IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No S66 of 2011

ON APPEAL FROM THE NEW SOUTH WALES
COURT OF APPEAL

BETWEEN **LITHGOW CITY COUNCIL**

Appellant

and

CRAIG WILLIAM JACKSON

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certificate

1. Counsel certify that this submission is in a form suitable for publication on the Internet.

Part II: ISSUES

2.

(a) What use may properly be made under ss. 76 & 78 of the *Evidence Act 1995* of the findings, observations and opinions expressed by the

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ambulance officers who first attended on the respondent/plaintiff at the scene;

(b) Whether the evidence which broadly grounded the inferences drawn by Basten JA at Appeal Book ("AB") commencing at 699/34-703/30 and as asserted in the Proposed Notice of Contention, a copy of which is annexed, was sufficient to make out the respondent's case on causation and liability.

Part III: S. 78B CERTIFICATE

3. The respondent has considered the question and agrees with the appellant that no notice is required to be given in compliance with s. 78B *Judiciary Act 1903*.

Part IV: RESPONDENT'S STATEMENT OF MATERIAL FACTS

4. At AB 610/35 the NSWCA found that the fall occurred in darkness.

"49 Without the note of the ambulance officer read in the way that I read it, it would be difficult to draw an inference as to what happened. With the note of the ambulance officers, the balance of the evidence being consistent with such a fall, I am prepared to draw the inference that the appellant, walking in an easterly direction (from the west) down the hill, fell over the wall and down on to the concrete striking his wrist and head making him unconscious.

50 There is the question of darkness or light. The primary judge's reasons and the argument dealt with this as a separate issue from the fall. I do not think it is. If the fall occurred as I have inferred, that is more likely to have occurred in the darkness because of the obscurity of the wall and the lack of any ability in the darkness to see the wall and the 1.5 metre drop. If the fall occurred shortly before 6.57 am (remembering

that this was mid-winter in Lithgow on the western side of the range) the hazard would have been somewhat more visible.

51 In all the circumstances, given that the appellant appears to have left home at 3.30 am to take the dogs for a walk, it is unlikely from human experience that he remained out in the chill of a Lithgow winter morning for somewhat over three hours before falling over the wall. It is far more likely, in my view, if one accepts that he fell over the wall, that this occurred in the dark some not-too-lengthy time after leaving home."

10 As the drain is both benign and visible at night when approached from the other sides, the fact the fall was found to have occurred in darkness renders the fall from the western wall the most likely inference,.

5. At AB 431 the subject Ambulance Service of New South Wales Retrieval Record, A928605, also records that the ambulance was booked at 06:57, it arrived at the scene at 07:07, patient contact occurred at 07:09, departure at 07:31, and arrival at Lithgow Base Hospital at 07:36

6. The "*Chief Complaint*" box was apparently completed by Officer Goodwin, having regard to the appearance of the handwriting and comparing it with the signature, and contains the entry:-

20 "*Depressed level of consciousness*

O/E (on examination) *pt* (patient) *responding to painful stimuli, haematoma to (R) eye, abrasions to face and haemorrhage from nose. Extremities cold to touch, trunk warm. Pt combative throughout Rx* (retrieval). *Incontinent of urine."*

7. The "*Patient History*" box contains the entry, again apparently by J. Goodwin,

"Found by bystanders-parkland.

? Fall from 1.5 meters (sic) *onto concrete.*

No other Hx (history)"

8. The Retrieval Record, which is poorly reproduced goes on to record at the base of the first page the following entries across a number of headings as follows:-

"*Time*	*AVPU**	*Resp rate*	*GCS***		Pupils
0711	*P Combative*	*16*	*1,4,2 (=) 7*	*Closed*	*Dilated*
0730	*P Combative*	*16*	*2,4,2 (=) 8*	*Closed*	-

* "Alert, Voice, Pain , Unresponsive", a descending system for assessing responsiveness

** Glasgow Coma Scale

9. At AB 432 The second Ambulance Retrieval Record, R19898, for the transfer by helicopter to Nepean Hospital, picks up the Plaintiff's condition on arrival in the Emergency Department at Lithgow Base Hospital at 07:36, and before removal to Nepean Hospital at 11:15, and records in the middle of the page on the left hand side under the heading "*Clinical Information Given*" the entry:-

"O/E in ED GCS 7, pupils equal & sluggish

T 36.2

Abrasions, blood on face"

10. At AB 378/15 Police appear to have been first contacted at 07:20 when contacted by the Ambulance and event E 47216693, was entered on COPS.

