PARTIES:	THI PHUONG NGUYEN and ME VAN HA v TERRITORY INSURANCE OFFICE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising TERRITORY JURISDICTION
FILE NO:	45/97 (9513957)
DELIVERED:	18 March 1998
HEARING DATES:	12 November 1997
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:

Appellant:	S. Gearin
Respondent:	J. Lawrence

Solicitors:

Appellant:	Caroline Scicluna & Associates
Respondent:	Bowden Turner and Deane

Judgment category classification:	C
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(tho98001)

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 9513957

BETWEEN:

THI PHUONG NGUYEN

and

ME VAN HA
Appellants

AND:

TERRITORY INSURANCE OFFICE
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 18 March 1998)

This is an appeal from a decision of a stipendiary magistrate relating to a claim for damages arising from a motor vehicle accident.

On 5 August 1997 Mr Donald SM, sitting in the Local Court of Alice Springs, dismissed a claim by the appellants against the respondent. The claim arose out of a motor vehicle accident which occurred on 16 December 1994 in which the appellants sought indemnification in respect of loss and damage suffered.

The respondent denied the appellants' claims, alleging a false claim by them or, in the alternative, a breach of their common law duty to not provide false information.

The grounds of appeal as set out in the Amended Notice of Appeal dated 12 November 1997 are as follows:

> "1. That the learned Magistrate erred in law in that the inferences he drew from the primary facts were not available or alternatively were not the proper inferences to be drawn from those facts.
>
> 2. The learned Magistrate erred in law in failing to take into account a relevant consideration."

The Orders sought by the appellant are as follows:

> "1. That this appeal be allowed.
> 2. That the decisions of the learned Magistrate of 5 August 1997 and of 26 August 1997 be reversed.
> 3. The respondent to pay the costs of and incidental to the appeal and the hearing at first instance.
> 4. That the respondent indemnify the appellant in respect of loss and damage suffered as a result of the incident on 16 December 1994 pursuant to the policy of insurance in existence at that time."

The appeal is pursuant to s19(1)(a) of the *Local Court Act* which provides as follows:

> "(1) A party to a proceeding (other than a small claim proceeding) may –
> (a) within 28 days; or
> ….."

> after the day on which the order complained of was made, appeal to the Supreme Court, on a question of law, from a final order of the Court in that proceeding."

The background to this matter briefly stated is as follows:

At 7.05 pm on 16 December 1994, the subject vehicle, a Holden registration number 428 401, owned by the appellants collided with a tree in Ptilotus Crescent, Saddadeen, a suburb of Alice Springs. The appellants were insured pursuant to a policy of private motor vehicle insurance with the respondent. It was a term of the policy of insurance that in the event of property damage being sustained to the motor vehicle the respondent would, with specified exception, pay to the appellant an amount up to the market value of the motor vehicle, subject to an excess of $200. The damage caused to the motor vehicle made it uneconomical to repair and it was written off. The motor vehicle had been purchased on 2 September 1994 for the sum of $22,990.

The appellants made a claim on the respondent pursuant to the policy of insurance. The claim alleged that the appellant, Thi Phuong Nguyen, was the driver of the car at the time of the collision.

The respondent refused to indemnify on the basis that Thi Phuong Nguyen was not driving the motor vehicle. Counsel for the appellant states the following facts are not in dispute:

1. A number of residents nearby to the accident site heard the collision.

2. No one saw who was driving the vehicle, either before the collision or after the collision.
3. The people who attended the scene after the collision did not see the first plaintiff. (I have assumed this refers to the time of their arrival at the collision site, because two witnesses testified to seeing a person they identified as the plaintiff at the vehicle shortly after the accident).

In his reasons for decision his Worship reviewed the evidence presented to him and made his findings. It is the appellants' submission that there was no evidence to support the inference drawn by the learned stipendiary magistrate when he stated:

> "I cannot accept that each of the four witnesses who saw four males in the motor vehicle immediately after the accident could be either lying or mistaken."

The submission is that a second inference, drawn by the learned stipendiary magistrate, that:

> "They (four witnesses) had ample opportunity to see the first plaintiff if she was there immediately after the accident."

is also unsupported by the evidence and accordingly an error of law.

The appellant submits that that inference cannot be drawn if the court failed to take into account a material fact as crucial as the presence of the plaintiff at the scene within minutes of the accident.

