HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HEYDON, CRENNAN AND BELL JJ

LITHGOW CITY COUNCIL APPELLANT

AND

CRAIG WILLIAM JACKSON RESPONDENT

Lithgow City Council v Jackson [2011] HCA 36
28 September 2011
S66/2011

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of New South Wales dated 11 June 2010 and in its place order that:*

   (a) *the appeal to that Court be dismissed with costs, including costs of and incidental to the first appeal to that Court (40614 of 2007); and*

   (b) *the respondent, Craig William Jackson, pay the costs of the appellant, Lithgow City Council, of the special leave application to the High Court of Australia in the matter S569/2008.*

3. *The respondent pay the appellant's costs in this Court.*

On appeal from the Supreme Court of New South Wales

Representation

S R Donaldson SC with S E McCarthy for the appellant (instructed by DLA Piper Australia)

A S Morrison SC with D W Elliott for the respondent (instructed by Gerard Malouf & Partners)

CATCHWORDS

Lithgow City Council v Jackson

Evidence – Admissibility – Opinion evidence – Section 78 of *Evidence Act* 1995 (NSW) ("Act") provided that rule excluding evidence of opinion does not apply where "opinion is based on what the person saw, heard or otherwise perceived about a matter or event" and evidence "is necessary to obtain an adequate account or understanding of the person's perception of the matter or event" – Respondent found unconscious and injured in drain – Respondent conceded appellant only liable if respondent fell from vertical retaining wall – Ambulance record contained representation "? Fall from 1.5 metres onto concrete" – Whether representation was admissible under s 78 of Act as opinion that respondent fell from vertical retaining wall.

Evidence – Admissibility – Hearsay evidence – Business records exception under s 69 of Act – Representation was hearsay evidence in business record – Whether representation must also comply with s 78.

Negligence – Causation – Whether circumstantial inferences sufficient to establish causation.

Evidence Act 1995 (NSW), ss 69, 78.

1 FRENCH CJ, HEYDON AND BELL JJ. This is an appeal from the second of two decisions of the Court of Appeal of the Supreme Court of New South Wales. It raises two groups of difficult issues in relation to the law of evidence. The first concerns the reception of lay opinion evidence in business records. The second concerns the use of circumstantial inference to establish causation.

The facts in outline

2 On 18 July 2002, the respondent, Craig William Jackson, was living at 7 Andrew Street, Lithgow with Naomi Spurling. He was 26 years old.

3 At about 3.30am on 18 July 2002, the respondent left home after an argument with Naomi Spurling. The trial judge found, after analysing conflicting evidence, that the respondent was "at least moderately intoxicated." He was accompanied by his two dogs, found by the trial judge to be "large" and "fierce".

4 Not far from the respondent's home to the southeast was an area of parkland called Endeavour Park. Endeavour Park was bounded by the Great Western Highway and Amiens Street. The park sloped generally downward from the Great Western Highway to Amiens Street in a roughly east-west direction. There was a large, shallow concrete drain which ran in the same east-west downhill direction at the Amiens Street end of the park. At the western end the drain had a vertical face topped by a small retaining wall projecting at different points between 90 and 280mm from the grass, partially concealed by foliage. The distance from the top to the bottom of the vertical face was 1.41m. In contrast, the northern and southern sides were not vertical but sloped down, although the distance from top to bottom was approximately the same.

5 Shortly before 6.57am the respondent was found lying badly injured in the drain. There was a pool of dried blood and urine 2.69m from the vertical face. Two dog leads were found near the respondent. The two dogs, with the fidelity which is proverbially attributed to those creatures, were at their master's side, and indeed their ferocious expressions of loyalty hampered attempts to give him aid.

6 The plaintiff's case as opened at the trial and as presented in the appeal to this Court was that he fell by tripping from the small retaining wall at the top of the western vertical face of the drain, not from one of the sides. The respondent concedes that if he failed to establish that, his entire case would fail. It is not now in dispute that the respondent's injuries were caused by falling either from one of the sides or from the western vertical face of the drain. Other possibilities ventilated at the trial, such as an attack by another person, were not pressed in this Court.

7 The respondent's injuries deprived him of recollection of how he came to be injured. This creates a serious obstacle in his path. A further obstacle in his path is created by the absence of any other evidence on that subject, apart from that already indicated, save a statement in a record of the Ambulance Service of New South Wales made by an ambulance officer or officers summoned to assist the respondent. The statement, which appeared among various representations on a different subject, namely the respondent's injuries, was: "? Fall from 1.5 metres onto concrete" ("the impugned representation"). The respondent contends that the impugned representation establishes that he fell from the vertical face of the drain.

