

## **The judge's duty to advise and assist a self-represented litigant in civil proceedings**

**23 November 2015**

**Karin Ottesen**

### **Introduction**

1. In *Trkulja v Markovic*,<sup>1</sup> the Victorian Court of Appeal summarised the principles relating to the judge's duty to provide advice and assistance to a self-represented litigant in civil proceedings. In that case, complaints were made that the trial judge had not given appropriate advice and assistance to one of the litigants in circumstances where both parties to the litigation had been self-represented. The Court of Appeal, however, held that the criticism of the trial judge was without foundation.

### **Original proceedings**

2. The appellant had commenced proceedings in the County Court of Victoria alleging that the respondent had defamed him by distributing a pamphlet and publishing items on websites which contained serious allegations against him. The respondent had denied the allegations.
3. At the hearing, both the appellant and the respondent represented themselves although the appellant had been legally represented at the time he had commenced the proceedings.
4. It was not in issue at the hearing that the material was defamatory. The sole issue was whether the appellant had discharged the onus of establishing that the respondent had published the defamatory material. The County Court judge concluded that the appellant had not discharged this onus and, accordingly, dismissed the proceedings.

### **Appeal to the Court of Appeal**

5. The appellant appealed to the Victorian Court of Appeal which dismissed the appeal. The members of the Court (Kyrou and Kaye JJA and Ginnane AJA) delivered a joint judgment.
6. Both parties were legally represented on the appeal.
7. The grounds of appeal raised allegations that the trial judge had:
  - breached his duty to ensure a fair trial by failing to provide appropriate assistance to the appellant as a self-represented litigant; and
  - failed to afford the appellant procedural fairness.

---

<sup>1</sup> [2015] VSCA 298.

## Judge's duty regarding self-represented litigants

### *Inconsistency of the authorities*

8. The Court of Appeal first considered the principles relevant to the judge's duty to advise and assist a self-represented litigant in civil proceedings and said that the authorities had not been consistent regarding the governing rationale for the duty.<sup>2</sup>
9. By way of example, the Court referred to *Rajski v Scitec Corporation Pty Ltd*<sup>3</sup> where Samuels JA had said that the advice and assistance which a self-represented litigant ought to receive from the court should be limited to that which was necessary to diminish the disadvantage which the litigant would ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which the adversary system offered to the unwary and untutored. Samuels JA had also said that the court had to be careful not to confer upon the self-represented litigant a positive advantage over the represented opponent and had to ensure that the rules were obeyed, subject to any exceptions, because to do otherwise, would be unfair to the represented opponent.
10. In the Court of Appeal's view, Samuels JA's comments suggested that the rationale for the judge's duty was to redress any comparative disadvantage suffered by a self-represented litigant but the Court of Appeal observed that subsequent authorities had not been so confined in their reasons.<sup>4</sup> To demonstrate this, the Court referred to the following cases:<sup>5</sup>
  - *Lee v Cha*,<sup>6</sup> where the principles relevant to the judge's duty were said to derive from the need to ensure that a self-represented litigant had sufficient information about the practice and procedure of the court as was reasonably practicable for the purpose of ensuring a fair trial.
  - *Hamod v New South Wales*,<sup>7</sup> where the reason for the duty was stated in terms of the need to ensure that the trial was conducted fairly and in accordance with law and so required that the self-represented litigant not suffer a disadvantage from exercising the right to be self-represented.
  - *Werden v Legal Services Board*,<sup>8</sup> where the rationale for the duty was expressed in terms of a duty to "ensure procedural fairness."

---

<sup>2</sup> Above, n 1, at [32].

<sup>3</sup> New South Wales Court of Appeal, 16 June 1986, unreported.

<sup>4</sup> Above, n 1, at [33].

<sup>5</sup> Above, n 1, at [33]-[35].

<sup>6</sup> [2008] NSWCA 13 at [48].

<sup>7</sup> [2011] NSWCA 375 at [309].

<sup>8</sup> [2012] VSCA 278; (2012) 36 VR 637 at [53]. Note, however, immediately after this was said, there followed an endorsement of Samuels JA's comments in *Rajski v Scitec Corporation Pty Ltd*, New South Wales Court of Appeal, 16 June 1986, unreported.