There were five witnesses called by the defendant on this issue. Counsel for the appellants, Ms Sally Gearin, closely analysed the evidence of each of these witnesses, in support of her submission that there was no evidence on which the learned stipendiary magistrate could base the two findings, which are the subject of the appellants' complaint.

I have had the opportunity to read through the transcript of the evidence of these five witnesses before the Local Court.

(1) **ALFRED WILLIAM GRENFELL** gave evidence on the issue of the plaintiff's presence, in examination in chief, when asked what he did after he heard the sound of the accident. His evidence is, that shortly prior to the accident he was working in the front yard of his house when he heard the sound of the accident. He walked to the fence and then stepped over it and walked straight down to the accident (t/p 85). Mr Grenfell gave evidence that he did not leave the accident scene prior to the arrival of the police and that he observed a lady of Asian appearance come to the scene and speak to police. She was not at the scene when he arrived. He identified the lady as being "most likely" the plaintiff in Court. The learned stipendiary magistrate noted she was the only Asian lady in the Court at that time. Mr Grenfell also gave evidence (t/p 89) that his view from his front yard to the accident scene was "clear all the way". Under cross-examination Mr Grenfell gave evidence as follows (t/p 92):

> "Now the people in the car were all out of the car by the time you got there weren't they?---They were getting out of the car as I was walking across. By the time I got there, yes.

Yes. So the answer is that by the time you got there everybody was out of the car?---Yes.

You didn't witness the impact did you?---No."

Mr Grenfell gave further evidence under cross-examination (t/pp 97-98) as follows:

"When you heard – you heard the bang first then you straightened up?---Yeah.

Then you stepped over your fence?---No, I just sort of took about probably two paces and I could see straight through to the corner.

Right, and could you see the vehicle?---Yeah.

But from your angle the trees were all on that side weren't they?---I think.

Can I have your drawing back?---Oh no, not the drawing. One photo there in particular, the one I said that could be taken from my – well from my yard.

No, no, no, that's not what I'm, asking you. What I'm saying is once the accident – if you'd like to look at your drawing again. From the angle that you were looking at it?---I was looking at the rear of the car.

Yes. So you could only see rear of the car?---Yeah.

You couldn't see the front of the car?---No, the front of the car was in among the trees and that.

Yes, and so was one side of the car too wasn't it?---Yeah.

So the back of the car was facing you was it?---Yeah.

Now when you were – when you took these couple of steps they were still in your own yard were they?---Yeah.

And so you took a couple of steps and you stood there and had a look did you?---Yeah.

> And then you've made a decision that you were going to walk over to the accident?---I went over to see if I could help, yes."

It is the submission of counsel for the appellant that it was impossible for Alfred Grenfell to see who was in the car until he arrived at the scene. By the time he got there everybody was out of the car.

I do not accept this submission. A reading of Mr Grenfell's evidence does not support such interpretation. The tenor of his evidence is that he had a clear view of the accident scene. As he walked toward the car he saw four men getting out of the vehicle, two from the front and two from the back. Mr Grenfell gave evidence in chief as follows (t/p 86):

> "Now you said that you went straight there and you saw people coming out of the driver's side of the car?---Yeah.
>
> Right. Was that the passenger or the driver's – the front or the back I should say. The driver's door or the passenger door?---They got out of both.
>
> And how many people did you see getting out of the car?---Four people.
>
> And what was their gender – sex?---They were just four guys.
>
> And how clear are you about that, that it was four males that got out?---Sure as you can. I mean there's four guys just came out, two from the front, two from the back.
>
> And did you notice anything about their racial origin?---I don't know whether they were - well, Asian. Whether they were Philippine or whatever (inaudible).
>
> You said Asian though?---Yeah.
>
> And how clear are you about that?---Oh, there's no worries.

So you saw four males of Asian origin get out of the car?---Yeah.

How many came out of the front door?---Only two come out the front and two come out the back.

Now did you see any female in the vicinity of the car at that time?---No.

Any female of Asian appearance?---No."

This is not inconsistent with his answer in cross-examination that by the time he got to the car everybody was out of the car. The learned stipendiary magistrate stated he was impressed with Mr Grenfell as a witness.