The trial judge

8 At the trial the District Court of New South Wales (Ainslie-Wallace DCJ) found that the appellant owed the respondent a duty of care. She found that the appellant was in breach of it in having failed to take steps to avoid the risk of injury, such as erecting a fence above the western vertical face. She found that the risk posed by the small wall at the top of the western vertical face of the drain would have been obvious to any person taking care for his or her safety while walking towards it through Endeavour Park in daylight. But she found that the risk was not obvious at night because the wall and drain were not readily apparent at night. She found that a sober person walking through Endeavour Park at night and taking reasonable care for his or her own safety would not have seen the wall and recognised that it represented a drop on the other side. These findings are not now controversial. What is controversial is her finding that the respondent had not established whether his injuries were caused by the appellant'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 at the top of the northern vertical face and losing his balance[1]. She also found that there was no evidence which would permit a finding that the respondent fell into the drain in darkness rather than in daylight. This latter finding was subjected to damaging criticism in both decisions of the Court of Appeal and was not supported by the appellant in this Court.

9 The trial judge did not refer to the impugned representation. That is probably because she had ruled, after admitting into evidence (without objection)

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1 The theory that the respondent lost his balance while standing at the top of the western vertical face was not supported in this Court. It is difficult to reconcile with the location of the pool of bodily fluids 2.69m away from the vertical face, as Basten JA pointed out in the second Court of Appeal judgment.

the records of the Ambulance Service in which it appeared, that the impugned representation not be used as evidence of the truth of its contents[2]. Since there was no relevant use of the impugned representation other than as evidence of the truth of its contents, the trial judge's ruling amounted to a rejection of it.

The legislative provisions

10 To understand the course of the proceedings thereafter it is necessary to bear in mind some relevant provisions of the *Evidence Act* 1995 (NSW) ("the Act"). Section 55(1) provides:

> "The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding."

Section 56(1) provides:

> "Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding."

Section 76(1) provides:

> "Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed."

Thus s 76(1) creates an exclusionary rule and s 78 creates an exception to it. Section 78 provides:

> "The opinion rule does not apply to evidence of an opinion expressed by a person if:
>
> (a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event, and

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2 The applicant's application had in fact been for an order under s 136 of the *Evidence Act* 1995 (NSW) which provides:

> "The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:
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> (a) be unfairly prejudicial to a party, or
>
> (b) be misleading or confusing."

(b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event."

Section 79 creates another exception for expert opinion evidence. Its details are immaterial since it was not submitted that the ambulance officers were experts. The word "opinion" is not defined in the Act. It is commonly taken to mean (and the parties accepted this definition as sufficient for present purposes) "an inference from observed and communicable data"[3]. Basten JA challenged the utility in that definition of the words "and communicable", but nothing was made of this in argument in this Court.

The first Court of Appeal decision

11 The respondent appealed to the Court of Appeal. The amended notice of appeal made no specific complaint about the trial judge's failure to refer to the impugned representation. However, in the course of submissions the Court of Appeal (Allsop P, Basten JA and Grove J) concentrated on the impugned representation. They saw the impugned representation as "crucial"[4]. They read it as an opinion, admissible under s 78 of the Act, that the respondent had fallen over the wall above the western vertical face[5]. They found that the evidence apart from the impugned representation would not have established that the accident happened in the way for which the respondent contended. But they found that when it was taken with the impugned representation it did.

The first decision of this Court

12 The appellant sought special leave to appeal to this Court. It emerged that the Court of Appeal had assumed that there was no question mark at the start of the impugned representation. The Court of Appeal had been misled into that assumption because the appeal books which the parties had prepared for the appeal to that Court had been defective in truncating the question mark. This Court granted special leave, allowed the appeal and remitted the matter for further hearing in the light of the accurate trial record.

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3 *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 5)* (1996) 64 FCR 73 at 75. See also *Guide Dog Owners' & Friends' Association Inc v Guide Dog Association of New South Wales & ACT* (1998) 154 ALR 527 at 532.

4 *Jackson v Lithgow City Council* (2008) Aust Torts Reports ¶81-981 at 62,465 [34].

