proper performance. The assistance to be given depends on the particular litigant and the nature of the case, but can include information about the relevant legal and procedural issues. Fairness and balance are the touchstones.

144. With respect, I think the judge applied the wrong test in coming to his decision. His Honour applied a long delay test, not a test based on exceptional circumstances and material prejudice to the informant's case. This amounted to a failure on the part of the judge properly to exercise his jurisdiction under the *Magistrates' Court Act*.

145. With respect, I also think the judge, in respects that were collectively significant, failed properly to perform his duty to ensure a fair hearing of Mr Tomasevic's application, given he was self-represented. That failure constituted a breach of the rules of natural justice, which also represented a failure on the part of the judge properly to exercise his jurisdiction.

146. For these reasons, Mr Tomasevic's application for judicial review in respect of the order of the judge dated 13 July 2006 refusing to grant his application to have the appeal heard out of time will be granted. That order will be quashed and Mr Tomasevic's application in that respect will be remitted to a judge of the County Court for reconsideration according to law."

Per Bell J in *Tomasevic v Travaglini & Anor* [2007] VSC 337; (2007) 17 VR 100; MC 38/2007, 13 September 2007.

5. Non-English Party

Accused with insufficient comprehension of English to understand everything said at hearing – no interpreter – represented by counsel – accused gave evidence and was cross-examined – whether a non-English speaker should have an interpreter in all cases

1. There is no rule of law which requires as an element of natural justice or procedural fairness that a non-English speaker should in all cases have an interpreter to translate the proceedings. The question is whether the accused will be unfairly disadvantaged in some way.

2. Where a defendant – whose facility with English at the level of court debate was insufficient to understand all that was said – was represented by and had fully instructed counsel upon a breach of a CBO, gave evidence and was cross-examined, the court was not in error in proceeding to hear and determine the charge in the absence of an appropriate interpreter.

Per Byrne J:

> "... It should be immediately noted that no person, including counsel on behalf of Mr Nguyen, asserted to the court that there was any difficulty arising out of his competence with language and, further, it should be noted that he was able and did give evidence without an interpreter. It was put that counsel's concession that the breaches of CBO had been committed was vitiated because counsel had no informed instructions to this effect. The short answer to that is that there is no evidence to this effect. Apart from a non-specific denial of the breach in his affidavit sworn 3 May 1997, paragraphs 6 and 11, the evidence is all to the contrary. It shows that Mr Nguyen's position was one of confessing and avoiding rather than traversing the allegations of breach. There is no suggestion that counsel had difficulty obtaining instructions or that there was any great problem of comprehension or expression when Mr Nguyen was interviewed by him on 17 March, by Mr Revill on 11 March, by the police on 24 August 1995 in relation to the armed robbery without an interpreter, interviewed and assessed for the plea by Dr Lester Walton in August 1996, or when he and his sister spoke to Ms East on 13 March 1997. In any event, he was at different times assisted by his sister and his father, each of whom, it is said, spoke better English than he.
>
> ... I do not intend by anything I say to detract from the propositions which they assert. I accept that Mr Nguyen's facility with English at the level of court debate was insufficient for him to understand all that was said. Nevertheless, there is no rule of law which would require, as an element of natural justice or procedural fairness, that a non-English speaker should in all cases have an interpreter to translate the proceedings. The question must be whether the accused was unfairly disadvantaged in some way. It might have been expected that counsel for Mr Nguyen would have perceived this if it existed.
>
> I was referred to cases which spoke of the failure of counsel to take a point at trial as an insuperable obstacle to raising it on appeal or review: *Dung Chi Nguyen v DPP* ([1996] VicSC 96; [1996] VSC 19; [1996] VICSC 19, CA (Vic), 20 March 1996) at page 11. I suspect that these cases are not precisely concerned with the same point as is before me. In *R v Lilydale Magistrates' Court; ex parte Ciccone* [1973] VicRp 10; [1973] VR 122 at 134, the suggestion was one of lying by or of election. The essential feature of such a case is that the applicant has, with knowledge of the facts, abstained from exercising rights. In a case such as the present, where the suggestion is that Mr Nguyen did not have a full understanding of his position, the obstacle, as it is called, may take on a different characteristic.
>
> In a case such as the present, I would not be minded to apply such a principle automatically without regard to all the circumstances and without regard to the fundamental objective of the criminal process. Nevertheless, where counsel makes no complaint and, above all, where the trial judge perceives no unfairness, I should be reluctant to conclude that the process has miscarried: *R v Lee Kun* (1916) 1 KB 337 at 342-3; (1915) 11 Cr App R 293. I repeat that counsel conducting the plea appeared, from my reading of the transcript, to be competent and fully instructed, and His Honour had the opportunity of assessing this matter independently by his observation of Mr Nguyen in the witness box. There is, to my mind, no substance in this complaint.
>
> Associated with this, it was put in support of ground 3 that the absence of an interpreter led to error in that relevant facts were not brought to the Chief Judge's notice. These facts I was told were that Mr Nguyen frequently attended the place of his unpaid work, that he denied that he had failed to attend his workplace, and that there were occasions when he did attend and was sent home. The evidence of this is scanty. The complaint that the failure to put these matters before the court was due to some want of instruction to counsel appearing for Mr Nguyen is without substance for the reasons I have already mentioned.
>
> The application before the court is one for prerogative relief. My task is not to revisit the merits of the plea nor to express any view as to the appropriateness of the sentence. I mention this not to hint any concern about this matter, but to explain why it is that I have not entered upon a consideration of much of the material which appeared to be directed to that. I conclude that this is not case where prerogative relief should go, and the application therefore will be refused."

Per Byrne J in *Nguyen v The County Court of Victoria & East* [1997] VicSC 172; MC 30/1997, 6 May 1997.

6. Statutory Provision not followed by Magistrate

At end of prosecution case magistrate apprised the accused orally of their rights – statute required caution to be hand-written and given to accused

A magistrate hearing charges against three accused gave oral notice of the rights of accused to give evidence or to make unsworn statements rather than written caution under Section 398 *Crimes Act.* Upon application for a writ of *certiorari*—

HELD: Prerogative writ of *certiorari* refused.

1. Section 398 of the *Crimes Act* is directory only, in the sense that non-compliance with it does not necessarily and always invalidate the trial. The mere failure of the Court to comply with the requirements of s398 did not necessarily have the result that a conviction must be quashed.

2. Having regard to the affidavits of what transpired before the magistrate, all that they disclosed was that the accuseds' rights as to making an unsworn statement or giving sworn evidence were conveyed to the applicants indirectly, by way of the Magistrate conveying the situation to their co-accused before turning to the applicants later on and asking them whether they had anything to add.

3. The failure to comply with the precise mode stipulated by the statute did not amount to anything analogous to lack or excess of jurisdiction and in particular did not amount to a denial of natural justice.

Per Fullagar J:

> "... In my opinion, the facts so ascertained disclose quite clearly that there was no denial of natural justice, and that there was nothing else analogous to a defect in jurisdiction in the Court to make and record the conviction. In my opinion, it is erroneous to say that the trial is invalid simply because, or that the conviction must be quashed simply because, there was not handed to the applicants any notice in writing as required by s398 of the *Crimes Act*.
>
> If the circumstances at the trial were such that the accused were never apprised of their rights as to giving evidence and as to making an unsworn statement, or as to the different consequence in relation to cross-examination, then that would, in most circumstances constitute a denial of natural justice, and *certiorari* would lie and would be granted – that would be a case of the kind dealt with by the Court of Appeal in *R v Wandsworth Justices: Ex parte Read* (1942) 1 KB 281; [1942] 1 All ER 56, and of the kind dealt with by the Full Court of this Court in *R v Chairman of General Sessions* [1959] VicRp 101; (1959) VR 800; [1959] ALR 1449, a kind of case analogous to want of jurisdiction because the inferior tribunal has so far departed from normal procedure as to have failed to exercise its jurisdiction to hear, try and determine the case according to law. In the present case the Magistrate apprised the accused persons of their rights, albeit orally and not by the writing as stipulated by the procedural s398 of the *Crimes Act*, (and indeed partly, I think, by implication).
>
> In the circumstances of the present case I am of the opinion that the failure to comply with the precise mode stipulated by the statute did not amount to anything analogous to lack or excess of jurisdiction and in particular did not amount to a denial of natural justice. Of course, even such a departure as here occurred could amount in some circumstances to a denial of natural justice. For example, if the trial in the inferior court had been before a jury, an oral indication of the accused person's rights in the presence of the jury might be so worded as to amount, if the accused elected to make an unsworn statement, to an impermissible comment upon their failure to give evidence or otherwise operate unfairly to prejudice them in the eyes of the jury; but it is unnecessary for me to go into any such question here. ..."

