[HIGH COURT OF AUSTRALIA.]

COUNCIL OF THE CITY OF GREATER WOLLONGONG . . . . . } APPELLANT;
DEFENDANT,

AND

COWAN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

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SYDNEY, *Mar.* 29, 30.

Dixon C.J., Williams, Webb, Kitto and Taylor JJ.

Appeal—New trial—Verdict regularly obtained—Fresh evidence—Availability and character of evidence—Reason for non-production on first trial—Standard necessary before Court will interfere—Presentation of fresh evidence to appellate court—Necessity for fullest detail.

Leaving aside cases where a trial has miscarried through misdirection, misreception or wrongful rejection of evidence or other error, and cases of surprise, malpractice or fraud, it is essential to give effect to the rule that a verdict, regularly obtained, should not be disturbed without some insistent demand of justice. The discovery of fresh evidence in such circumstances can rarely, if ever, be a ground for a new trial unless (a) it is reasonably clear that if such evidence had been available at the first trial and had been adduced, there would have been an opposite result, (b) if it is not reasonably clear that such would have been the outcome, it must have been so highly likely as to make it unreasonable to suppose otherwise, and (c) reasonable diligence had been exercised prior to the first trial to procure such evidence.

In support of an application for a new trial of an action on the ground of the discovery of fresh evidence the solicitor for the unsuccessful plaintiff made an affidavit wherein he deposed that following the trial of the action he interviewed the plaintiff who subsequently gave him certain information as a result of which he contacted an officer of the defendant council and made further inquiries. The affidavit did not state when the plaintiff first learned the " certain information " subsequently communicated to the solicitor, the name or position of the officer or the precise nature of the information, nor did it reveal what further inquiries were made. As a result of such inquiries

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it was stated that the solicitor verily believed that further evidence was available that (i) on 18th January 1951 the then chief clerk of the defendant council had sustained injury by slipping on the same polished linoleum as that on which the plaintiff had slipped some seventeen months later and at a spot eight to ten feet removed from that where the plaintiff had fallen, (ii) that a file relating to this occurrence existed and had existed when the solicitor interviewed the chief city health inspector, one Way, prior to the first trial, (iii) that no file existed in relation to other similar incidents occurring in the council's main office but that verbal reports had been made concerning them by Way to his superiors, (iv) that after the date of the plaintiff's injury Way had instructed the cleaners of the defendant council to apply polish more sparingly to the linoleum in question, (v) that shortly after the plaintiff's accident another woman had slipped and fallen at a spot some six feet from where the plaintiff had fallen, (vi) that thereafter and before the issue of the plaintiff's writ Way purchased strips of rubber covering and had them laid in the main office over the linoleum. At the trial of her action the plaintiff had called a clerk employed by the defendant council at the inquiry desk situated in the main office. This witness said in evidence that during the thirteen months prior to the date of the plaintiff's accident—this being the length of her employment with the defendant council when the accident occurred—the floor of the main office was covered with the same linoleum as existed at such date, that the linoleum was highly polished and, to one unaware of such condition, slippery. She knew nothing of the manner or times of treatment of the linoleum, this taking place outside the hours of her employment. She knew that a number of people, estimated to be about twelve and to be mostly women, had slipped on the linoleum prior to the plaintiff's accident, some had slipped but not fallen to the floor, some had twisted their ankles, some had fallen to the floor but not required attention, and on one occasion a woman had fallen and injured herself seriously.

Held, (1) that it did not appear reasonably clearly that the fresh evidence would produce an opposite result on a new trial, nor was such a result so highly likely as to make it unreasonable to suppose to the contrary, as in so far as it went the fresh material merely indicated that evidence of other incidents similar to those deposed to at the trial was available.

(2) that the requirement of reasonable diligence to discover such evidence prior to the trial had not been fulfilled.

