HIGH COURT OF AUSTRALIA

GLEESON CJ
KIRBY, HAYNE, HEYDON AND CRENNAN JJ

OLIVIA FLOYD FERGUSSON BY HER
NEXT FRIEND LARA FLOYD APPELLANT

AND

KIM LATHAM RESPONDENT

Fergusson v Latham
[2008] HCA 24
20 May 2008
S47/2008

ORDER

1. Special leave to appeal revoked.

2. Appellant to pay the respondent's costs.

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with R I Goodridge for the appellant (instructed by Firths The Compensation Lawyers)

R V Letherbarrow SC with C J Allan for the respondent (instructed by Sparke Helmore Lawyers)

CATCHWORDS

Fergusson v Latham

Negligence – Causation – Pedestrian struck by motor vehicle – Possibility of a differential chance of injuries – Possibility not raised in argument in the courts below.

Motor Accidents Compensation Act 1999 (NSW), s 83.

1 GLEESON CJ. In this matter I will ask Justice Hayne to deliver the first judgment.

2 HAYNE J. The appellant contends that the Court of Appeal erred in its conclusion that the failure of the driver of the vehicle which struck the infant plaintiff, and caused her catastrophic injuries, "was not causative of [her] injuries"[1]. The error alleged is that the Court of Appeal did not consider the possibility that, had the driver been keeping a proper look out, the collision would still have occurred, but the injuries sustained by the plaintiff would have been less serious.

3 The appellant accepts that the point which is now advanced was not raised at first instance or in the Court of Appeal. It was sought to support the point in this Court by reference to s 83 of the *Motor Accidents Compensation Act* 1999 (NSW). These arguments were not advanced in the courts below. They are not arguments that meet the difficulty that is presented by not having raised at an earlier stage of these proceedings any question about the possibility of different or lesser injuries if the driver had kept a proper look out.

4 Having now had an opportunity to consider the appellant's arguments in more detail than was possible at the time of the grant of special leave, I am persuaded that, given the way in which the proceedings were conducted, there is no reason to doubt the correctness of the conclusions reached in the Court of Appeal.

5 There was no attempt in this Court to argue that the approach and order of the primary judge should be restored and any such approach would be outside the sole ground upon which special leave was granted to the appellant.

6 Further, in her written argument, the respondent, responding to the appellant's submissions, made it clear that she relied on the principles governing procedural fairness in appellate decision-making stated by this Court in decisions such as *Coulton v Holcombe*[2] and *University of Wollongong v Metwally [No 2]*[3]. It was not suggested that the appellant, either at trial or in the Court of Appeal, had presented evidence or advanced submissions on a differential chance of injuries to the appellant that might have occurred if the respondent had acted more quickly to anticipate the danger that was presented.

7 In all these circumstances, I would revoke special leave.

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1 *Latham v Fergusson* (2006) 46 MVR 412 at 423 [61].

2 (1986) 162 CLR 1 at 7; [1986] HCA 33.

3 (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71; [1985] HCA 28.

8 GLEESON CJ. I agree.

KIRBY J. I also agree.

HEYDON J. I agree.

11 CRENNAN J. I agree.