Per Fullagar J in *R v Stipendiary Magistrate at Benalla: ex parte Heddington & Tupper* [1975] VicSC 426; MC 48/1976, 29 August 1975.

7. Disclosure of Court Reports

(a) Confidential pre-sentence reports obtained – allegations in reports against parents – allegations not disclosed to parents – young person admitted to care – whether court's discretion properly exercised – whether non-disclosure breached rules of natural justice:

When dealing with an irreconcilable application by a young person ("D.B."), a Children's Court magistrate was provided with four written reports, two from a Doctor at the Children's Court Clinic and two from Social Workers. These reports contained a number of serious allegations and items of information which, if true, could have cast real doubt on D.B.'s parents as being suitable parents. However, the parents were not warned of the allegations and information. Subsequently, D.B. was admitted to the care of the Department

of Community Welfare Services. Upon application to set aside the order—

HELD: Application granted. Admission order quashed.
1. The principles of natural justice require that justice be done openly and a decision given only on evidence that is made known to all parties. However, in rare and exceptional circumstances, a court may exercise its discretion not to disclose information contained in a report.

2. In the present case, the reports contained allegations against the parents in respect of which they could reasonably want to be heard. Further, there was no warrant for suggesting that disclosure of the allegations would cause substantial harm to D.B. Accordingly, no exceptional circumstances existed to justify the non-disclosure of the allegations, the magistrate failed to comply with the principles of natural justice and the order admitting D.B. to care was invalidly made.

Per McGarvie J:

"... In *Commissioner of Police v Tanos* [1958] HCA 6; (1958) 98 CLR 383 at 395-6; [1958] ALR (CN) 1057, Dixon CJ and Webb J stated this basic principle:

> "....it is a deep-rooted principle of the law that before any one can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard. ... The general principle has been restated in this Court with a citation of authority in *Delta Properties Pty Ltd v Brisbane City Council* [1955] HCA 51; (1955) 95 CLR 11 at p18; [1955] ALR 869. It is hardly necessary to add that its application to proceedings in the established courts is a matter of course. But the rule is subject to a sufficient indication of an intention of the legislature to the contrary. Such an intention is not to be assumed nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations. The intention must appear from express words of plain intendment."

The other member of the court, Taylor J, agreed with those reasons. It is obvious that the parents here would not have had an adequate opportunity of being heard, in the sense of answering the case put against them and putting their own case, if they were not aware of allegations and material put against them which were contained in the reports. Likewise, they would not have had adequate notice of the case against them.

... I have no doubt that the parents in this case did not have an adequate opportunity to answer the case against them and put their own case. The question is whether particular principles which apply to custody cases, the legislation, or both, deprive them of that opportunity. The parties commenced from the position that in ordinary cases before courts the principles of natural justice require that justice be done openly and a decision given only on evidence that is made known to all parties. See *Official Solicitor v K* (1965) AC 201 at pp237-8 per Lord Devlin. I do not consider that s20(3)(b) of the *Children's Court Act* affects this position. It provides that a Children's Court may inform itself on a matter in such a manner as it thinks fit, despite any departure from the rules of evidence, not from the principles of natural justice.

... In my opinion, the parents were entitled to have disclosed to them the allegations and information which they would reasonably desire to make an answer. As this was not done, there was a failure to comply with the requirements of the principles of natural justice, which was a condition of the exercise of the power to make the order. The order was therefore invalidly made.

... Where no Act or rule provides a procedure to satisfy a requirement of natural justice, it is for the court to prescribe and enforce the appropriate procedure in the particular case: *Twist v Randwick Municipal Council* [1976] HCA 58; (1976) 136 CLR 106 at pp109-110; (1976) 12 ALR 379; (1976) 51 ALJR 193; (1976) 36 LGRA 443; *King v Rowlings* [1987] VicRp 2; (1987) VR 20 at p26. It is for the court to decide what is appropriate to give an adequate opportunity of making an answer:

> "The guideline is fairness; in general the party should have an opportunity of dealing in an appropriate way with matters with which he can reasonably be expected to be able to deal, and which might assist his or her case."

Sinnathamby v Minister for Immigration (1986) 66 ALR 502 at p506 per Fox J; (1986) 10 ALN 86. Usually it would be appropriate to permit the party to answer by calling evidence to contradict, at least. Sometimes a party may be allowed to question or cross-examine; *Re K. (infants)* (1963) Ch 381 at p390; *City of Brighton v Selpam Pty Ltd* [1987] VicRp 5; (1987) VR 54; (1986) 61 LGRA 167; *Kelk v Pearson* (1871) LR 6 Ch 809; *Broder v Saillard* (1876) 2 Ch D 692; *Rust v Victoria Graving Dock Co* (1887) 36 Ch D 113. ..."

Per McGarvie J in *JB & EB v The Director General of Community Welfare Services & Ors* [1988] VicSC 60; MC 30/1988, 22 February 1988.

(b) Community-based orders – request for report as to offender's suitability – report adverse – counsel refused permission to cross-examine report writer – community-based order not made – whether a denial of natural justice:

1. In deciding whether or not to make a community-based order under s28 of the *Penalties and Sentences Act* 1985, a court should bear in mind the general rule that it is repugnant to the basic concepts of fairness and justice that material upon which the court acts should be withheld from a party to the proceedings.

R v Carlstrom [1977] VicRp 44; (1977) VR 366, applied.
R v Hill [1983] VicRp 84; (1983) 2 VR 231, distinguished.

2. Accordingly, a court was in error where a person adversely affected by a report of a Community Corrections Officer was not given an opportunity to examine the Officer before the court decided not to make a community-based order.

Per Nathan J:

"... In this case O'Keefe presented himself to the CCO. He neither could, nor did know of the contents of that officer's report until it was pronounced in court and read by the magistrate. He neither could, nor did he have an opportunity to challenge the CCO's findings or to make contrary assertions. Procedural fairness may well have been pursued, but O'Keefe would not have been able to know this. On the other hand a prime requirement of natural justice, given its restrictions in the context of s28, is that a person be given an opportunity to be heard and a right to challenge those decisions which affect his interests, especially so when the consequences may otherwise be incarceration.

... It is beyond peradventure that a sentencer may go behind and question a reporter relating to the sentencing function. Judges and magistrates commonly question those persons who bring to the court pre-sentence reports, whether psychiatric, psychological or social. That process is a testing of the validity, efficiency and force of the opinions expressed by the reporter. It is proper that a similar opportunity to test and evaluate those opinions be extended to the offender or his counsel. To my mind there is no logical difference between a pre-sentence report and a report of a CCO relating, as it does, to only one of the sentence options.

... Most significantly, *R v Hill* [1983] VicRp 84; (1983) 2 VR 231 was decided before *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550; (1985) 62 ALR 321; (1986) 60 ALJR 113; 9 ALN N28, from which I quote the following from Mason J (as His Honour then was):

> "Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute. In *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* [1963] HCA 41; (1963) 113 CLR 475; [1964] ALR 517; (1963) 37 ALJR 182; 13 ATD 135; 9 AITR 133, Kitto J pointed out that the obligation to give a fair opportunity to parties in controversy to correct or contradict statements prejudicial to their view depends on 'the particular statutory framework'. What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, *inter alia*, the nature of the enquiry, the subject matter, and the rules under which the decision-maker is acting."

... I move to *R v Carlstrom* [1977] VicRp 44; (1977) VR 366 which is pertinent and persuasive. The Full Court (Young CJ, Menhennitt and Kaye JJ) considered the access an accused person should have to a pre-sentence psychiatric report called for by the trial judge. In this case the trial judge had relied upon such a report in determining sentence but had not shown that report to the offender or his counsel. Of that fact the Court said (p367):

> "The failure to make this material available to the applicant's advisers produced a very unsatisfactory state of affairs which, we trust, will never occur again. It is fundamental that, save in exceptional circumstances, counsel for a prisoner should have an opportunity of seeing and commenting upon any material which is provided to the trial judge, although in some cases it is necessary to obtain from counsel an undertaking not to disclose, for instance, a psychiatric report to his client. If there be a case in which the judge thinks that, for some exceptional reason, a report or some part thereof should not be made available to a prisoner's legal advisers, the trial judge should tell them that he has it and should give most explicit reasons for not allowing them to see it."

The judges, prior to the publication of this report authorized the following addendum (p368):

> "The matter dealt with in this case was a psychiatric report and the court's insistence that counsel for a prisoner should have an opportunity of seeing and commenting upon any material

> which is provided for a trial judge was based, as Kaye J said in *R v Licata & Regan* (Full Court [1977] VicSC 57, 28th February 1977, unreported), upon the principle that it is, as a general rule, repugnant to basic concepts of fairness and justice that material upon which the court acts should be withheld from a party to the proceedings. The above judgment, however, recognized that there may be cases where the withholding of material is justified. The judgment did not refer particularly to pre-sentence reports obtained pursuant to s507(6) of the *Crimes Act* 1958, the disclosure of which is a matter for the discretion of the trial judge: see *Social Welfare Regulations* 1962, Division VI, Part V, (a), 14 and *R v Webb* [1971] VicRp 16; (1971) VR 147, at p152 but the same principles as to the exercise of the discretion are applicable - Ed VR."