11. At AB 449-456 the eight colour Police photographs taken between about 8am and 11am showing the respondent's injuries and condition whilst intubated, neck braced and unconscious at Lithgow Base Hospital following his retrieval and stabilisation, show injuries accepted by the NSWCA at AB 611/37-612/15

as consistent with a significant sudden fall face first from height after tripping or stumbling while in motion.

12. At AB 438/20 & 486/35, photographs, Figures 4 & 7, in the report by the respondent's expert engineer, Ian Burn, show a temporary orange and white mesh fence installed with picket spikes across the subject western approach, and only this approach, shortly after the event. Such fence was formalised with a permanent structure prior to trial. Such temporary fence was not evident to Mr Burn when he attended on 24.1.06, in daylight, and, on 24.2.06, at night.

13. Figure 7 at AB 486/35 is taken from the floor of the drain looking West towards the subject wall and fence and bears the caption:-

"Figure 7.-Wall top vegetation around time of alleged incident".

14. Mr Burn took the previous photograph, Figure 6, at AB 486/20 at his inspection on 24.1.06 and it shows that the garden/foliage planted at the western edge of the drain lip, and which previously served to conceal the lip, has been removed following the appellant's fall.

15. At AB 434-447 the photographs of the scene taken by NSW Police shortly after the departure of the ambulance containing the respondent, particularly photographs 434, 435, 437, 438, 441, 443, 445-447 show the pooled bodily fluids, the discarded dog leashes, discarded medical packaging, and the treating ambulance officer's discarded and bloody latex gloves.

16. There is no evidence of apparent movement by the respondent post fall. The pooled fluids as photographed appear to be lying naturally in the lowest points without any smearing or disruption as would be expected if the respondent had moved about sufficient to change his bodily orientation, from North-South to East –West, post fall.

17. In the course of deciding the 2008 appeal the NSW Court of Appeal held unanimously as follows:-

1 AB 594/20- That *"...an inference could be drawn that the appellant suffered a significant fall while walking down the hill in an easterly direction in the dark.*

2 AB 599-600/30 The Court correctly instructed itself as to the drawing and weighing of inferences and with the benefit of such instruction and the Retrieval record made such finding at AB 610-612.

3 AB 603/36-603/50 Allsop P, with whom Basten & Grove JJ agreed, "*accepted*" the respondent's submission that a *"natural route"* for the respondent to have walked on the night on leaving his home was South along the Great Western Highway, crossing into the park and down the slope (walking in an easterly direction), and that the low (western) wall concealed the significant fall behind it.

4 AB 555/25-7/30 it was accepted by the trial judge that the respondent's mother, Mrs Shakespeare, would use this route at night when walking from her son's home, in Andrew St, on the west of the park, to her home on the east, and that the wall and drop was invisible if approached from the west, but was visible from the sides. The evidence of the respondent's engineer, as to his observations of the western wall at night was to similar effect.

5 AB 611/15 the NSWCA held that respondent left home to take his dogs for a walk at about 3:30am and it was;

"*...far more likely, in my view, if one accepts that he fell over the wall, that this occurred in the dark some not-too-lengthy time after leaving home...*" .

6 AB 603/25-604/15 The low western wall concealed the significant fall behind it, and the wall and drain could be seen if approached from directions other than from the west. The other walls had sloping sides but the west had a shear 1.5 metre fall. IE, the drain only presented a

risk of falling if approached at night from the west in the manner alleged.

7 AB 611/37-612/45 That the respondent's injuries were more consistent with a *"...significant fall of 1.5 metres than stumbling into the shallow drain from the side."*

18. These findings, save as to the approach taken by the respondent, are not challenged by the appellant and collectively they compel the inference drawn by the Court of Appeal, even absent the Ambulance Retrieval record entry, as was found by Basten JA.

10 19. All other scenarios of injury (other than a fall from the western wall) were examined and rejected by the trial judge whose findings in this regard were left undisturbed by the Court of Appeal.

20. The appellant only challenges the manner of the fall, the respondent says that the balance of the evidence overwhelmingly justifies the decision of the Court of Appeal as explained by Basten JA at AB 700-703.

21. The absence of such broader challenge undermines the merit and utility of the Appeal.

Part V: RESPONDENTS STATEMENT RE APPLICABLE PROVISIONS

20 22. The respondent accepts the appellant's citation of applicable statutes.