(2) **ASHLEY BRIGGS** was, at the date of the accident, a young man aged 14 years. He gave evidence (t/p 158) that he was the first person to reach the car. He helped open the rear door on the driver's side of the car and two guys got out. He observed somebody sitting in the front seat. This person got out and walked round the outside and got back into the car (t/p 160). He gave evidence in chief (t/p 158) as follows:

"Now you made your way straight to the scene you told us?---Yes. And on your way there did anybody pass you coming in the opposite direction?---No, not at all.

And did you have – are you quite clear about that?---Yes.

And was there any time – was it possible for anyone to have come from where that car came to a stop down past you before you left your property and got on to the road?---No.

Now did you have that car in your sights at all times from the time you turned around and had seen the tree come down?---No, as soon as I got past the fence I could see the car.

And how long would it have taken you to go to your front door to get to the fence?---Not even a second.

You got there and when you got to the car, what part of the car did you stop at?---I stopped at the back door on the driver's side."

He gave evidence under cross-examination that he did not see any other person. In reviewing this evidence, the learned stipendiary magistrate stated in his reasons for decision (p17):

"In cross-examination he adhered to his evidence and there was little to detract from it except for the acknowledgment that he was focussing on the accident as he ran towards the scene and was not looking for people. Further, he did not see four Asian men at the car, only 3."

(3) DEBBIE PENNELL. A reading of the transcript of her evidence reveals that Ms Pennell had a clear view of the accident scene from the house where she was at the relevant time. In cross-examination she said (t/p 134):

"Now I think your evidence is that there were four Asian males that got out of the vehicle, right? Now did you see them get out of the vehicle?---I saw two get out of the vehicle and two were already out.

So there were two out by the time you - - -?---Uh huh.

- - - got there. And the ones that you saw getting out of the vehicle were they in the back seat or the front seat?---The front. I saw two get out of the front and out – they both got out the driver's side of the front.

Are you absolutely sure about that?---Uh huh.

And the other two were – where were they?---They were already out of the car. The passenger's door was open and they were out of the car. Yeah, and just – one of them – this one that had injured his knee, he was sort of walking over to the footpath and sat down. The other one had started to move down the road while the other two were still trying to start the car. And then the injured man got up as well."

There was evidence from which the learned stipendiary magistrate could draw the inference drawn by Mrs Pennell that there were four Asian males in the vehicle at the time of the collision, two of whom were getting out of the driver's side door and the other two who had already got out of the car. Mrs Pennell did not see an Asian woman departing the scene nor at the scene when she arrived. Her evidence is that, had an Asian woman departed the accident scene and run down Ptilotus Street, she would have seen her. She did observe an Asian female arrive at the scene after the accident and identified this woman as the first plaintiff. Her evidence is that this woman had not been at the accident scene earlier. She observed this woman run to the driver's side of the car and appear to be looking for something: "…. the ambulance arrived and attended to her as if, yeah, she was the driver." At t/p 142-3 she gave evidence:

> "Okay. All right. Now did you tell the – did you speak to the policeman at the scene?---Yes.
>
> And do you remember what you told him?---I told him that – that the man in the white singlet may have been the driver because that is who I saw get out the driver's side.
>
> Do you remember what else you told him?---I just told him that the woman wasn't driving. I can't even remember my exact words."

In his reasons for decision, the learned stipendiary magistrate noted that Ms Pennell was an independent witness who was not shaken in cross-examination.

(4) ANN BRIGGS does not state in her evidence that she saw four men in the vehicle at the scene of the accident. Her evidence is she did not actually approach the vehicle from where she was on the other side of the road. Ms Briggs did not see who was driving or who was in the vehicle at the time of the collision. Her evidence is that she was treating a man who had staggered across the road from round the back of the car. She observed two Asian males in the front of the car. During evidence in chief (t/p 207) Ms Briggs gave evidence as follows:

> "And did you see at any stage a female of Asian origin from the time that you got to your steps from the front doorstep?---No. No, there was no-one in sight – no-one of Asian origin in sight, a woman, and looking directly down it was very definite I didn't see anybody.
>
> Is it possible that from the time it took you to go from your lounge to the two steps from the front doorstep that a person could have got out of the driver's side of that car and ran up Ptilotus towards Plumbago?---No. The sound of the impact I think would disorientate someone quite markedly in a car accident with the impact. It would take them time to orientate themselves to be able to open a door, get out.
>
> But even aside from that, would there have been time to run back down past your house?---No.
>
> And how much attention were you paying to the presence of other people on the roadway between your house and the car?---I was very mindful of that. As I said, I was looking for children. It's quite popular for children to play out in that area.
>
> And how long did you stand at the accident scene approximately?---Between 2 and 3 minutes.
>
> And what did you do after that?---I couldn't help this particular man in any way with any sort of first aid so I'd decided I'd come back to ensure an ambulance had been rung, so I left the scene with the intent of ringing the ambulance but it was at that stage I heard the sirens coming so I just walked back to the house."