R v Webb (1971) is also a Full Court decision (Winneke CJ, Pape and Lush JJ). The Court made the following observation as to the use to which pre-sentence reports should be put (p152).

> "... the *Crimes Act* 1958 makes provision for the Court to seek a report of this kind. The judge, therefore, was perfectly entitled by law to call for the report and in view of the terms of the Act making that provision, there can be no doubt that he was entitled to make use of the report when he received it. The *Social Welfare Regulations* provide that the judge shall have a discretion when he receives such a report to decide whether he will or will not disclose it to the parties. If a trial judge in the exercise of that discretion is of opinion that the report should be disclosed to the parties, it should, in our view, be done before the sentence is pronounced in order that the parties may have an opportunity at that stage of dealing, if they so desire, with any of the matters stated in the report."

I am of the view the principle as expressed by the Full Court in *Carlstrom* viz. "as a general rule, it is repugnant to basic concepts of fairness and justice that material upon which the court acts should be withheld from a party to the proceedings", encapsulates the common law and sets the parameters around which s28 should be interpreted.

... In this case, the structure of the 1985 Act must allow a person adversely affected by a CCO's report a chance to be heard. In my view s28 taken in its context, does not exclude such a result. Common law requirements as to procedural fairness and natural justice prevail. The only venue at which the adverse opinion can effectively be challenged is the court during its sentencing process, that is, after the report has been delivered to the court. This conclusion necessarily imputes the right of an offender or his counsel to examine the conclusions and the bases upon which they are made. I have purposefully adopted the word "examine" rather than "cross-examine", because the report of a CCO is a product of s28 and is not of the Crown or defence. The opinions of a reporter are not critical to the issues of proving the charge and are not to be likened to evidence in chief called by the Crown. For these and other practical reasons, the author of a report should not be subjected to cross-examination, as is commonly understood, either by the offender or his counsel.

... On either view, the magistrate should have given the offender or his counsel the opportunity of examining the reporter and of making further submissions. For these reasons the order nisi will be made absolute and the matter returned to the magistrate for sentencing in accordance with the terms of this judgment."

Per Nathan J in *O'Keefe v Tankard* [1989] VicRp 34; [1989] VR 371; MC 14/1989, 5 September 1988.

(c) CBO assessment report obtained – not disclosed to counsel – terms of proposed order not explained to offender – refusal by offender to give unqualified consent – offender convicted and fined – whether denial of natural justice

A magistrate when considering making a community-based order ('CBO') in respect of G., adjourned the hearing for the purposes of obtaining a report from a community corrections officer as to whether G. was a suitable person for such an order. When the report was obtained, G.'s counsel was asked whether G. would consent to a CBO. However, counsel indicated that in order to advise G., it was necessary to know whether the report was favourable or not and whether the making of the order would involve a conviction for all purposes. The magistrate refused this request, G. refused to give unqualified consent whereupon the magistrate imposed a conviction and fined G. Upon order nisi to review—

HELD: Order absolute. Remitted for determination of sentence according to law.
An offender is entitled to know exactly what is meant by an order such as a CBO, the conditions which attach to it and the implications of it before being asked to give unqualified consent to the making of the order. The refusal by the magistrate to disclose to counsel whether the report was favourable or not and whether the proposed CBO would be a conviction for all purposes or not amounted to a denial of natural justice. Accordingly, in those circumstances, the magistrate was in error in imposing the conviction and fine.

Per Marks J:

> "... To some extent the numerous instances of the denial of natural justice referred to in the order nisi miss the main point. In my opinion, a court seeking a consent of an offender to an order which is criminally based should make it clear what it is precisely to which consent is required. A community-based order might vary greatly in the conditions it imposes. Whilst as a preliminary enquiry, a court might well be justified in asking whether an offender is prepared to consent to a community-based order, an offender is, in my opinion entitled to know exactly what is meant by the order and what it implies by way of deprivation of liberty before giving unqualified consent. A community-based order normally, if not always, involves to some extent deprivation of liberty. If a person, for instance, was empowered to withhold consent from or give consent to going to prison and a court simply asked an offender, "Do you consent to going to prison?", it would naturally evoke the response, "For how long?" Similarly, if a community-based order is to be made, one would think that an offender is entitled to know, "What does all this mean?"
>
> In the present case, the main concern of counsel was to learn whether it involved the very important question of the order not being taken to be a conviction for most purposes. The refusal of the magistrate to respond to that enquiry, in my opinion, amounted to a denial of natural justice and I propose to make the order absolute. If necessary, I would also hold that the magistrate did deny natural justice in not permitting counsel fully to make submissions on the plea and on the course which was to be taken by way of sentence. Counsel was entitled to know, in my opinion, at the very least whether the report received from the corrections officer was favourable or unfavourable. It may be a debatable point as to whether counsel was entitled to have a copy of the report, although one would think, as did the Full Court in *R v Hill* [1983] VicRp 84; [1983] 2 VR 231 that if the report was adverse, the rules of natural justice would require disclosure of its contents, to counsel at least, if not to the offender himself or herself.
>
> It would be unwise for me here to embark on the debate as to the precise formulation of the rule. I think it can be said that circumstances of a particular case generally will dictate what is required by the rules of natural justice. It may be that in some cases it is not required to show the entire report to an offender, particularly where there are psychiatric matters involved or some other matter which is irrelevant. On the other hand, it may be that it is appropriate in a particular case that the legal representative of the offender be shown the contents on an undertaking as to confidentiality.
>
> But if the case for withholding the report is justified, it seems to me that there is no justification for withholding from counsel a general indication whether the report is a handicap to or advances the case for the making of a community-based order. I should think that if the magistrate had indicated that the corrections officer had not placed any impediment in the way of an order, then counsel would have been satisfied to that point. If that were the case it would seem that little further advantage could be obtained by seeing the contents. It may well be that if there were any qualification whatever in the report, such a qualification would be relevant to whether the magistrate "otherwise directed" under s39(1). Counsel was entitled to know whether there was any such qualification, and, if there were such a qualification, he would be entitled to know what it was.
>
> The conduct of the Magistrates' Court on this occasion I think was unjust and entirely unsatisfactory. The reason is that the magistrate appears to have imposed the sentence he did, not because it was what he considered to be appropriate, but because he was impatient of the enquiry which I think was reasonably and properly made by counsel for the applicant about what was involved in consent to the community-based order. I propose to set aside the conviction as well as the sentence in this case ... and the magistrate constituting the Court should be free to impose such sentence as he or she considers appropriate after considering the whole question of sentence afresh. Accordingly, it must be left open to the court to consider whatever submission counsel sees fit to make in the interests of the applicant."

Per Marks J in *Gates v Lloyd* [1990] VicSC 407; MC 35/1990, 31 August 1990.

8. Other Cases

(a) Charges alleged to have occurred on a highway – discussion by magistrate that he had some local knowledge – magistrate decided to conduct a view of the area – no objection by police – defendant not consulted – magistrate travelled in police informant's vehicle to the scene – view conducted – upon return to court charges dismissed on ground that area not a highway

On charges of careless driving and driving without "P" plates, the question arose as to whether the alleged offences were committed on a "highway". Evidence was led that the defendant drove on a beach section of road near a 'boat hole', that there were speed restrictions erected in the area, and the area was used by cars towing boats to a ramp, and for persons going to and from the beach at Sandy Point. Discussion indicated that the Magistrate had some local knowledge of the area as he expressed some concern as to whether the

tide was in or out at the time. He decided to conduct a view of the area after which he indicated that p10-11 *Vickery* suggested that the area was not a highway. The charges were dismissed. Upon Order Nisi to review—

HELD: Order nisi discharged.
1. Little attention was paid to the interests of the defendant. If the conviction had followed on the basis of the informant pointing out the place where the offences were alleged to have occurred, there could be little doubt that the conviction would have to be set aside.

Scott v Numurkah Corporation [1954] HCA 14; (1954) 91 CLR 300; [1954] ALR 373; and

R v Magistrates Court at Lilydale; ex parte Ciccone [1972] VicSC 253; [1973] VicRp 10; (1973) VR 122 at 128, followed.

2. As a matter of strict law the evidence of the demonstration was inadmissible, since the defendant neither expressly consented nor asked for such a demonstration but by the way in which the prosecution was conducted, without any objection from the prosecutor — and, indeed, with his co-operation — the inadmissible evidence was put before the magistrate.