Part VI: THE RESPONDENT'S STATEMENT OF ARGUMENT

23. Pursuant to *Fox v Percy* [2003] 214 CLR 118 at [21]-[27] and s. 75*A Supreme Court Act*, 1970, the Court of Appeal embarked on a re-hearing of evidence, as it was required to do, *Warren v Coombes* (1978-1979) 142 CLR 531 at 551-2. The overturning of the finding as to the time of injury and consequent finding that the respondent's fall occurred in the dark (which overturning is not

challenged here), justified a re-assessment of the evidence. No issue of demeanour or credit was involved.

24. The appellant's primary submission is that the entry of the Ambulance officer of a question mark at the commencement of the history converts the opinion expressed into speculation.

25. The Court of Appeal at AB 680/25 deals with this and finds, as a matter of fact, that the question mark renders the opinion *"less positive"* than it would have been if absent, but it does not act to rob the opinion of *"all probative force"*, noting that the entry was made by an officer who had had *"...the advantage of seeing him, his state of reduced consciousness, his injuries, his position, the position of blood and urine and the surrounding structures. The advantage of the Ambulance Officers and the inference they drew makes the posited cause of injury more likely than not."*

26. The Court of Appeal's revisiting and treatment of the Ambulance Retrieval evidence was consistent with Authority. Having embarked upon a re-hearing the Court of Appeal was entitled to re-visit the question of what use should be made of that documentary evidence (unaffected by oral evidence) and to conclude, as it did, that no limiting order was appropriate at AB 609/15-610/50, 681/10-682/15 & 691/35-697/20.

27. Ainslie-Wallace DCJ found at AB 550/35-45

> *"...the plaintiff was found lying unconscious in the drain...Two dog leads were on the ground beside him..."*

28. The respondent does not accept the appellant's contention that a reference to the respondent being "*combative throughout Rx* (retrieval)" denotes that he was capable of purposive movement and/or was usefully conscious/capable of moving so as to change his orientation in the drain. Being recorded as "*combative*", does not equate to being capable of significant purposive

movement and the NSWCA rightly notes at AB 679/35 that he was responding to painful stimuli and so combativeness is not surprising.

28. When his consciousness was first assessed at 07:11 his GCS was 7, he was noted to be responding to pain, being the second lowest level of the AVPU scale, with dilated pupils. His Glasgow Coma Scale result fluctuated from 7 on initial assessment to 8 and back to 7 on arrival at Lithgow Hospital. Both are low readings. His extremities were cold and trunk warm indicating an absence of circulation and therefore movement.

29. Whilst it is possible he moved about post fall and prior to removal it is contrary to the physical evidence, the photographs of the scene and the manner in which the trial and appeals have been conducted to date.

30. The evidence as to the invisibility of hazard only when approached in the dark from the west, the respondent's orientation when retrieved from the drain, as derived from the Ambulance Retrieval Record, the fact of the respondent's severe injuries being only to his front side, and, in the absence of eye witnesses, the history recorded, being

"?Fall from 1.5 metres onto concrete"

can only lead to the inference that that he was facing away from the wall in a position best explained by falling off it whilst walking in an easterly direction from the west at night and in the dark.

31. The argument and alleged limiting order under s. 136 of the *Evidence Act (NSW)* was far from clear at first instance AB 608/45-609/20.

32. The Court of Appeal's failure to limit the evidence pursuant to s. 136 is not surprising in circumstances where no relevant "unfair" prejudice was demonstrated nor anything, misleading or confusing. The Court of Appeal concluded it was a proper use of a qualified Ambulance Officer's opinion, observing and relying on the position and condition of the Respondent, to draw the conclusion as to the manner of the fall.

33. S. 78 of the *Evidence Act 2005 (NSW)* is said by the appellant to be limited in its application to those witnesses who actually saw the fall.

34. Limiting s. 78 to those witnesses who actually saw the fall renders the section otiose, because such evidence would be direct evidence. The Ambulance Officer's observation was a conclusion based on the position and condition etc. of the respondent, and was a commonsense conclusion, in circumstances where the respondent was found at the foot of and facing away from a concealed drop. The obvious conclusion is the very evidence which s. 78 intends to be admitted as evidence of the fact and to be weighed in determining judicial findings.