(3) that the affidavit was inadequate as a basis for interfering with a verdict regularly obtained in that the Court could not be certain of what witness or witnesses were available, what facts he or they could prove, what inquiries had been made before trial and what subsequent inquiries had resulted in the discovery of the evidence.

Decision of the Supreme Court of New South Wales (Full Court): *Cowan* v. *Greater Wollongong City Council* (1954) 54 S.R. (N.S.W.) 264; 71 W.N. 226, reversed.

APPEAL from the Supreme Court of New South Wales.

On 4th June 1952 Mrs. Maizie Cowan went to the main office of the town hall of the City of Greater Wollongong for the purpose of there paying certain municipal rates on behalf of her son. Having paid the rates she turned from the counter to make her way out of the main office. She had taken only a few steps when she slipped on the polished linoleum and fell to the floor. At the time of the accident she was very shaken but suffered no apparent hurt, and after resting for a while in the office she left the town hall. Some considerable time later she suffered from pains in her back, which caused her loss of sleep, and she was also troubled at a later stage by the pains in her back extending into her left leg. She sought medical and surgical treatment and it appeared that she was suffering from traumatic radiculitis.

On 1st June 1953 Mrs. Cowan commenced proceedings in the Supreme Court of New South Wales against the Council of the City of Greater Wollongong, alleging that the council had failed in its duty to her, its invitee, to take care to make its premises reasonably safe and had permitted the floor covering in its premises to become dangerous of which fact it gave her no warning, as a result whereof she suffered injury.

Prior to the issue of the writ the solicitor for Mrs. Cowan communicated with the town clerk of the council asking to be informed whether the council would permit him to inspect its records concerning the incident involving his client and also its files relating to incidents of a similar nature occurring in that portion of the council's premises where his client had fallen. He expressly excluded from his request any reports made by his officers to the town clerk or to the council. The town clerk agreed to the request and referred the solicitor to the chief city health officer, one Edgar Way. When interviewed, Way informed the solicitor that there existed a file dealing with the incident involving Mrs. Cowan, it consisting mainly of reports made to his superior officer and to the council's insurer, and that he was not aware of any similar incident having occurred in the town hall and that there would not be any records such as the solicitor desired to inspect. The solicitor informed Way that he did not desire to inspect reports made to his superior officer or to the council's insurer, and Way thereupon suggested that the solicitor should interview Miss Veronica Bertha Karooz, an employee of the council. This the solicitor did, and Miss Karooz was called by him at the trial.

The trial of the action took place at Wollongong before *Maguire* J. and a jury of four. The plaintiff gave evidence as to how she fell

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and said that as she lay upon the floor she could not fail to notice that the linoleum floor covering was very slippery. Miss Karooz gave evidence that the linoleum which had been on the floor during the thirteen months she had been employed by the council prior to the plaintiff's accident was slippery and was in a highly polished condition. She could not say how often or with what substance the linoleum was treated as the treatment took place outside the hours of her employment. She had seen a number of persons, about twelve in number and mostly women, slip on the floor during the thirteen months preceding the plaintiff's accident. Some slipped but did not fall, some twisted their ankles, some fell but did not require attention, whilst one woman had fallen and seriously injured herself. The witness had observed these incidents from the inquiry desk at which she was employed.

No evidence was called on behalf of the defendant council, in whose favour the jury returned a verdict. The substantial issue put to the jury by the learned trial judge was whether the council had taken reasonable care to prevent injury to the plaintiff arising from an unusual danger on the premises, of the existence of which it knew or ought to have known. The case put to the jury on behalf of the defendant council was that the condition of the linoleum on the date of the accident did not constitute an unusual danger.

The plaintiff appealed to the Full Court of the Supreme Court against the verdict of the jury and moved for a new trial of the action on three grounds, of which the second was that the plaintiff had discovered fresh evidence touching the matters in issue.