3. What happened at the scene may be regarded as merely a confirmation of the indication arising from the record of the proceedings in court, namely, that the magistrate was not satisfied beyond reasonable doubt that the prosecution had proved its case, and, accordingly, he was seeking confirmation of that view. No proper and persuasive proofs had been given to him that the offence had occurred on a highway in the relevant sense.

4. It was true the evidence was uncontradicted when given, but it assumed a knowledge of local geography and that the person hearing it would understand the evidence with his knowledge of local geography. It appeared the magistrate did have that local knowledge and he found the evidence as given by the police officers was insufficient to prove that the place where the offences were committed was 'a highway'. It was unacceptable to him, accordingly, when the magistrate sought an inspection with the informant to discover whether or not his knowledge was accurate, the informant now could not complain about his action, having regard to the way the prosecution was presented.

Per Gillard J:

> "... Without objection from the informant, the magistrate decided to have an inspection and the informant took the magistrate to the scene and pointed out where the offences allegedly occurred. So far as the informant was concerned, he must be taken as relying on his action as being real evidence of the facts. (See *Gould v Evans & Co* (1951) 2 TLR 1189; *Buckingham v Daily News* (1956) 2 All ER 904; [1956] 2 QB 534). It was a demonstration not merely to enable the Magistrate to understand the evidence given before him in court. (cf *Scott v Numurkah Corporation* [1954] HCA 14; (1954) 91 CLR 300; [1954] ALR 373. Little attention seems to have been paid to the interests of the defendant at all. If the conviction had followed on the basis of the informant pointing out the place where the offences were alleged to have occurred, there could be little doubt that the conviction would have to be set aside. (See *Gould v Evans*, *Scott v Numurkah Corporation* (*supra*), *R v Magistrates' Court at Lilydale; ex parte Ciccone* [1972] VicSC 253; [1973] VicRp 10; (1973) VR 122 at 128). ..."

Per Gillard J in *Parkinson v Taylor* [1976] VicSC 55; MC 66/1976, 5 March 1976.

(b) Request for particulars of alleged offences – whether particulars adequate – magistrate declined to order further particulars on ground that it would amount to ordering disclosure of the police brief

Not only did the Magistrate not order supply of such particulars, but he decided this matter on an erroneous basis. He said that to direct any further particulars than he ordered would amount to ordering disclosure of the police brief. That is an entirely irrelevant test. The supply of any particulars to some extent involves disclosure of the police brief, and the test is not whether the supply of particulars would involve disclosing the police brief, but what a defendant is reasonably entitled to. The combination of the fact that the Magistrate failed to order particulars to be supplied which should have been supplied and the fact that he proceeded on an erroneous basis did in this case amount to a denial of natural justice, because the defendant did not know and would not know when the cases commenced the precise facts alleged to constitute the assaults and the precise false name relied upon and would thereby not know the precise case against him, would not be able to prepare adequately to meet it, and would not be able to know whether evidence sought to be adduced was or was not relevant and whether or not it could be or could not be properly objected to.

Per Menhennitt J:

> "... Not only did the Magistrate not order supply of such particulars, but in my view he decided this matter on an erroneous basis. He said that to direct any further particulars than he ordered would amount to ordering disclosure of the police brief. That, in my view, is an entirely irrelevant test. The supply of any particulars to some extent involves disclosure of the police brief, and the test, in my view, is not whether the supply of particulars would involve disclosing the police brief, but what a defendant is reasonably entitled to. The combination of the fact that the Magistrate failed to order particulars to be supplied which should have been supplied and the fact that he proceeded on an erroneous basis in my view does in this case amount to a denial of natural justice, because the defendant does not know and will not know when the cases commence the precise facts alleged to constitute the assaults and the precise false name relied upon and will thereby not know the precise case against him, will not be able to prepare adequately to meet it, and will not be able to know whether evidence sought to be adduced is or is not relevant and whether or not it can be or cannot be properly objected to.
>
> For those reasons I propose to make the order nisi for prohibition absolute in the same conditional way as was done by Joske J in *R v Hermes; Ex parte Ball* [1967] ALR 158; (1966) 10 FLR 375. ..."

Per Menhennitt J in *R v Magistrates' Court at Heidelberg; Ex Parte Karasiewicz* [1976] VicRp 73; [1976] VR 680; MC 73/1976, 21 June 1976.

(c) Question disallowed by magistrate – whether denial of natural justice

During cross-examination of a witness, defendant's counsel asked 'And do you understand that difference to be that in the one it is an offer to pay for the goods and the other is a statement of intention to pay for the goods?' The magistrate upheld an objection by the prosecutor and counsel was told that the question would not be allowed. Counsel then said that he could not continue with the matter unless he was permitted to ask the question. He was again told that it had been disallowed. He then reiterated that it was a perfectly proper question and very soon thereafter he asked the magistrate for an adjournment so that he may seek prohibition in the Supreme Court.

HELD: Order nisi discharged. The matter to proceed before the magistrate.

1. The question which was disallowed related to the understanding of the defendant and might, in the circumstances, fairly be taken as a question concerning what at the time of the relevant events was the witness' belief as to the import of certain forms of words. Thus regarded, it seemed that the question was permissible.

2. It is the duty of counsel, with courtesy but with firmness, to ask to be given an opportunity to state his position. In any ordinary situation it would be the duty of the court to listen to him, although, as one knows, it is the practice that reasons for admitting or disallowing questions need not be given. Quite often the conduct of the business of any Court would be greatly impeded if much time was occupied with argument about questions of admissibility. However, cases differ and the matter in the long run must be left to the good sense and good judgment of the Bench.

3. All that did in fact happen was that the magistrate disallowed a question. He did not say that he was limiting cross-examination or suggest that he would not allow the fullest testing of the evidence of the witness by cross-examination. It was simply a question of the admissibility of a particular question.

4. It has more than once been held that a wrongful allowance or disallowance of a question does not amount to a denial of natural justice. 'Natural justice' is a rather elusive rubric and it could not be said that in no circumstances could disallowance of a question amount to a denial of natural justice when taken in the situation of a particular case. On the other hand, it is plain that cross-examination can be so excluded or abridged or interfered with that there will be a denial of natural justice. In the present case there was no denial of natural justice.

5. The conduct of proceedings before magistrates would become quite impossible if the admission or disallowance of questions, even of important questions, were to be subject to be tested in this way and the degree of interference by the superior court would soon become intolerable.

Per Fox J:

> "... It seems to me that, apart from all other considerations, if counsel has some such object in view and the particular question is disallowed, he should endeavour to put before the magistrate, with some clarity, the grounds upon which he supports the allowance of the question.

> I appreciate that in some situations what has been said to him from the bench may be strongly discouraging but I think, nevertheless, that it is the duty of counsel, with courtesy but with firmness, to ask to be given an opportunity to state his position. In any ordinary situation it would be the duty of the court to listen to him, although, as one knows, it is the practice that reasons for admitting or disallowing questions need not be given. Quite often the conduct of the business of any Court would be greatly impeded if much time was occupied with argument about questions of admissibility. However, cases differ and the matter in the long run must be left to the good sense and good judgment of the Bench.
>
> ... [A]ll that did in fact happen was that the magistrate disallowed a question. He did not say that he was limiting cross-examination or suggest that he would not allow the fullest testing of the evidence of the witness by cross-examination. It was simply a question of the admissibility of a particular question.
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> It has more than once been held that a wrongful allowance or disallowance of a question does not amount to a denial of natural justice. 'Natural justice' is a rather elusive rubric and I would not for myself like to say that in no circumstances could disallowance of a question amount to a denial of natural justice when taken in the situation of a particular case. On the other hand, it is plain that cross-examination can be so excluded or abridged or interfered with that there will be a denial of natural justice. In the present case, in my view, there was no denial of natural justice. ...":

Per Fox J (of the ACT Supreme Court) in *R v Dobson; ex parte Anm* (1975) 15 ACTR 33; MC 09/1978, 19 June 1975.

(d) Disqualification for bias – duty of magistrate to hear case unless valid reason exists

Whilst hearing committal proceedings, counsel for one of the accused informed the Court that the police informant's counsel had been associating in some undefined way with some of the prosecution witnesses. Although this was denied, it was suggested that the proceedings were "tainted" and it would be preferable for the proceedings to start afresh before another magistrate. After further discussion, the magistrate disqualified himself and adjourned the proceedings before another magistrate. Upon orders nisi to review—

HELD: Orders nisi discharged. Each party to pay own costs.

1. Where a magistrate embarks upon a hearing, the proceedings are to continue until their termination, unless a valid legal reason requires otherwise.

Sankey v Whitlam (1977) 29 FLR 346; (1977) 21 ALR 457; [1977] 1 NSWLR 333, followed.