11. The Court of Appeal also said that some authorities had described the judge's duty in terms which suggested that the duty was owed to the self-represented litigant whereas other authorities had "more accurately described it as a general duty which is inherent in the discharge of the judicial function."<sup>9</sup>

#### *Relevant principles*

12. The Court then said as follows:

*"Whatever the rationale for the judge's duty may be, it is clear that the boundaries of legitimate judicial intervention are flexible and will be influenced by the need to ensure a fair and just trial. It follows that what a judge must do to assist a self-represented litigant depends on the circumstances of the litigant and the nature and complexity of the case."*<sup>10</sup> [footnotes omitted]

13. Having regard to the authorities, the Court said that the circumstances of the self-represented litigant could include his or her:

- age;
- physical and mental health;
- level of education;
- proficiency in the English language;
- level of intelligence, personality and experience as well as understanding of the case; and
- legal qualifications or prior litigation experience, if any, which might indicate a working knowledge of the relevant substantive area of law and applicable court procedure.<sup>11</sup>

14. The Court also indicated that it could also be relevant whether there was another represented party to the litigation who had similar interests to those of the self-represented litigant and so could provide assistance to the self-represented litigant.<sup>12</sup>

#### *Scope of assistance*

15. The Court said that in determining the proper scope of assistance to be provided to a self-represented litigant, the touchstones were fairness and balance and that the assistance:

- could extend to issues concerning substantive legal rights as well as to issues concerning the procedure to be followed;

---

<sup>9</sup> Above, n 1, at [36].

<sup>10</sup> Above, n 1, at [37]. See also *Abram v Bank of New Zealand* [1996] ATPR 41,507; *Minogue v Human Rights & Equal Opportunity Commission* [1999] FCA 85; (1999) 84 FCR 438; *Werden v Legal Services Board* [2012] VSCA 278; (2012) 36 VR 637.

<sup>11</sup> Above, n 1, at [37]-[38].

<sup>12</sup> Above, n 1, at [38]. See also *Lee v Cha* [2008] NSWCA 13 at [48].

- could, in some cases, require the judge to identify the issues and the state of the evidence in relation to them so as to enable the self-represented litigant to consider whether he or she wished to adduce evidence; and
- should involve the judge ensuring that the self-represented litigant understood his or her rights (but without advising the litigant as to how or when those rights should be exercised) so that the litigant was not unfairly disadvantaged by being in ignorance of those rights.<sup>13</sup>

16. The Court of Appeal noted that the High Court in *Neil v Nott*<sup>14</sup> had recognised that the judge often had to assume the burden of trying to ascertain the rights of parties which were obfuscated by their own advocacy and that the Court of Appeal in *Downes v Maxwell Richard Rhys & Co Pty Ltd (in liq)*<sup>15</sup> had itself endorsed the proposition that a just case could be concealed in a self-represented litigant's lay rhetoric and inefficient presentation.<sup>16</sup>

#### *Limits to assistance*

17. Nevertheless, the Court of Appeal emphasized that there were limits to the assistance which a judge could provide because a judge could not become the advocate of the self-represented litigant. This was because:

- a judge's role was fundamentally different from an advocate's role; and
- a judge was required to maintain both the reality and appearance of judicial neutrality at all times and to all parties.<sup>17</sup>

#### *Where all parties self-represented*

18. The Court then said that where all parties to the litigation were self-represented, the need for the judge to act fairly and in a balanced manner was "particularly acute".<sup>18</sup> In these circumstances:

- The judge had to be careful to ensure there was an equal playing field having regard to the parties' circumstances and the nature and complexity of the case. While in many cases, the judge would need to provide the same level of assistance to both parties, a more selective approach could be appropriate

<sup>13</sup> Above, n 1, at [39]. See also *McWhinney v Melbourne Health* [2011] VSCA 22; (2011) 31 VR 285; *Pamamull v Albrizzi (Sales) Pty Ltd [No 2]* [2011] VSCA 260; *Werden v Legal Services Board* [2012] VSCA 278; (2012) 36 VR 637.

<sup>14</sup> [1994] HCA 23; (1994) 121 ALR 148 at 150.

<sup>15</sup> [2014] VSCA 193; (2014) 313 ALR 383 at [26].

<sup>16</sup> Above, n 1, at [40].