and under cross examination (t/p 227):

> "You see what I'm going to suggest to you is that it is possible that somebody could have got out of that vehicle and run back past your house?---Well in actual fact if you're talking about reaction time, the reaction time for someone to be able to get out - - -
>
> No I'd just like you - - -
>
> MR DAVIES: The witness is answering the question.
>
> MS GEARIN: I'm not talking about reaction time, I'm suggesting a possibility to you and I'd ask you to focus on the question?---Well I actually disagree that someone could have got out that vehicle in the time – talking about my reaction time – to actually get out to when I had a view of the vehicle, nobody could have gotten out that vehicle and run past the house at that stage."

and at p228:

> "It is possible it is possible (sic) for somebody to have got out of the motor vehicle and to have got onto your right?---I don't think it is, no, not with an impact like that when people – people are rather shocked or disturbed at such an impact, for someone to have gotten out so quickly, no I don't think they could have.

In his reasons for decision (p18) the learned stipendiary magistrate states:

> "Mrs Briggs was also very steadfast in her evidence in the course of cross-examination. I found her to be a very impressive witness."

(5) JUDY MAIL was seated at the rear of her house, at 11 Ptilotus Crescent, when the accident occurred. Her evidence is she ran outside. She observed four persons in the car, two in the front and two in the back. All four persons were Asians and were male. During the course of examination in chief, Ms Mail gave the following evidence (t/p 263):

> "MR DAVIES: Now thank you, you can put that down. Now did you see when you were looking in that general area anyone running from the vehicle in the direction of Plumbago?---No.
>
> And how clear was your view of that area?---Very clear.
>
> And would you have seen them if there had been anyone running?---Yes.
>
> Now what do you say to the suggestion a person, a female person got out of the car and – from the driver's seat – and ran up the road – what do you say to that suggestion?---No.
>
> And why is that?---I just don't think it'd be possible in that amount of time."

Ms Mail also gave evidence that an Asian woman came running from Plumbago Street, went to the car and looked into the car. This lady had not been at the scene of the accident prior to this time. Not long after this lady's arrival the ambulance arrived.

In his reasons for decision (p19) the learned stipendiary magistrate stated with respect to Ms Mail:

> "Again in cross-examination, this witness was steadfast as to the evidence that she had given in chief. She was positive that there were four males in the motor vehicle immediately after the accident."

The learned stipendiary magistrate was in a better position than this Court to assess the credibility of the witnesses (*Jones v The Queen* (1997) 72 ALJR 78). He was clearly impressed with the evidence given by the five witnesses called for the defence. He describes each of these witnesses as independent and impressive.

The appellants' grounds of appeal related primarily to errors of law it was submitted were made by the learned stipendiary magistrate in assessing the evidence called for the respondent, being the defendant in the hearing before the learned stipendiary magistrate.

In relation to the evidence of the plaintiff's witnesses, the appellant submitted that it was the first plaintiff, Thi Phuong Nguyen, who was driving the motor vehicle. The learned stipendiary magistrate found this evidence to be implausible, improbable and plainly calculated to deceive the court.

On the appeal, no complaint was made by the appellants (who were the plaintiffs) regarding the learned stipendiary magistrate's summary of the plaintiffs' evidence. For this reason it is not necessary here to go into detail as to the evidence called by the appellants at the hearing before the Local Court.

It must be noted however, that in its submissions on appeal, the respondent placed much emphasis on the discrepancies in the evidence given by the witnesses for the plaintiff. The respondent also pointed out that it is not open for this Court to disturb the learned stipendiary magistrate's finding of fact, in particular, his clear statement that he found it "impossible to accept the story put forward by the plaintiffs".

No error is demonstrated in the learned stipendiary magistrate's summary of the plaintiff's evidence or in his assessment of the plaintiff and the plaintiff's witnesses.

Because the appellants' argument focused on errors, the appellants submit the learned stipendiary magistrate made in assessing the evidence called for the respondent, it is these submissions that I address.