2. The requirement of natural justice that justice must not only be done but seen to be done is infringed when it is firmly established that a reasonable person – whether a party or a member of the public – might suspect that the magistrate might not bring to the resolution of the proceedings a fair and unprejudiced mind.

R v Watson; Ex parte Armstrong [1976] HCA 39; (1976) 136 CLR 248; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11, followed.

3. An application for disqualification should only be granted where there is a reasonable apprehension that the magistrate will not decide the case impartially or without prejudice rather than that the magistrate will decide the case adversely to one party.

Re JRL; Ex parte CJL [1986] HCA 39; (1986) 161 CLR 342; [1986] FLC 91-738; 66 ALR 239; (1986) 60 ALJR 528; (1986) 10 Fam LR 917; (1986) 10 ALN N184, followed.

4. In the present case, there was no basis on which a reasonable person could suspect a reasonable bias on the part of the magistrate and accordingly, the magistrate lacked a proper ground on which to disqualify himself.

Per Miles CJ:

> "... As to good cause or valid legal reason, the only ground on which counsel before the magistrate sought his withdrawal from the case was a reliance on the principle of natural justice that justice must not only be done but be seen to be done, and that the requirement of natural justice had been denied because the proceedings before the magistrate had been "tainted" in such a way as to cause an aura of bias to descend over the magistrate if he proceeded with the further hearing.
>
> For myself I find it quite impossible to see how any question of a denial of natural justice arose. The test as to whether there has been a denial of natural justice in the sense mentioned was confirmed by the High Court in *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248 at 262; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11 as that discussed in *R v Commonwealth Conciliation & Arbitration Commission* [1969] HCA 10; (1969) 122 CLR 546 at 553-

554; 43 ALJR 150, in the following terms:

> 'Those requirements of natural justice are not infringed by a rare lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who came before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the question arising before the tribunal fair and unprejudiced minds. Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it.'"

Per Miles CJ (ACT Supreme Court) in *R v Dainer & Ors; ex parte Cooke* [1986] ACTSC 308; [1986] 84 FLR 305; MC 61/1987, 24 September 1986.

(e) Relevant material on court files – referred to by magistrate – not disclosed to party – no opportunity given to controvert material – whether party accorded procedural fairness

S. – who had had an intervention order made against him – applied to the court for a declaration that he be deemed "not a prohibited person". When hearing the application, the magistrate had access to material on the court files which cast serious allegations against S. The ambit of the intervention order was discussed; however, the magistrate did not inform S. of the relevant contents of the court files. The magistrate refused S's application. Upon originating motion to quash—

HELD: Application granted. Decision quashed. Remitted to the magistrate for further consideration. A court must accord a party the right to be heard or procedural fairness. In the present case, the magistrate was obliged to disclose to S. the material in the court files on which he relied so as to give S. an opportunity to controvert it. In failing to do so, the magistrate denied S. natural justice.

Per Chernov J:

> "... The Magistrate's answering affidavit, or affidavit in reply as he calls it, of 23 May 1997, so far as is relevant, makes it clear that he warned the applicant before he gave evidence that he would need, in effect, corroborative material because he said there were various allegations that were made against him in the applications for intervention orders and that this material was on the court files and the applicant had to overcome that material. The material from the Magistrate also makes it clear that at the conclusion of the applicant's evidence, that he, the Magistrate, having read the court files and the relevant intervention orders, and having had the opportunity of observing the applicant and hearing his evidence, refused his application. It is therefore fairly clear that the magistrate examined the court files and came to the conclusion that there were serious allegations made against the applicant which he, the applicant, had to overcome.
>
> There were two principal contentions by Mrs Davis who appeared for the respondent in relation to this. First, she submitted that not every breach of natural justice warrants the setting aside or quashing of the order made consequent upon a breach of procedural fairness. She cited *Stead v The State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141; (1986) 67 ALR 21; (1986) 60 ALJR 662; [1986] Aust Torts Reports 80-054; (1986) 4 MVR 542; (1986) 11 ALN N80 in support of that proposition, and it is true that the High Court there held that not every departure from the rules of natural justice would entitle the aggrieved party to a new trial.
>
> The issues that arise in the context of whether a new trial should be ordered are quite different from the issues that arise in the case of a hearing such as the one that was held before the Magistrate where there is an obligation obviously to accord procedural fairness to the applicant. But in any event, in *Stead's* case, the court did say where there was a denial of natural justice affecting the entitlement of the party or, I interpolate, the ability of a party to conduct its case properly, that it is difficult for a court to conclude that denial of natural justice would have made no or no practical difference to the conduct of the case in the ultimate decision that flowed from it.
>
> In my view, Mrs Davis is correct that there were discussions between the Magistrate and the applicant as to intervention orders and the ambit of those orders but in my opinion, that falls short of the applicant being appraised of what actual case he had to meet because he was not informed of what it was that the Magistrate was taking into account in deliberating upon the application before him. In my view, therefore, the applicant did not have a full or fair opportunity of addressing the substance of the relevant matters in the files. It should also be borne in mind that despite the applicant's apparent stubbornness in not obtaining legal advice, he was obviously a lay person and he was unlikely to have been aware of his legal rights to demand from the Magistrate information which would convey to him, the applicant, what relevant material was being referred to by the magistrate in his deliberations.
>
> The second point to which Mrs Davis pointed was that in any event, the breach here was not of great moment and should be disregarded because it was unlikely to have affected the Magistrate's

decision having regard to the opportunity which the applicant had to address him on the extent of the intervention orders. For reasons I have already given, I do not regard it as a matter of judging or trying to judge the quality of the breach of natural justice. There was a breach which in my view was a material one.

Rules of procedural fairness fall into two broad categories, the first deals with the requirement that the decision-making tribunal must not be biased, and the second deals with the requirement that it must accord the person in question the right to be heard, or, as is the current expression, procedural fairness.

In my view, the second requirement in the context of this case obliged the Magistrate to have disclosed to the applicant the material in the court files on which he proposed to rely and apparently did rely so as to give that applicant an opportunity to controvert it. If reference needs to be made to authorities to support that proposition, I refer to the case of *Kanda v Government of the Federation of Malaya*, decision of the Privy Council reported in [1962] UKPC 2; [1962] AC 322; [1962] 2 WLR 1153, where at AC page 337 Lord Denning said that,

> "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

Those words obviously are as true today as they were then and in my view, the magistrate has failed to comply with those basic requirements. It has been said by Mrs Davis that the applicant should have, as a matter of procedure, proceeded by way of appeal under s109 of the *Magistrates' Court Act* and not by way of prerogative review. This point troubled me for some time particularly in light of the observations by the Full Court in *Stefanovski v Murphy* [1996] VicRp 78; [1996] 2 VR 442, particularly on pages 452 to 453 where reference is made to the decision of Brooking J in *M v M* [1993] VicRp 29; [1993] 1 VR 391 at 396 where Brooking J said that,

> "Judicial review under order 56 ought not to be seen as furnishing a means of appealing against decisions."

As Mrs Davis has pointed out, it is the fact that the remedy which is sought here is a discretionary one and one of the matters to which the court has regard is the alternative procedures which have been available to the applicant. Mr Simon, who appeared for the applicant, submitted that the applicant could not have appealed on a question of law under s109 because the magistrate did nothing wrong in the substantive aspect of the case. I am not persuaded that that is necessarily correct, but I do not have to decide that point having regard to the view that I have reached that I would not exercise my discretion against the applicant merely because he has chosen to seek an order in the nature of *certiorari*.

It is made plain by the High Court in *Craig v State of South Australia* [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595 particularly at 599; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359, that *certiorari* generally goes where there has been failure to observe some applicable requirement of procedural fairness.

In my view, that has occurred in this case and therefore the decision of the magistrate ought to be quashed and the matter remitted back to him for consideration according to law. That is the order I propose to make."

Per Chernov J in *Samuel v The Magistrates' Court of Victoria* [1997] VicSC 236; MC 40/1997, 13 June 1997.

(f) Application made to make submissions why notification should not be made – application refused – whether failure to accord procedural fairness – whether denial of natural justice

Section 7(7) of the *Criminal Injuries Compensation Act* 1983 ('Act') provides:

> "Where the Tribunal considers it appropriate, notification of the making of the application shall be given by the Tribunal to any person who, in the opinion of the Tribunal, has or may have an interest in the determination of the application."

