



HIGH COURT OF AUSTRALIA

Public Information Officer

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THE WATERWAYS AUTHORITY v DANIEL GERARD FITZGIBBON, MIDDLE HARBOUR YACHT CLUB AND MOSMAN MUNICIPAL COUNCIL

A retrial on Mr Fitzgibbon's personal injury case should examine all issues and should not be constrained by a finding that he was jostled or pushed into shallow water rather than deliberately diving in, the High Court of Australia held today.

On 29 March 1997, Easter Saturday, Mr Fitzgibbon, then 20, of Brisbane, was in Sydney to compete in a sailing regatta. That night he attended a ball at Middle Harbour Yacht Club. Nathan Wilmot, then 17, had won the national titles in Hobart the previous Christmas for his class of boat. Sailing winners are frequently thrown into the water but this did not happen in Hobart, so a group of fellow sailors threw Mr Wilmot into the water at the Yacht Club during the ball. Mr Fitzgibbon also ended up in the water, which was 20cm deep. He hit his face on the sand and his injuries left him a quadriplegic. He said he was accidentally nudged from behind and lost his balance when his feet butted against a 20cm-high toeboard on the jetty's edge. There was no handrail.

Mr Fitzgibbon sued the Waterways Authority, the Yacht Club and Mosman Council for damages for negligence. They were said to be responsible for the design or approval of the jetty and the absence of a handrail. Their defence was that Mr Fitzgibbon deliberately dived into the water because he thought Mr Wilmot was in trouble. This was based on evidence from Dr Shane Trevithick, the emergency registrar at Royal North Shore Hospital, who said Mr Fitzgibbon told him he dived in because he thought his friend was drowning. In the Supreme Court Mr Fitzgibbon denied this and said he was jostled or pushed and lost his balance. Other young sailors described him tumbling into the water, and putting his arms out in front of him as he fell. Several said Mr Wilmot was by then standing in the water and clearly not in danger. One witness said Mr Fitzgibbon, while still in the water, asked him "who pushed me in?".

Acting Justice Peter Newman accepted Dr Trevithick's evidence and dismissed the action. Mr Fitzgibbon appealed to the Court of Appeal, claiming Justice Newman had failed to give adequate reasons and failed to properly consider all the evidence. The Court of Appeal held that Justice Newman had failed to examine all the evidence or to explain why Dr Trevithick's evidence was to be preferred, and held that the finding that Mr Fitzgibbon deliberately dived into the water was glaringly improbable. It ordered a new trial conducted on the basis that the evidence established that he fell into the water after being jostled or pushed and losing his balance. The Waterways Authority appealed to the High Court, primarily complaining of the limited basis on which the new trial was to be conducted.

The High Court, by a 4-3 majority, allowed the appeal and ordered a new trial without the limitation related to a particular finding of fact. The Yacht Club and Mosman Council sought special leave to appeal out of time. The Court unanimously allowed extensions of time and ordered that the applications for special leave be granted and that the applications be treated as appeals. The majority also allowed these appeals.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*