In aid of this ground the plaintiff's solicitor swore an affidavit setting out the fresh evidence relied upon. This affidavit, after setting out the inquiries relative to the council's records made by the deponent before trial substantially as set out above, continued as follows:—" (6). Following the trial of this action I interviewed the abovenamed plaintiff who subsequently gave me certain information as a result of which I interviewed an officer of the defendant council concerning the information I had received from the said plaintiff and made further inquiries. (7). As a result of such inquiries I verily believe that the following further evidence is available to the plaintiff:—(a) That on Thursday 18th January 1951 at approximately 12.45 p.m. Charles Thomas McLean, the then chief clerk of the defendant council, slipped on the same polished linoleum as that on which the said plaintiff allegedly slipped and fell at a distance of approximately eight to ten feet from the spot at which the said

plaintiff slipped and fell and sustained a fractured femur of the right leg. (b) That a file in respect of the injury to the said Charles Thomas McLean is in existence and was in existence at the time I interviewed the said Edgar Way. (c) That no file or record is in existence covering other incidents of a similar nature which happened in the council's main office in the town hall but were covered by verbal reports made by the said Edgar Way to his superior officer and the mayor of the defendant council. (d) That after the date of the incident in respect of which this action arises the said Edgar Way instructed the cleaners employed by the defendant council to apply polish more sparingly to the linoleum in the main office. (e) That within a short period after the date of the said incident another woman slipped and fell at a distance of approximately six feet from the spot at which the said plaintiff slipped and fell and sustained injuries. (f) That thereafter and before the writ was issued by the said plaintiff strips of rubber covering were purchased by the said Edgar Way and were laid in the said main office of the council over the said linoleum."

The Full Court of the Supreme Court (*Maxwell*, *Herron* and *Clancy* JJ.) held that that which the council either knew or ought to have known as to the state of the floor was clearly material and the evidence foreshadowed in the affidavit above-mentioned on its face was such as was most likely to be believed and, if believed, would be most likely to have a serious bearing on the result. It accordingly allowed the appeal on the second ground and ordered a new trial (1).

From that decision the defendant council by special leave appealed to the High Court.

K. W. Asprey Q.C. (with him *H. J. H. Henchman*), for the appellant. The alleged fresh evidence would not be admissible on a new trial. Evidence of the alleged accident to McLean, if put on the ground of similar fact, is inadmissible as being too disconnected in time and place. Proof of the appellant's knowledge that McLean slipped seventeen months before some ten feet from the spot where the respondent slipped could not be evidence of the appellant's knowledge that the floor was slippery on the occasion in question. The weight of fresh evidence is very material, and even if admissible the evidence would not advance the respondent having regard to the evidence at the trial of accidents before and after the date of her injury. Paragraph 7 (b) and (c) of the affidavit do not take the matter any further. Instructions given by Way as set

(1) (1954) 54 S.R. (N.S.W.) 264; 71 W.N. 226.

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out in par. 7 (d) are inadmissible. Paragraph 7 (d), (e) and (f) relating to incidents after the date of the accident are not admissible to prove the existence of facts at such date (*Reynolds* v. *Mayor &c. of Hawthorn* (1)). The affidavit is wholly unsatisfactory as to the nature of the fresh evidence. The court must be satisfied that the fresh evidence is prima facie likely to be believed. The court could not be satisfied in this regard on the present affidavit. The informant is not named and his position in the council and his means of knowledge are not stated. The precise nature of the fresh evidence must be stated on affidavit, and where possible the deponent of the affidavit should be the proposed witness. This has not been done and this Court could not be satisfied that the evidence is prima facie likely to be believed. Then, the mere fact that it is sought to adduce evidence of other incidents of high polishing, some such evidence having already been given at the trial, will not make the fresh evidence admissible. All this evidence could have been obtained by reasonable diligence on the part of the respondent and her advisers prior to trial. No discovery was sought by the respondent. The view of the Full Court that the course adopted by the respondent's solicitor represented an informal and not unusual method of discovery and inspection is challenged, as too is the view that the solicitor was misled by an officer of the appellant. It is not suggested in the affidavit that the material in par. 6 came to the respondent's knowledge only after the trial, and is consistent with the respondent having known before such trial. It may be that it could have been elicited by the solicitor before trial. Nor is there any satisfactory explanation in the affidavit as to why this evidence was not available at the trial.