P. applied to the Crimes Compensation Tribunal ('CCT') for compensation claiming she suffered injury as a result of the criminal acts ("assaults, rape, threats to kill") of her former husband. Prior to the determination of the application, P. was informed that the CCT proposed to notify P.'s former husband of the application. P. then sought an opportunity to make submissions to the CCT to the effect that such notification would place P.'s safety in jeopardy. The CCT refused to receive P.'s submission. Upon originating motion for an order in the nature of prohibition—

HELD: Order for prohibition made. CCT prohibited from notifying P.'s former husband of P.'s application without giving P. an opportunity of being heard.
1. The meaning of "appropriate" in s7(7) of the Act is not determined by reference only to the CCT's conclusion that there is a person who "has or may have an interest in the determination of the application". The discretion conferred by the section is a wider general discretion. It may be that in some cases any interest which the "alleged offender" may have in the determination of the application will be outweighed by a serious risk to the applicant.

2. Having regard to the scheme of the Act, the nature of the discretion given to the CCT and the position of the applicant, the refusal by the CCT to hear the applicant on the question of notification amounted to a denial of natural justice by a failure to accord procedural fairness.

Per Hampel J:

"... By an Originating Motion the plaintiff seeks an order in the nature of prohibition to prevent the Tribunal from notifying the alleged offender of her claim on the ground that the refusal to receive her submissions amounts to a denial of natural justice. Alternatively the plaintiff asks for an order in the nature of *certiorari* quashing the Tribunal's decision to refuse to hear her submission before notifying the offender or for declarations which would have the same effect. It was contended on behalf of the plaintiff that the decision to notify the alleged offender affected her interests in two ways. One was that it exposed her to a real risk of violence by way of retribution. The other was that it would significantly alter the nature of the proceedings by introducing another party with a right to appear and participate. These interests, it was argued, are analogous to those of any litigant in the appropriate management of litigation and, as such, attract the rules of natural justice and procedural fairness.

For the defendant it was submitted that the decision to notify is merely an administrative part of the process which occurs prior to the hearing and does not affect the plaintiff's rights to compensation. The exposure to retribution is an inevitable risk resulting from the proceedings and, while it may have a personal effect on the plaintiff, it has no legal effect. It was further submitted that the structure of the legislation does not provide for a hearing at the notification stage. The plaintiff's interest in the appropriate management of litigation arises, it was argued, only at and after the directions stage under s9(A) when procedural fairness must be accorded.

Since *Kioa and Ors v West and Anor* [1985] HCA 81; (1985) 159 CLR 550; (1985) 62 ALR 321; (1986) 60 ALJR 113; 9 ALN N28 the concept of procedural fairness has broadened.

> "The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention." (Per Mason J at p584)

In *Annetts v McCann and Ors* [1990] HCA 57; (1990) 170 CLR 596; 97 ALR 177; (1990) 65 ALJR 167; 21 ALD 651 it was taken as settled that:

> "When a statute confers power upon a public official to destroy defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words or necessary intendment."

In that case the interests extended to the protection of the reputation of the appellants' deceased son. It was said in *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564 at 578; (1992) 106 ALR 11; (1992) 66 ALJR 271; 59 A Crim R 255 (1992) 175 CLR 564 that:

> "Where a decision-making process involves different steps or stages before a final decision is made, the requirements of natural justice are satisfied if 'the decision-making process, viewed in its entirety, entails procedural fairness'."

(See also *South Australia v O'Shea* [1987] HCA 39; (1987) 163 CLR 378 at 389; (1987) 73 ALR 1; 26 A Crim R 447; 61 ALJR 477 per Mason CJ.) In *Johns v Australian Securities Commission and Ors* [1993] HCA 56; (1993) 178 CLR 408; 11 ACLC 1; 67 ALJR 850; 31 ALD 417; 11 ACSR 467; 116 ALR 567 a delegate who examined a company director in private and authorised the release of the transcripts to a Royal Commission was found to have breached the rules of natural justice in failing to give the director the opportunity to be heard in opposition. The Tribunal's discretion both at the hearing and pre-hearing stages is wide and undefined. The Act does not provide any criteria upon which such decisions as who may assist the Tribunal (s7(5)), whether there should be a hearing (s8) and, if so, whether it should be held in public (s9) should be made. Similarly there are no criteria

> provided for the making of the decision to notify although the Tribunal must consider notification "appropriate" to a person who "has or may have an interest in the determination of the application".
>
> ... In my opinion the scheme of the Act, the nature of the discretion given to the Tribunal and the position of the plaintiff are such as to make the refusal to hear her on the question of notification amount to a denial of natural justice by a failure to accord procedural fairness. Although the notification decision and process take place before a hearing and are therefore strictly not the process which determines the plaintiff's right to compensation, nevertheless they are, in my opinion, part of the "decision making process viewed in its entirety" in that they may affect the nature and the conduct of the proceedings. The time, place and the private nature of the hearing may be affected (s9) and the plaintiff may become subject to cross-examination by or on behalf of the alleged offender (s11) who is not a party to her application. The plaintiff therefore has a sufficient interest in the management of these proceedings to which she is a party to entitle her to the right to be heard.
>
> ... This legislation contemplates that criminal acts must be shown to have been committed before compensation can be awarded. The character and propensity of the person who, if the applicant's allegations are true, is to be notified creates a potentially dangerous situation for the applicant. She must, in my opinion, have a legitimate expectation that facts which are relevant to the exercise of the Tribunal's discretion are placed before it.
>
> For these reasons I make the order sought in the Originating Motion, namely, that the Tribunal be prohibited from notifying the alleged offender of the plaintiff's application without giving her an opportunity of being heard."

Per Hampel J in *P v Crimes Compensation Tribunal* [1997] 2 VR 63; (1996) 88 A Crim R 292; MC 31/1996, 2 August 1996.

(g) Breath Analysis Manual – whether magistrate may refer to

There is no objection to a magistrate having recourse to the Breath Analysis Manual of the Victoria Police. However, if a magistrate intends to rely on the Manual, it is necessary to inform the parties of that fact and give them an opportunity to be heard.

Per Nathan J:

> "... I come to the second ground of appeal, that is, the magistrate's reference to the Police Manual. This, so Mr Hardy contended, amounted to a denial of natural justice as the magistrate must have sought to gather evidence himself, evidence about which the defendant knew nothing and could not test. Therefore, so he says, it leads to speculation as to what the magistrate actually did; ie contrary to *DPP v Martell* [1992] VicRp 64; [1992] 2 VR 249; (1992) 15 MVR 397.
>
> I find no attraction in these arguments. There could be no objection to a magistrate having recourse to a dictionary to help comprehend a word in a statute. If the word was a technical one, no objection could be made if recourse was had to technical dictionary. The Police Manual is of the same nature as a dictionary insofar as it defines how things are to be done, it is known as a matter of common sense to be so.
>
> Of course if the magistrate was going to rely on it, it would have been necessary to inform the parties of that fact and to have given them an opportunity to have been heard. Here he did not rely on the Manual and said so. There is no room for speculation. What the magistrate did was transparent and could not have been the subject of submissions. This ground must fail. The appeal must be dismissed. Costs should follow the event, but I shall hear counsel."

Per Nathan J in *Bregazzi v Kilby* [1996] VicSC 487; (1996) 25 MVR 285; MC 04/1997, 18 October 1996.

(h) Application by one party for adjournment – party said to be overseas or interstate on return date – whether party denied natural justice

Some time well prior to the return date, parties to a claim and counterclaim were notified of the date of hearing. J. told his legal practitioner that the date of hearing would have to be adjourned because J. had important business overseas. When the matter came on for hearing, counsel appeared for J. and requested that the matter be adjourned. No explanation was given to the magistrate as to the nature of the business which required J. to be overseas on that day or why it was so urgent that he be there. No affidavit or any evidence in support of the application was filed with the court. B. opposed the application. In refusing the application, the magistrate said that there was not sufficient detail as to why the absent party had to leave the jurisdiction. The magistrate then heard the matter, made an order in B's favour and dismissed J's counterclaim. On appeal—

HELD: Appeal dismissed.
It is entirely within the discretion of a magistrate whether or not to grant an application for an adjournment of proceedings before the court. In this case, there was no evidence whatsoever to support J's application. In particular, there was no material as to the nature of J.'s business overseas that day, why it was necessary for J. to be overseas that day, why it was so urgent that J. had to be overseas that day and when he would be returning to Victoria. It is incumbent upon the person making the application to place before the court appropriate material in support of the application. Accordingly, it could not be said in the circumstances that in refusing J.'s application for an adjournment J. was denied natural justice.