35. Developing the Applicant's argument re drunkenness would limit the giving of evidence involving a conclusion of intoxication, to the evidence to those who had observed the actual drinking of liquor, and again, would further render the section otiose. The appellant would even reverse the common law position where such a conclusion was allowed from lay, as well as, expert observers. *Normandale v Rankine* (1972) 4 SASR 205, *Cross on Evidence, 3rd Australian Edition, at [15.19 & 15.22], R v Davies* [1962] 3 All ER 97

36. In any event, and adopting the argument put by the appellant, the ambulance officers can give evidence of matters they observed such as the relative position of the Respondent, and the other surrounding indicia, to which the Ambulance Officers were eye witnesses and which entitled them to express this opinion.

37. The Applicant further seeks to limit the utility of s. 78 by an unreasonable emphasis on the requirement that the opinion be "*necessary*", elevating it to a *sine qua non* and destroying the utility of the section. This construction is contrary to the unanimous approach of the Court of Appeal and longstanding principles of statutory interpretation.

38. The Court of Appeal at AB 681-684 has adopted a construction which is consistent with long practice in NSW in respect to the right to Interrogatories and Discovery in personal injury cases as governed by UCPR 22.1(4) and its predecessors, construing "necessary" as meaning "necessary in the interests of a fair trial" and not as "essential".

39. The respondent points to similar constructions applied in *Boyle v Downs* [1979] 1 NSWLR 192 at 204-5, *Percy v GMH Pty Ltd* [1975] 1 NSWLR 289. *Greibart v Morris* [1920] 1 KB 659 ("necessary for disposing fairly of the cause or matter") *Yamakazi v Mustaca* [1979] NSWSC 1083.

10 40. Odgers' *Uniform Evidence Law* (8th Edition 2009) at 303-304 supports the Court of Appeal's interpretation.

Part VII: STATEMENT OF ARGUMENT RE NOTICE OF CONTENTION

41. A copy of the Notice of Contention is annexed hereto. It was filed late and is the subject of a Summons and the appellant consents to an enlargement of time to allow late filing.

42. Basten JA at AB 700/20-703/30 resiles from his previous views and analyses the physical evidence on conventional, "common sense" principles and concludes that even absent the Retrieval Record, he would have drawn the

20 same conclusion.

43. Basten JA has regard to five matters set out at (a)-(e) at AB 700/25 and is persuaded by :-

    1 The nature of the respondent's injuries being severe and consistent with an unprotected and unanticipated fall from a height greater than body height;

2 The distribution and collection of bodily fluids, being both urine and blood, at a point 2.7 m from the western wall, but about 4.5 m from the northern wall,

3 the configuration of the drain,

and is left comfortably satisfied at AB 703/30 and able to draw the inference that the respondent probably fell over the western wall when moving downhill and without seeing the drain (in the dark).

42. This broad analysis was submitted by the respondent at trial and referred to by Ainslie-Wallace DCJ at AB 558/52 and formed the basis of the original appeal to the NSWCA and is cited at AB 606/35.

43. The respondent succeeded at trial in establishing the existence of a duty of care, a foreseeable risk of harm and an unreasonable failure take measures to avoid such risk, at AB 559-564.

44. The respondent also established injury consistent with the manifestation of that risk.

45. In the absence of any other explanation, and consistent with the appellant's own conduct in erecting a temporary fence across the western approach and ultimately in erecting a permanent fence, the Court was entitled to infer that the fall occurred as alleged by the respondent.

46. This Court would take a similar approach to Basten JA.

Dated: 29 April 2011

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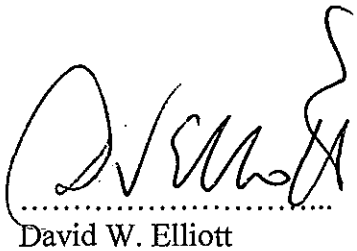

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S158 of 2010

ON APPEAL FROM THE NEW SOUTH WALES COURT OF APPEAL

BETWEEN:

LITHGOW CITY COUNCIL
Appellant

and

CRAIG JACKSON
Respondent

Proposed NOTICE OF CONTENTION

The Respondent contends that the decision of the New South Wales Court of Appeal should be affirmed, but on the ground that, the judgment of the Court of Appeal as to the circumstances of injury, and the resultant finding on liability, is supported by evidence other than that challenged herein.

Grounds

Consistent with common sense principles of causation at common law as discussed in *Sutherland SC v Heyman* and *Bennett v Minister of Community Welfare,* the fact the Defendant was responsible for the creation of a particular scope of risk, as posed by the concealed, unguarded, and precipitate drain wall, and, the Plaintiff had injuries consistent with a heavy fall from height, at that location, was sufficient, in the absence of other evidence, to establish causation.

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