ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY **No. S66/2011**

BETWEEN: **LITHGOW CITY COUNCIL**
Appellant

and

CRAIG WILLIAM JACKSON
Respondent

APPELLANT'S WRITTEN SUBMISSIONS IN REPLY TO THE RESPONDENT'S PROPOSED NOTICE OF CONTENTION

CERTIFICATE

1. Counsel certifies that these Submissions are in a form suitable for publication on the internet.

ISSUES

2. Whether Court of Appeal erred reaching the conclusion that, absent the documentary evidence of the opinion of the attending ambulance officer the subject of this appeal, the Respondent had not adduced sufficient evidence to discharge the onus of proving that his injuries were caused by the defendant's breach of duty.

S.78B CERTIFICATE

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

NARRATIVE OF FACTS AND HISTORY OF LITIGATION

4. The narrative of facts is adequately summarized for present purposes in the Appellant's principal submissions. The history of the litigation so far as it is relevant to the Notice of Contention is as follows.

5. When the matter was first before the NSW Court of Appeal ("**the 2008 appeal**") AB 610 [49] Allsop P stated:

> *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 …*

6. At AB 612 [56] the learned President added:

> *…, if it is not legitimate to use the Ambulance Officers' record in the way that I have, I would agree with the primary judge that on the material available it was not possible to infer that the accident happened in the way asserted by the appellant. All the other material, while consistent with that being the case, does not permit, in my view, any inference that it had occurred in that fashion.*

7. At AB 626 [109] Basten JA agreed with both the orders and the reasons of the President. At AB 626 [110] Grove J also agreed with Allsop P.

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8. When the matter was remitted to the New South Wales Court of Appeal ("**the 2010 appeal**"), the President said at AB 680 [20]:

> *That inference, or opinion, is, in my view, still sufficient to tip the balance of the evidence making it more likely than not, that Mr Jackson suffered injuries as described in [48]-[55] of my earlier reasons…*

9. Grove J agreed with the orders and reasons proposed by Allsop P.

10. Basten JA, in a minority judgment, reached a conclusion different to that of the trial judge on the question of whether it had been established on the balance of probabilities that the Respondent sustained his injuries by tripping or stepping over the headwall at the western end of the drain (AB 697 - 706 [77]- [106]). In doing so, his Honour acknowledged that these reasons were *inconsistent* with the reasoning of the President in the 2008 appeal with which he had previously agreed (AB 703 [93]).

ARGUMENT

11. The Notice of Contention (when read with the supporting Submissions) has the effect of contending that the reasoning of Allsop P with whom Grove J agreed was erroneous as to the issue of causation and that the reasoning of Basten JA should be adopted instead.

12. The argument runs into the immediate difficulty that, while the purpose of the Notice of Contention is to facilitate an argument that the decision of the Court of Appeal should be affirmed on the ground that the Court erred in arriving at its conclusions regarding proof of the cause of the Respondent's injuries, the submissions assert (at subparagraph 17(2)) that *the Court correctly instructed itself as to the drawing and weighing of inferences.*

13. The Respondent's submissions cite *Fox v Percy* [2003] 214 CLR 118 for the purpose of identifying the nature of the task undertaken by the Court of Appeal in dealing with an appeal in the nature of a rehearing, but overlook the circumstance (recognized in *Fox v Percy* at [32]) that this Court is engaged in a strict appeal, not a rehearing.

14. The submissions do not rise above the suggestion that the conclusion reached by Basten JA was supportable and should be adopted. That is not an adequate basis for overturning the decision of the majority of the Court.

15. In any event, the decision of the trial judge and of the majority of the Court of Appeal (on two occasions) that absent the ambulance officers' note, the Court could not be affirmatively satisfied that the Respondent suffered injury by tripping or stepping over the headwall at the western end of the drain was sound and should be preferred to that of Basten JA in his judgment in the 2010 appeal.

16. At AB 700 [85] Basten JA set out six matters which he stated *might assist in divining the inference*, that the Respondent tripped on the headwall as opposed to coming to grief in some other way. In the Appellant's respectful submission, the factors identified cannot properly be regarded as providing an adequate basis for an affirmative satisfaction as to the cause of the Respondent's injuries:

(a) **The Severity of his Injuries.**

This issue was dealt with at AB 700-701 [86]-[88]. There was no medical evidence which suggested that the injuries were inconsistent with stumbling into the drain from one of its sides and falling heavily (while either running or walking) or overbalancing while standing upon the wall and falling into the dish drain (see AB 563 [76]).

No medical practitioner was asked to turn his/her mind to this issue. Without the assistance of medical evidence of that kind, it was an exercise of impermissible speculation to determine that the nature of the injuries suffered by the Respondent was more consistent with the alleged cause of the accident.

(b) **The Nature of the Injuries**

The Appellant repeats its submissions as to (a) which largely overlap. There was no medical evidence at all to link the nature of the injuries to the cause posited by the Respondent. The only expert opinion which dealt with the question was the report of William Bailey, mechanical and biomechanical engineer dated 19 September 2006 (AB 507-528). He considered that the injuries were inconsistent with stepping over the headwall.