Per Beach J:

> "... 13. The first thing to note about the application for the adjournment made that day was that no affidavit evidence or, for that matter, any other evidence was placed before the Magistrate in support of the application.
>
> 14. But perhaps of more significance is the fact that no explanation was given to the Magistrate as to the nature of the business which required the presence of the appellant overseas that day, or why it was so urgent that he be there. The appellant had been informed of the date of hearing well prior to 26 July and had had ample opportunity to put that material before the court had he been minded to. In that situation, as the Magistrate made clear in the brief reasons he gave for refusing the application, the Magistrate was completely in the dark in the matter.
>
> ... 19. Once the Magistrate refused to grant the adjournment, he was bound then to proceed to determine the respondent's claim and the appellant's counterclaim.
>
> 20. As to the allegation of denial of natural justice, I say this. It is entirely within the discretion of a Magistrate as to whether he will grant an application for adjournment of a proceeding then before him. This court will be slow to interfere with the exercise of such a discretion, and will only do so where it is clear that the Magistrate has fallen into error in the matter, for example, by applying some principle of law incorrectly or by failing to apply some recognised and applicable principle of law when he should, or by making a determination on the facts which was not reasonably open to him.
>
> 21. In my opinion, the Magistrate in this case made no error in any of those respects so far as the application for an adjournment was concerned. The simple fact of the matter is that there was no evidence whatsoever before him to support the appellant's application. In particular, there was no material before him as to the nature of the appellant's business overseas that day, why it was necessary that the appellant be overseas that day, why it was so urgent that he had to be overseas that day, and when he would be returning to Victoria. The fact of course is that the appellant was not overseas but was simply interstate. Where an application for an adjournment is opposed, as it was in this case, I think it is incumbent upon the person making the application to place before the court appropriate material in support of the application.
>
> 22. If appropriate material is placed before a court, and nevertheless the court refuses the application, it may well be successfully contended that there has been a denial of natural justice so far as the applicant is concerned. But, in my opinion, such a contention cannot be made when no such material is placed before the court.
>
> 23. I should also point out that this case is a very good example of the problems which can arise if an applicant for an adjournment is permitted to support his application by nothing more than statements made by his counsel from the Bar table. Through no fault whatsoever on the part of the appellant's counsel, the appellant's counsel made his application to the Magistrate on the basis that the appellant had left for overseas urgently on 22 July 1999. The fact is, the appellant had not. He had simply gone interstate.
>
> 24. In the circumstances of this case, I am not satisfied that it can be said that, in refusing the appellant's application for an adjournment, the appellant was denied natural justice.
>
> 25. If that view of the matter is correct, it must follow that in hearing and determining the respondent's claim, as he was then bound to, the Magistrate could not be said to have denied natural justice to the appellant.
>
> 26. Both proceedings will be dismissed with costs to be taxed, including reserved costs, and paid by the appellant."

Per Beach J in *Jacobson v Biggs* [1999] VSC 476; MC 29/1999, 17 November 1999.

(i) Intervention orders made – subsequent proceedings alleging breaches of intervention orders – order later made against plaintiff without consent – whether making of order involved a denial of natural justice

In 1997, intervention orders were made between H. and A. In 1998, the parties came before the same magistrate seeking extensions of the intervention orders. After hearing outlines of each party's case, the magistrate stated that he did not consider H.'s case constituted any breach of the order or provided any grounds for extension. The matters were stood down to enable counsel to confer with their clients and later, counsel discussed the matters with the magistrate in chambers. When the court reconvened, the magistrate made orders against H. without hearing any evidence and without H.'s consent. Upon an originating motion to quash—

HELD: Orders made by the magistrate quashed. Remitted for hearing and determination by another magistrate.
1. As H. did not consent to the orders being made and the requirements imposed, the making of the orders after the negotiations failed involved a denial of justice because there was no hearing accorded to H.

2. The statements made by the magistrate were made before any sworn evidence had been given. Also, the magistrate made an order against H. and imposed an additional constraint without H.'s consent. These actions of the magistrate provided evidence supporting pre-judgment and a finding of ostensible bias.

Per Smith J:

"... **Natural Justice on 17 July 1998**

36. For the foregoing reasons, I am satisfied that Ms Hunter did not at any time consent to the orders that were made against her or accept Mr Aulich's undertaking in lieu of an order extending her order against him. At the most, and this may explain the belief of Ms James and his Worship, she consented to adopting the third option offered by his Worship – negotiation in his chambers. In that situation, however, to make the orders after the negotiations failed involved a denial of natural justice because there was no hearing accorded to her.

37. Alternatively, if it be accepted that she consented to a package of proposals in which

(a) the order against Mr Aulich would not be extended provided he undertook not to attend at her premises except on police business, and

(b) the order against her was extended indefinitely,

I am satisfied that she did not consent to an order against her for a ten year period nor did she consent to the order requiring her to go to his Worship for permission before making a complaint to the police.

38. Counsel for Mr Aulich argued that the ten year limit was less onerous than an indefinite order. I disagree. In my view it is a more serious restriction than an indefinite order. It carries with it the implication that his Worship had concluded that the situation was one where the orders were needed for at least ten years. Consent by Ms Hunter to such an order would carry the implication against her that she conceded that it was necessary. As a result, attempting to vary or remove a ten year order would be more difficult than attempting to vary or remove an indefinite order.

39. His Worship imposed those requirements without her consent and without a hearing. Thus, on that more limited basis, there was also a denial of natural justice.

... 57. For the foregoing reasons I am satisfied that the plaintiff has made out her case of a denial of natural justice and of ostensible bias. The decisions and orders made should be quashed and the matter returned to the Magistrates' Court at Ringwood for hearing a determination at that Court. In light of the conclusions I have reached it is necessary that another Magistrate hear the matter.

58. To conclude, the case is testimony to the pressure the Magistrates' Courts are under in dealing, in particular, with intervention order applications and the attempts by that Court to devise practical and efficient approaches to such applications. The unfortunate outcome in the present case appears to me to be likely to be the result of a breakdown of communication and a misunderstanding between the Magistrate, the lawyers and the litigants as to precisely what was envisaged in the options made available by the Magistrate. On the evidence before me, the way his Worship conducted himself suggests to me that he was under the impression that the parties had waived their right to a hearing and had consented to the option of a negotiated settlement in his chambers. Further, my impression

> is that, his view of that option was that the parties had empowered him to impose a solution upon them in light of what they stated were orders to which they would agree. That may lie behind the perception of Ms James and Mr Aulich, that there was in the end a consent result. On the other hand, I am satisfied that Ms Hunter did not appreciate that that might be the outcome."

Per Smith J in *Hunter v Magistrates' Court & Aulich* [2002] VSC 362; MC 23/2002, 30 August 2002.

(j) Return of sub-poena to Chief Commissioner of Police to produce documents – matter adjourned by magistrate

A sub-poena addressed to the Chief Commissioner of Police sought that certain documents be produced to the court. The police prosecutor who appeared on behalf of the informant indicated that some documents would be produced but opposed the production of other documents sought. The defendant's counsel submitted that the prosecutor had no standing with respect to challenging any aspect of the sub-poena and had no instructions to challenge the sub-poena. After hearing submissions in the matter the magistrate stated that the Chief Commissioner of Police should be given the opportunity to appear to present submissions and on his own motion adjourned the proceedings. Upon an originating motion to quash—

HELD: Application refused.

The absence of an application to adjourn the return of the sub-poena did not prevent the magistrate adjourning the proceedings. The magistrate had power under s128 of the *Magistrates' Court Act* 1989 to adjourn the sub-poena on his own motion. Having information before him that the person sub-poenaed opposed the sub-poena, the magistrate could not ignore that information. It would have been a denial of natural justice to press on and order the police prosecutor to produce the documents without giving the Chief Commissioner of Police an opportunity to be represented. The decision of the magistrate to adjourn was a practical and prudent solution which was likely to minimise the wastage of the court's time and the parties and it also protected the positions of the relevant parties and avoided any prejudice.

Per Smith J:

> " ... 19. As to the decision to adjourn and not release the documents, his Worship was faced with the situation where a point had been raised by the party that had issued the subpoena questioning whether Senior Constable Ridgeway could appear for the Chief Commissioner in response to the subpoena. If this argument was correct, there was no-one who could respond in court to the subpoena and, in particular, no-one who could be called on to produce the documents to the Court. Thus the subpoena had to be adjourned or steps taken to enforce its compliance.
>
> His Worship, in any event, also had information from Senior Constable Ridgeway, who purported to be answering the subpoena for the Chief Commissioner, that the Chief Commissioner wished to oppose the subpoena. Senior Constable Ridgeway had also explained to him his unsuccessful attempts to obtain legal representation for the Chief Commissioner of Police. Having information before him that the person subpoenaed opposed the subpoena, he could not ignore that information. It would have been a denial of natural justice to press on and order Senior Constable Ridgeway to produce the documents without giving the Chief Commissioner of Police an opportunity to be represented in the manner in which the plaintiff alleged was lawful.
>
> Counsel submitted that the adjournment in the circumstances prejudiced the rights of the plaintiff and ought not to have occurred. The only "prejudice" caused to the plaintiff was that he was deprived of the opportunity of having access to the documents there and then without further argument, that result being achieved by depriving the Chief Commissioner of Police of the opportunity to be heard. His Worship adopted the practical and prudent solution of adjourning the subpoena and reserving costs. This was likely to minimise the wastage of time of the Court and the parties on the issue about whether Senior Constable Ridgeway could represent the Chief Commissioner of Police. It also protected the positions of the relevant parties and avoided any prejudice. ..."