<sup>17</sup> Above, n 1, at [41]. See also *Tomasevic v Travaglini* [2007] VSC 337; (2007) 17 VR 100; *McWhinney v Melbourne Health* [2011] VSCA 22; (2011) 31 VR 285. The Court of Appeal did not refer to *Cicek v The Estate of the Late Mark Solomon* [2014] NSWCA 278 where the New South Wales Court of Appeal held that a trial judge did not have a duty to run the case for a self-represented litigant. For a discussion of that case, see K. Ottesen, "Self-represented litigants: The limits to the judge's assistance", 22 September 2014.

<sup>18</sup> Above, n 1, at [42].

where one of the self-represented litigants was a lawyer or had extensive litigation experience.

- The judge had to carefully consider the type of assistance that was to be provided to each self-represented litigant. Assistance which could be appropriate to give to a self-represented litigant where there was a represented opponent who had the expertise to determine how best to protect its interests in response to such assistance might not be appropriate to give, and could lead to unfairness, where the opponent was also self-represented and did not have that expertise.<sup>19</sup>

#### *Consequences of failure to provide appropriate assistance*

19. The Court noted that a failure by a judge to provide appropriate advice and assistance to a self-represented litigant could constitute a denial of procedural fairness which might warrant an appellate court setting aside the trial judge's decision and ordering a new trial. This would be the case if compliance with the requirements of procedural fairness could have made a difference to the outcome of the case.<sup>20</sup>

#### **Appellant's complaints regarding the judge's duty**

20. The appellant submitted that the trial judge had failed to adequately assist the appellant in a number of particularised ways having regard to:

- the appellant's limited knowledge of the English language compared with the respondent's proficiency in English;
- the appellant's state of emotion and agitation caused by the publication of the defamatory material which had led him to be less measured than he might otherwise have been in making wide-ranging allegations against the respondent; and
- the appellant's lack of understanding of the rules of evidence.<sup>21</sup>

21. It was also submitted that the trial judge had failed to properly balance the interests of both parties to the litigation and had favoured the interests of the respondent because the judge had drawn adverse inferences against the appellant without adequately advising him of what he should have done to avoid such inferences being drawn.<sup>22</sup>

#### **Court of Appeal's decision**

22. The Court of Appeal said that the allegation of breach of the judge's duty had to be considered in the context of the trial as a whole but that that context was missing because no transcript of the entire hearing was available. However, the Court found

---

<sup>19</sup> Above, n 1, at [42]-[43].

<sup>20</sup> Above, n 1, at [44].

<sup>21</sup> Above, n 1, at [46].

<sup>22</sup> Above, n 1, at [47].

that an analysis of the judge's reasons and of the transcript for the part of the hearing that was available - which dealt with the oral evidence of a police officer who had formally interviewed the respondent - demonstrated that the judge had been fair and had provided extensive assistance to the appellant and that the appellant had understood the forensic process. The assistance provided by the trial judge had included:

- on several occasions, advising the appellant:
  - on questions he should ask the police officer;
  - on the process of asking the police officer to identify a document; and
  - on the need to tender documents he had put to the police officer;
- reminding the appellant of the allegations in his pleading and of the need to focus on adducing evidence to support those allegations;
- intervening to clarify for the police officer the appellant's questions and which documents were the subject of those questions; and
- asking the police officer questions that supplemented the appellant's questions.<sup>23</sup>

23. After examining in depth the particular matters claimed to show that the trial judge had not provided appropriate assistance to the appellant, the Court of Appeal was also satisfied that none of those matters indicated that there was any breach of the judge's duty to ensure a fair trial.<sup>24</sup> Accordingly, the Court rejected the claim that the trial judge did not provide sufficient assistance to the appellant.

24. The Court also rejected the grounds of denial of procedural justice.

25. Accordingly, the Court of Appeal dismissed the appeal.

K Ottesen

23 November 2015

#### Copyright

© This paper is subject to copyright which is retained by the author. Apart from any use as permitted under applicable copyright law, this paper may be reproduced in whole or in part for study or training purposes, subject to the inclusion of an acknowledgment of the source. Reproduction for commercial use or sale requires prior written permission from the author.

#### Disclaimer

This paper is intended only to provide a summary of the subject matter covered. It does not purport to be comprehensive and is not to be relied upon as legal advice. Readers should obtain their own legal advice.

---

<sup>23</sup> Above, n 1, at [48]-[59].

<sup>24</sup> Above, n 1, at [62]-[111].