(c),(d) **The position of the Appellant (Mr Jackson) when discovered, and markings on the concrete**

These issues were dealt with together at AB 701 [89] and relate to the location, as distinct from the orientation of the Respondent's body after the fall, as indicated by the markings observed on the floor of the drain. This issue has been dealt with in part at [35]-[37] of the Appellant's principal submissions. There was expert opinion dealing with the question of whether the Respondent was likely to have fallen from the headwall in the report of Mr. Bailey dated 19 September 2006 (AB 507-528). Although the trial judge and the Court of Appeal attached little weight to the report of Mr Bailey (AB 562 [70]; AB 605 [29]), he opined that the Respondent *did not receive his injuries after a fall over the vertical face of the concrete area* (AB 516-10). The principle reason for this opinion was that the distance between the wall and a pool of blood found within the dish drain was thought to be too great. Basten JA referred to this evidence at AB 701 [89] but appears to have discounted it because *no attempt was made to explain why the staining was said to be consistent with falling on the sloping sides of the drain, which appeared to have been further away from the stain than was the wall.* That observation did not directly address Mr Bailey's conclusion. In any event, there is no inherent unlikelihood in the suggestion that the Respondent could have stumbled down the steep side of the drain and fallen heavily in the centre of the drain.

(e) **Dislodged Belongings**

This is dealt with at AB 702 [90]. His Honour, having referred to the fact that some personal belongings including dog leads were found within the drain concluded that *little weight can be given to that evidence.*

(f) **The Configuration of the Area**

This is dealt with at AB 702 [91]. His Honour observed that there was no evidence as to the length of the wall at the western end of the drain, but estimated that it was about 10 metres. On the basis of that estimation he concluded that the blood stain was about 4-5 metres from the northern edge of the drain, which wall he observed to be steeper than that to the south. In fact, the photograph at AB 466-20 contains a dimension for the length of the wall of 5 metres. Basten JA went on to observe that:

> *If the Appellant did not fall from the vertical wall, it would seem that he must have stumbled going down the steeper slope, heading across the drain from north to south. If he did that, he was heading away from his home.*

The significance of the observation that the Respondent would have been *heading away from his home* is unclear. As he would also have been doing so had he tripped and fallen over the headwall at the western end of the drain, it appears to take the matter nowhere

17. In the Appellant's respectful submission, a consideration of the factors relied upon by Basten JA as supporting the inference drawn at AB 703 [92] serves to reinforce the conclusion reached unanimously in the 2008 appeal and by the majority in the 2010 appeal, namely, that absent some evidence of the orientation of the Respondent's body indicative of a fall from the headwall at the west of the drain, the Court could not be affirmatively satisfied that the Respondent suffered injury by tripping or stepping over the headwall,

18. In addition to the factors identified by Basten JA, there are a number of additional matters raised in the Respondent's submissions which are apparently directed towards the argument that the Respondent discharged the onus of proof with respect to causation.

19. At paragraphs 8 and 9 of the submissions, reference is made to the Respondent's Glasgow Coma Scale ("**GCS**"). At [28], the Respondent's GCS readings of 8 and 7 are described by the Respondent as being "low readings". Uninformed by medical opinion as to the likely consequence that the GCS reading had on the capacity for physical movement immediately following the accident, there is no probative value to the evidence.

20. The same can be said for the submission at [28] which references the fact that the *Respondent's extremities were cold and trunk warm indicating an absence of circulation and therefore movement.* There was no evidence at all before the Court to corroborate that contention.

21. Reference is made at [17.3] to what is said to be a unanimous finding that the route which would have led the Respondent to the headwall was *a natural route* and at [17.4] the fact that it was a route used by the Respondent's mother. The fact that it was *a* natural route, and one (later) used by others is of no real weight in the context of the causation issue. The evidence of the Respondent at trial was that he had no recollection of ever having been to Endeavour Park before in his life [AB 95-26]. There was therefore no usual route from his perspective.

22. Finally, it is suggested in the Notice of Contention, though not in the submissions served in support of it, that causation is established by the fact that the Appellant created a risk, and that the Respondent suffered injuries consistent with an accident arising from that risk. That conclusion is said to be supported by the decisions of this Court in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 and *Bennett v Minister of Community Welfare* (1992) 176 CLR 408.

23. While difficult questions as to the extent of evidence required to prove causation can arise in cases involving a negligent omission, the respondent's claim raised no such complexity. If he tripped or stepped over the headwall as he alleged, then that occurrence was caused by the breaches of duty which the trial judge found to be established. However, unless and until he proves accident of that kind, he cannot establish an injury *within an area of foreseeable risk* in the relevant sense, and decisions such as *Bennett* and *Sutherland Shire Council v Heyman* do not advance his position.

Dated 3 May 2011

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