B. P. Macfarlan Q.C. (with him *A. Cameron-Smith*), for the respondent. The appeal should be dismissed for the reasons given by the Full Court. No objection was taken in the court below to the form in which the facts relied on as fresh evidence were stated in the affidavit. The result of the decision in *McCann* v. *Parsons* (2) is that there is no inflexible rule and the question is in every case one for the satisfaction of the court as to the availability and truth of the evidence, and its likely probative effect. The evidence in the affidavit should be so viewed. Way was under a duty to answer inquiries truthfully in accordance with the town clerk's directions. The respondent's solicitor was misled. He used the only information he was given originally by interviewing and calling Miss Karooz.

(1) (1887) 13 V.L.R. 23.

(2) (1954) 93 C.L.R. 418.

Paragraph 6 of the affidavit shows that however the information was obtained, the solicitor interviewed an officer of the council concerning such information and made further inquiries. It is not material for any purpose of this appeal or for a new trial that the person interviewed should be named. If there is any materiality in names the materiality would be in respect of the names of the persons who could depose to the facts which it is necessary or desirable to prove. If the only point of inquiry in this Court were the reasonableness of the inquiries made before trial the Court would hold them to be reasonable, they having been carried out by the solicitor. The facts deposed to in the affidavit, if proved, would have a material bearing upon the matters litigated. The issues at the trial were whether the polished linoleum was an unusual danger of which the council knew or ought to have known, whether the council failed to protect or warn the respondent. On the issue of knowledge the evidence of Miss Karooz was all that was available. Evidence of similar injuries would be cogent evidence on this issue, and, coupled with that of Miss Karooz, might well be decisive.

H. J. H. Henchman in reply. It is a necessary factor for the names of the proposed witnesses to be revealed to afford the court dealing with the fresh evidence application an opportunity of deciding whether the evidence, if admitted, would be conclusive or have at least an important influence on the result. The practice in New South Wales is always to have affidavits from the proposed witnesses. (*Meredith* v. *Innes* (1)).

[TAYLOR J. Were these objections expressly taken before the Full Court ?]

No objection was taken to the form of the evidence as appearing in the affidavit. Further, it is more than doubtful whether the knowledge of the council was ever a real issue between the parties, it being put to the jury at the trial that the danger was not unusual. The question of knowledge in the council was not argued before the Full Court.

The following judgments were delivered :—

DIXON C.J. This is an appeal from an order of the Supreme Court of New South Wales granting a new trial. The court consisted of *Maxwell*, *Herron* and *Clancy* JJ. The new trial was granted upon the ground of the discovery of new evidence. The action is an action for damages for personal injuries caused by negligence

(1) (1930) 31 S.R. (N.S.W.) 104 ; 48 W.N. 5.

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and the defendant, who is the appellant here, is the Council of the City of Greater Wollongong. The defendant is sued as the occupier of the town hall. The plaintiff, the respondent here, is a lady who is a ratepayer of Greater Wollongong.

On 4th June 1952 she attended at the town hall to pay her son's rates. After paying the amount of the rates over the counter, she turned to go out through the passageway by which she had entered in the front. After taking a few paces, she slipped on the polished linoleum and fell. She was shaken, but apparently at the time she did not regard herself as seriously injured. However, some weeks later—possibly some months—in consequence of pains in her back which, among other things, made it difficult for her to sleep, she consulted a doctor and underwent some surgical processes and other treatment. The result according to medical evidence at the trial, was that she then suffered from what is called traumatic radiculitis.

