



HIGH COURT OF AUSTRALIA

28 September 2011

LITHGOW CITY COUNCIL v JACKSON [2011] HCA 36

Today the High Court allowed an appeal against the decision of the Court of Appeal of the Supreme Court of New South Wales which had upheld a claim in negligence by Mr Craig William Jackson against Lithgow City Council.

On 18 July 2002, Mr Jackson was found unconscious and badly injured in a concrete drain in an area of parkland in Lithgow, New South Wales. The western end of the drain had a 1.41m vertical face topped by a small retaining wall partially concealed by foliage. Mr Jackson brought proceedings in negligence against Lithgow City Council, arguing that his injuries were caused by tripping from the small retaining wall. Mr Jackson's injuries prevented him from recalling how he came to be injured, and he sought to rely on a statement contained in a record made by the ambulance officer or officers summoned to assist him, which was: "? Fall from 1.5 metres onto concrete" ("the Statement").

The trial judge relevantly found that Mr Jackson had not established whether his injuries were caused by Lithgow City Council's breach of duty, because he had not established that he had fallen over the western vertical face after walking over it, as distinct from stumbling down one of the sloping sides, or standing on the top of the northern face and losing his balance. Her Honour did not refer to the Statement in her reasons.

On appeal to the New South Wales Court of Appeal, the appeal books before the Court truncated the question mark in the Statement, and the Court considered the truncated statement to be an opinion, admissible under s 78 of the *Evidence Act* 1995 (NSW) ("the Act"), that Mr Jackson had fallen down the vertical western face of the drain. The Statement was crucial to their Honours' conclusion that Mr Jackson had established causation.

Following a grant of special leave by the High Court, an appeal by the Council was heard *instanter* and allowed, and the matter was remitted to the Court of Appeal for a rehearing in light of the accurate trial record. On the rehearing, the Statement, including the question mark, was held to be an admissible opinion, and the Court adhered to its original conclusion that Mr Jackson had proved causation. Basten JA concluded that the evidence established causation even without the Statement.

Two issues were presented in the High Court. The first was whether the Court of Appeal in its second decision was correct to hold that the Statement was admissible. The second was whether, even if the Statement was not admissible, the conclusion that causation was established could be supported by other evidence.

The High Court held unanimously that the Court of Appeal erred in treating the Statement as an admissible opinion under s 78 of the Act. The Statement was so ambiguous as to be irrelevant.

In any event, the nature of the Statement was such that it was not possible to find positively that it stated an opinion. Moreover, even if it was assumed that the Statement did express an opinion, it was not one which satisfied s 78 of the Act. The Court held by majority that Mr Jackson had not established causation because the conclusion that a fall from the vertical western face of the drain caused his injuries could not be drawn on the balance of probabilities.

- *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.*