Per Smith J in *Cheremnov v Magistrates' Court & Ors* [2002] VSC 364; MC 24/2002, 30 August 2002.

(k) Notice to admit served – not responded to within time – application by defendant for an adjournment to pursue defence and counterclaim – application refused by magistrate – whether magistrate in error

MIP/L claimed against IPP/L an amount for work and labour done pursuant to an agreement for the obtaining of finance. IPP/L (who had not retained a solicitor at the time) filed a notice of defence and certain interlocutory steps were taken between the parties including a pre-trial conference. MIP/L served a notice to admit which was not responded to. MIP/L subsequently retained solicitors who drew up an out-of-time

objection to the notice to admit and served it on IPP/L's solicitors. A cross-claim was also issued but not served. After further interlocutory steps the matter came before a magistrate for a contested hearing. Two days before the hearing IPP/L requested an adjournment of the proceeding in order to serve the cross-claim and third party notice. At the hearing, the application was refused and judgment was given on the basis that the matters asserted in the notice to admit were deemed to be admitted. Upon appeal—

HELD: Appeal allowed. Order of magistrate set aside. Remitted for further hearing and determination.

1. It is fundamental to the concept of procedural fairness that a party to litigation will be accorded a fair opportunity to meet the case against it. In the present case the magistrate did not have proper regard to matters which should have been taken into account and that the decision amounted to a denial of procedural fairness. Although the Magistrate was well entitled to refuse to adjourn the case having regard to its history, he was not entitled to hold IPP/L to the strict consequence under the rules of a failure to object to a notice to admit within the specified time.

2. It must be remembered that the Rules of Court are a servant and not a master. The admissions were deemed admissions not express ones; they arose by default and it is clear that they were unintended. IPP/L were unrepresented at the time of receipt of the notice to admit and may not have understood the full ramifications of a failure to respond to the notice.

Yendall v Smith Richmond & Co Ltd [1953] VicLawRp 53; [1953] VLR 369; [1953] ALR 724; *Board of Education v Rice* [1911] AC 179; [1911-13] All ER 36; 80 LJKB 796; 104 LT 689; and *Southern Equities Corp Ltd (in liq) v Bond (No 7)* [2000] SASC 427, applied.

3. The continuation of the interlocutory steps between the parties indicated that the matter was proceeding as a fully contested matter corroborated by the fact that all witnesses had attended court on the hearing date. Also, the substance of the defendants' claim was that they had a complete defence to the claim made against them. The defendants were deprived the opportunity to effectively contest the proceeding which was an extreme consequence to visit them given the history of the matter and their appearance before the Court. Accordingly, the order made by the magistrate was set aside.

Per Osborn J:

"... 14. In essence the appellants contend the Magistrate did not have proper regard to matters which he should have taken into account and that his decision amounted to a denial of procedural fairness in all the circumstances of the case.

15. The Magistrate's reasons must be interpreted in the light of well accepted principles. In particular a failure to expressly refer to a relevant consideration will not necessarily lead to an inference that the Court did not have regard to it. The proper test to be applied is that stated by Sholl J in *Yendall v Smith Richmond & Co Ltd* [1953] VicLawRp 53; [1953] VLR 369 at 379; [1953] ALR 724 adopted by Adam J in *McConkey v McConkey* [1960] VicRp 47; [1960] VR 295 at 300. The test was restated by Sholl J in *Harrison v Mansfield* [1953] VicLawRp 60; [1953] VLR 399:

> "The true principle ... must be, not that everything relevant which a Magistrate does not refer to is to be taken to have been overlooked, or on the other hand, that it is to be taken to have been considered, but that, if something which should have been considered is not referred to, and the nature of the decision suggests some error, which may have been due to that matter not having been considered as it should have been, or if the Magistrate's observations indicate, on a comparison of what he said with what he did not say, that the matter in question has not been considered as it should have been, the appellate tribunal may properly draw such an inference, and the Magistrate will have no cause to complain if it does so."

16. Further the rules of procedural fairness must be applied in accordance with the principles stated by Mason J in *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550; (1985) 62 ALR 321; (1986) 60 ALJR 113; 9 ALN N28:

> "What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, *inter alia*, the nature of the inquiry, the subject matter and the rules under which the decision maker is acting."

17. Nevertheless it is fundamental to the concept of procedural fairness that a party to litigation will be accorded a fair opportunity to meet the case against it: *Board of Education v Rice* [1911] AC 179; [1911-13] All ER 36; 80 LJKB 796; 104 LT 689.

> 18. In the present case I have come to the conclusion that the Magistrate did err in law in the exercise of his discretion. He did not give any express or I find proper consideration to the following critical matters: ...
>
> ... 19. For the above reasons I am of the view that although the Magistrate was well entitled to refuse to adjourn the case having regard to its history, he was not entitled to hold the appellants to the strict consequence under the rules of a failure to object to a notice to admit within the specified time. I have reached this conclusion firstly, because it can be inferred from his reasons that he failed to take into account material considerations and secondly, because the consequence of the ruling was to deny the appellants procedural fairness.
>
> 20. A failure to accord parties procedural fairness with respect to a significant matter is necessarily a vitiating error of law. Accordingly the order of the Magistrates' Court must be set aside. I will further direct that leave be given to the appellants to object to the notice to admit filed and served on behalf of the respondents in the Magistrates' Court proceeding and that the matter be further heard according to law."

Per Osborn J in *International Property Development Pty Ltd & Ors v Mevco International Pty Ltd & Anor* [2003] VSC 287; MC 22/2003, 8 August 2003.

(l) Application by defendant for costs – application refused – whether breach of the rules of procedural fairness

Z. was charged with the offence of driving a motor vehicle whilst his licence was suspended. Z.'s solicitors wrote to the Police Prosecutors' Office requesting that the matter be booked in for a contested hearing. When Z. did not appear at Court, the Magistrate issued a warrant to apprehend Z. Subsequently Z. applied to the Magistrate for the warrant to be recalled and cancelled which was granted. Z.'s application for costs was refused. Upon application for relief in the nature of *certiorari*—

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.

Per Zammit AsJ:

> "... 20. The primary submission made on Mr Zigouris' behalf was concerned with procedural fairness and the hearing rule. A general principle of the hearing rule is that the requirements of the rule are flexible and will be determined by what is fair in all the circumstances of a particular case. The flexibility of natural justice was emphasised by Tucker LJ in *Russell v Duke of Norfolk* (1949) 1 All ER 109, at 118; (1949) 65 TLR 225. [The High Court has approved this passage in *R v Commonwealth Conciliation and Arbitration Commissioner; Ex parte Angliss Group* [1969] HCA 10; (1969) 122 CLR 546; [1969] ALR 504; (1969) 43 ALJR 150]:
>
> > The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.

... 22. On 22 August 2011, Magistrate Cure determined to refuse Mr Zigouris' application for costs against the prosecution without hearing oral argument from Mr Zigouris' counsel. However, Magistrate Cure did consider the affidavit material filed on Mr Zigouris' behalf, and she had listened to the tape of the hearing on 25 May 2011 when by her own motion she issued the warrant. Further, Magistrate Cure identified at the hearing on 1 June 2011 why she issued the warrant. Her reasons were because of Mr Zigouris' failure to appear at the hearing on 25 May 2011. Mr Zigouris 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 on 22 August 2011.

23. The question for this Court in a supervisory role is limited to ensuring the decision maker has acted within lawful authority. There is no evidence before the Court that Magistrate Cure acted outside of the scope of ss349 and 401 of the *Criminal Procedure Act* 2009 or s131 of the *Magistrates' Court Act* 1989.

24. Mr Zigouris' real grievance is the fact that the arrest warrant was issued. However, this is not a review of the Magistrate's decision to issue the warrant, it concerns the exercise of a discretion as to costs. I do not find a denial of natural justice has occurred.

25. While there may have been a technical breach of procedural fairness by Magistrate Cure on 22 August 2011, in that she would not entertain oral argument, there is no basis for *certiorari* because the Magistrate had considered the argument, in that she had read the affidavit material. On close analysis, Mr Zigouris was not denied an opportunity to put forward his argument but rather was denied an opportunity to say it again.

26. Further, I do not consider there was any injustice in what occurred because ultimately there is nothing the prosecution did which could have attracted a costs order against the prosecution. The learned 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. ..."

Per Zammit AsJ in *Zigouris v Sunshine Magistrates' Court & Anor* [2012] VSC 183; MC 16/2012, 8 May 2012.

Patrick Street LL B, Dip Crim
13 April 2014