The declaration contained one count. It alleged that the plaintiff was an invitee and that the council failed to take due care to make the premises reasonably safe and caused or permitted the floor covering to become dangerous and failed to provide any warning.

According to the plaintiff's evidence, as she fell, so she put it, she could not fail to be aware that the linoleum was very slippery.

At the time when the writ was issued the plaintiff's solicitor communicated with the council's town clerk and requested to allow him (the solicitor) to know whether the council would permit him to inspect the council's records concerning the incident and also the records of any other incidents of a similar nature in that portion of the council's premises. The solicitor says that he told the town clerk that he did not wish to inspect the reports of officers of the council to him or to the council itself, and if any particular records or documents were found to be relevant he would provide a list of them for the use, apparently, of both parties. He was referred by the town clerk to the chief city health inspector as the person in charge of the records dealing with incidents arising in the council chambers. He (the solicitor) made a request to that officer to know whether files were available in respect of the accident to his client or any other similar occurrences in that portion of the town hall. The city health inspector told him that the council had a file dealing with the incident referred to but that it consisted mainly of reports to superior officers or to the insurance body which insured the council against such risks, and he added that he was not aware of any other accident which had occurred in the building nor would

there be any records concerning it. The solicitor said he did not wish to see reports made to superior officers or the council's insurer and it was then suggested that he should see an employee, a lady named Miss Karooz.

He saw Miss Karooz and she gave evidence, first of all, that the floor was slippery. She said she had been in the council's employ for about thirteen months before the accident took place; that would be about from May 1951. She said the floor consisted of linoleum and it was the same linoleum that was there when she first arrived at the council. She described it as highly polished and slippery if you were not aware of the condition of the linoleum. She could not say how the linoleum was treated because the treatment took place after office hours. She did not know how often it was polished but it appeared to be well polished. Then she said, over an objection that was overruled, that she knew a number of people had slipped before 4th June when the plaintiff's accident took place; that some of them twisted their ankles, some had slipped and just steadied themselves against the wall and on one occasion a woman did fall and she did hurt herself seriously. There was no warning sign. In her cross-examination she said that there were some who fell to the floor but did not require assistance and that she would say she had seen about twelve slip in some way or other while she was at the inquiry desk, most of them women.

There was no evidence called for the defendant. The plaintiff, of course, gave her evidence, which, in the main, was devoted to her injuries.

In the course of the summing-up the learned judge put the issue to the jury, the substantial issue, as to whether the council had fulfilled the duty which he defined as a duty to take reasonable care to prevent the plaintiff from suffering from any unusual danger in relation to the premises, provided that the occupier (the council) knew of the existence of the unusual danger, or ought to have known of it. There was no objection taken to the summing-up at the trial. The jury found a verdict for the defendant.

From that verdict there was a motion for a new trial which, as expressed in the notice of appeal, was put on three grounds. The first was that the verdict was against the evidence and the weight of the evidence. That ground does not appear to have been pursued before the Supreme Court. The second was that fresh evidence was available to the plaintiff. That ground was relied upon and was the ground upon which the order for a new trial was made. The third was that his Honour was in error in directing the jury

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too narrowly as to the duty imposed by the law upon the defendant towards invitees. The third ground failed because no objection had been taken at the trial to the direction. It was not made the subject of any effective argument in the Full Court, or on appeal to this Court.

The whole matter came to depend upon the suggestion that there was fresh evidence. The fresh evidence relied upon related to previous incidents or accidents and to another incident subsequent to the accident to the plaintiff and also to subsequent precautions which were taken to make the floor safer.

The law which governs the grant of new trials on the ground of the discovery of fresh evidence is not in doubt. It has been discussed in this Court in different aspects recently on three occasions. We dealt with it at length in an aspect which affects this case in *Orr* v. *Holmes* (1). We also dealt with it in an aspect where it touches the issue of damages in *Commissioner for Government Tram & Omnibus Services* v. *Vickery* (2) and in a very unusual aspect as it governs the presentation of a false claim, we dealt with it in *McCann* v. *Parsons* (3).