At p24 of his reasons for decision, the learned stipendiary magistrate states four witnesses saw four males in the motor vehicle immediately after the accident. This is an error. Three of the five witnesses called for the defence gave evidence relating to there being four male persons in the car. The learned stipendiary magistrate's earlier analysis of the evidence of the five witnesses indicates he was well aware there were only three witnesses, Mr Grenfell, Ms Pennell and Ms Mail, who gave evidence that there were four persons in the car. Mr Briggs observed three male persons in the car and Ms Briggs observed two persons in the car when she arrived. Accordingly, there were only three persons who gave evidence relating to there being four persons in the motor vehicle. Read in the context of the whole decision, I am not persuaded that the error is of any significance and certainly not such as to throw doubt on the learned stipendiary magistrate's substantive findings.

The appellant complains that, in drawing the inference that the plaintiff was not the driver, the learned stipendiary magistrate failed to take into account a relevant consideration, that is, how could the plaintiff have been at

the scene within minutes of the accident if she was not in the car at the time of the collision.

I do not accept this submission. The learned stipendiary magistrate accepted the evidence of the five witnesses who stated they did not see a female person at the accident when they arrived. On the evidence all five witnesses arrived very shortly after hearing the impact. Mr Grenfell, Ms Pennell and Ms Mail each saw an Asian lady arrive at the accident scene shortly after the accident and look into the car. A short time later the ambulance arrived. Mr Grenfell and Ms Pennell identified this lady as being the plaintiff in the court room. Ms Mail saw an Asian lady running to the scene of the accident from Plumbago Street. I consider there was evidence for the learned stipendiary magistrate to base his finding that the plaintiff was not the driver of the motor vehicle at the time of the accident. Having made this clear finding supported by the evidence, the learned stipendiary magistrate was not required to make a finding as to how the plaintiff came to be at the accident scene shortly after the collision. The only issue was whether or not the plaintiff was driving the subject motor vehicle at the time of the collision. The evidence supports the finding made by the learned stipendiary magistrate that the plaintiff was not the driver at the time of the collision. It is not in dispute that on this issue the respondent bears the legal and evidentiary onus of proof.

Counsel for the appellants submits that it is a fact not in issue that the plaintiff was seen at the scene of the collision within minutes of the accident

occurring. The complaint is that the learned stipendiary magistrate has not made any finding as to how the plaintiff came to be at the motor vehicle. This Court was referred to the judgment of Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2:

> "…. The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences. ….."

It is the argument of Ms Gearin, counsel for the appellants, that it was not open to his Worship to come to the conclusion that he did, which was that the plaintiff was not the driver of the motor vehicle at the time of the accident. I do not accept this submission. I agree with the submission made by Mr Lawrence, counsel for the respondent, that this finding that the plaintiff was not the driver of the motor vehicle at the relevant time, was open to the learned stipendiary magistrate given his view as to the lack of credibility of the plaintiff and the plaintiff's witnesses. The evidence of the plaintiff and

the plaintiff's witnesses was contradicted by witnesses called for the defence whom the learned stipendiary magistrate found to be impressive and independent.

The appellants have not persuaded this Court that the learned stipendiary magistrate made an error at law. What constitutes an error of law has been determined by the Full Court of the Supreme Court of the Northern Territory in *Wilson v Lowery* (1993) 4 NTLR 79.

Counsel for the appellants referred to the headnote of the High Court decision of *Warren v Coombs & Anor* (1978) 23 ALR 405 at 406:

> "(iii) There is no justification for holding that an appellate court, which, after having carefully considered the judgment of the trial judge, has decided that he was wrong in drawing inferences from established facts, should nevertheless uphold his erroneous decision. To perpetuate error which has been demonstrated would seem to us a complete denial of the purpose of the appellate process. The duty of the appellate court is to decide the case – the facts as well as the law – for itself. In so doing it must recognize the advantages enjoyed by the judge who conducted the trial. But if the judges of appeal consider that in the circumstances the trial judge was in no better position to decide the particular question than they are themselves, or if, after giving full weight to his decision, they consider that it was wrong, they must discharge their duty and give effect to their own judgment."

I am not persuaded the learned stipendiary magistrate was wrong in the inferences he drew from the established facts.

I am satisfied the evidence supports the findings made by the learned stipendiary magistrate and that he applied the correct standard of proof.

For these reasons I dismiss the appeal.

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