If cases are put aside where a trial has miscarried through misdirection, misreception of evidence, wrongful rejection of evidence or other error and if cases of surprise, malpractice or fraud are put on one side, it is essential to give effect to the rule that the verdict, regularly obtained, must not be disturbed without some insistent demand of justice. The discovery of fresh evidence in such circumstances could rarely, if ever, be a ground for a new trial unless certain well-known conditions are fulfilled. It must be reasonably clear that if the evidence had been available at the first trial and had been adduced, an opposite result would have been produced or, if it is not reasonably clear that it would have been produced, it must have been so highly likely as to make it unreasonable to suppose the contrary. Again, reasonable diligence must have been exercised to procure the evidence which the defeated party failed to adduce at the first trial.

In *Orr* v. *Holmes* (4) there are collected a number of different expressions which have been judicially used at various times. Their result is then summed up in these words :—" No doubt some of the foregoing expressions are susceptible of a weaker application than others of them. But the evident purpose of all of them is to ensure that new trials will not be granted because of fresh evidence unless

(1) (1948) 76 C.L.R. 632.
(2) (1952) 85 C.L.R. 635.
(3) (1954) 93 C.L.R. 418.
(4) (1948) 76 C.L.R., at pp. 640-642.

it places such a different complexion upon the case that a reversal of the former result ought certainly to ensue. The fact which the new evidence tends to prove, if it does not itself form part of the issue, must be well nigh decisive of the state of facts upon which the issue depends. The evidence must be so persuasive of the existence of the fact it tends to prove that a finding to the contrary, if it had been given, would, upon the materials before the court, appear to have been improbable if not unreasonable " (1).

In the present case it is to be pointed out that no discovery was obtained before the trial. The facts which were put before the Supreme Court on the new trial motion contained no precise evidence of inquiries having been made before the trial which might reasonably be expected to disclose the evidence. An affidavit was filed which states what was done after the trial and what was discovered, and it is upon that that the Full Court acted. The solicitor for the plaintiff says that following the trial of the action he interviewed the plaintiff herself who subsequently gave him certain information as a result of which he interviewed an officer of the defendant council concerning the information he had received from the plaintiff and that he (the solicitor) made further inquiries.

It is to be noticed that that statement does not show when the plaintiff herself learned what he describes as " certain information " which she communicated to her solicitor subsequently. It does not state who the officer was, it does not state what the information precisely was nor does it state what the further inquiries were. However, the affidavit proceeds to say that, as a result of such inquiries, the solicitor verily believes that the following further evidence was available to the appellant, and then he sets out the substance of the facts which further evidence will prove.

The first is that a man named McLean, who was then said to be the chief clerk of the council, about seventeen months before the incident slipped on some polished linoleum and it was the same polished linoleum as that on which the plaintiff slipped ; he fell at a distance of approximately eight feet to ten feet from the spot at which she had slipped and fallen and his fall resulted in the fracture of his right hip. The affidavit says that there was a file in the council's office in existence at the time when the solicitor had an interview with the chief health inspector. It goes on to say that no file or record was in existence in the office of the council covering other incidents of a similar nature, but there were verbal reports by the same officer of health to his superior officer and to

(1) (1948) 76 C.L.R., at p. 642.

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the mayor. Then it proceeds to say that, after the accident to the plaintiff the officer of health instructed the cleaners to apply less polish to the linoleum but that another woman slipped within a short time after the accident about six feet away from the spot where the plaintiff had slipped, and that she had sustained injuries. It goes on to say that after that, but before the writ was issued, strips of rubber were laid down by the officer of health over the linoleum at the office.

It is upon that material that the new trial was granted. It will be seen from what I have stated that there is very little reason to suppose that such evidence would have proved as well-nigh conclusive as the rule requires. It covered much the same ground as the witness, Miss Karooz, had covered in her verbal evidence of other accidents; it added little more to what she said, except that a serious accident had taken place some seventeen months before which had been the subject of reports to the council. The affidavit, however, does not contain any allegation which would make it right to suppose that the officer of health was conscious of the existence of the file relating to that accident when he spoke to the solicitor and that he deliberately suppressed it. It leaves the issue simply that other evidence could have been given of the sort of thing that had already been admitted in evidence and Miss Karooz had deposed to. It does not go directly to the issue of whether the condition of the linoleum did involve an unusual danger, the condition of the linoleum as an objective fact having been made the subject of the plaintiff's own evidence and Miss Karooz' evidence, and it cannot, in the view we take, fulfil the standard as I have stated it which the law requires, before the discovery of fresh evidence can be made the ground of a new trial. Nor do we think that the requirement that reasonable diligence to discover fresh evidence has been fulfilled. The inquiries which were made to the town clerk were no doubt proper and they may have been normal, but to rely upon them alone is hardly enough to fulfil the requirement of due diligence when it afterwards turns out that further information was available. It is a question of fulfilling a strict standard which is required in the interests of the administration of justice. It does not appear that in the Full Court any very definite objection was taken to the form of the affidavit and it is possible that, if an objection had been made precisely and insisted upon, an adjournment might have been granted to enable the plaintiff to prove the facts properly and in accordance with the rule that should be followed, but it is impossible to fail to see that the affidavit

does not in any degree comply with the strict rule which the court ought to enforce before it takes the course of granting a new trial under the impression that the imperative dictates of justice demand it. In no respect could one be sure of exactly what witness could be called, exactly what that witness would be prepared to say or prove, or of what inquiries had been made before the trial, or what subsequent inquiries had resulted in the disclosure of the evidence.

As to the special facts relating to the precautions taken after the event, the Supreme Court appears not to have acted upon those statements, taking the view that such evidence would not be admissible. The observations I make would be equally applicable to the fresh evidence discovered as to these facts, had a different view been adopted as to their admissibility.

In the Supreme Court the judgment of their Honours contains a statement:—"In the present case the solicitor for the plaintiff took all the steps to be expected of him touching the knowledge of the defendant as to the state of the floor prior to the occasion of the plaintiff's accident." With respect, it is only possible, I think, to say that in our view a much stricter standard of due diligence should have been exacted and that that statement is not in accordance with the view that we have taken.

Their Honours say that, in their opinion, that which the council knew or ought to have known as to the state of the floor was clearly material and the evidence foreshadowed in the affidavit in support of the present application on its face was such as was most likely to be believed and, if believed, would be most likely to have a serious bearing on the result. With all respect, it appears to me that that language does not express the standard which is laid down in the authorities with respect to the cogency of the fresh evidence and the effect which it must be likely to produce. The fresh evidence must have a greater cogency before it can be said to be of such a character that its discovery demands a new trial. I speak upon the hypothesis that a verdict has been regularly obtained without any miscarriage at the trial and the application for the new trial is based wholly on the ground that the subsequent discovery of fresh evidence demands a second trial.

For these reasons I am of opinion that the appeal should be allowed, that the order of the Full Court should be discharged and the appeal to the Full Court dismissed. The orders must be made with costs.

WILLIAMS J. I agree and have nothing further to add.

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WEBB J. I agree.

KITTO J. I agree.

TAYLOR J. I agree.

Appeal allowed with costs. Order of Full Court of New South Wales discharged. In lieu thereof order that the motion for a new trial be dismissed with costs.

Solicitor for the appellant, *F. P. McRae*, Crown Solicitor for the State of New South Wales.

Solicitors for the respondent, *Henry Peedom & Chapman*, Wollongong, by *Bowman & Mackenzie*.

R. A. H.