5 *Jackson v Lithgow City Council* (2008) Aust Torts Reports ¶81-981 at 62,465-62,468 [34]-[56].

The second Court of Appeal decision

13 In the second Court of Appeal decision, Allsop P and Grove J, after construing the impugned representation as a "less positive" but admissible opinion, adhered to their original conclusion that the respondent had proved causation[6]. Basten JA agreed on the admissibility question for somewhat different reasons[7]. He also held that even without the impugned representation the evidence established a conclusion of causation but that the impugned representation confirmed that conclusion[8].

The issues in this Court

14 By that unusual route two issues are presented in this Court. The first is whether the Court of Appeal in its second decision was correct to hold that the impugned representation was admissible. The second is whether, even if it were incorrect, the conclusion that causation is established can be supported, as Basten JA held, by other evidence. Although the parties did not approach the matter in this way, there is also potentially a third issue: even if the impugned representation is admissible, does it, taken with other evidence, establish causation? That is a potential issue because, even if the impugned representation is admissible, its probative value is highly questionable for reasons which will be seen below. But since both of the first two questions should be answered in the negative for reasons stated below, the third question does not arise.

The context of the impugned representation

15 The document recording the impugned representation was a "Patient Healthcare Record". It was a form divided into various parts. In the part headed "Chief Complaint" appeared the following words, as transcribed by Allsop P:

> "Decreased level of consciousness
>
> OE pt responding to painful stimuli, haematoma
>
> To RI abrasions to face & haemorrhage
>
> [Indistinct] nose. Extremities cold to touch, trunk [indistinct]

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6 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [20]-[36].

7 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [51]-[76].

8 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [77]-[106].

Pt combative throughout [Rx or Pt] incontinent of urine."

In the part headed "Patient History" appeared the words:

"Found by bystanders — parkland

? Fall from 1.5 metres onto concrete

No other Hx".

"Hx" means "history".

16 The document was signed by two persons, J Goodwin (described as driving) and M Penney (described as officer treating). Neither gave evidence at the trial. There was no evidence as to their health or whereabouts at the time of the trial or as to their capacity to give evidence at the trial. There was no evidence about whether the impugned representation was made by both, or by only one, and if so, which. However, below it will be assumed that it was made by both. Nor was there evidence about whether the impugned representation was based on something the makers of the statement had been told, or on a matter from which the makers drew an inference, and, if so, what that matter was. The Court of Appeal, however, took the view that there was no reason to infer that the impugned representation was a conclusion from what bystanders had said. In their opinion it was a conclusion from what the ambulance officers could perceive.

The problem of admissibility under s 69

17 The onus of demonstrating the conditions of admissibility of evidence under the Act lies on the tendering party. In the present case the respondent had to demonstrate that the impugned representation fell within the exclusion created by s 78 from the inadmissibility generally applying to opinions by reason of s 76(1). But the impugned representation was also hearsay. The "hearsay rule" is defined in the Dictionary as meaning s 59(1). Section 59(1) provides:

> "Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation."

Section 59(2) provides: "Such a fact is in this Part [Pt 3.2] referred to as an *asserted fact*" (emphasis in original). But s 69 creates an exception to the hearsay rule in relation to business records. The parties did not dispute the proposition that the "Patient Healthcare Record" in which the impugned representation appeared was a business record for the purposes of s 69. But s 69 does not render business records as such admissible. It concerns representations

in a document which is or forms part of a business record within the meaning of s 69(1). The representations are admissible if s 69(2) is satisfied. Section 69(2) provides:

> "The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:
>
> (a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact, or
>
> (b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact."

What is the "asserted fact"? If the "asserted fact" is "the respondent fell 1.5 metres onto concrete", at once a difficulty arises which was not debated by the parties. Section 69(2)(a) cannot apply, because the makers of the representation, the ambulance officers, did not have personal knowledge of a fall of 1.5m onto concrete, and could not reasonably be supposed to have had it, since the fall had happened some time before they arrived. And s 69(2)(b) cannot apply, because even if it were the case that the ambulance officers were told by bystanders that the respondent fell in that fashion, the bystanders did not have personal knowledge of the fall, and could not reasonably be supposed to have had it: again, the fall took place before the bystanders arrived. The problem may be reduced by the approach adopted by the majority of the Court of Appeal: they saw the impugned representation as a representation that there was a question whether the respondent had fallen 1.5m onto concrete. And the problem may be completely overcome if "asserted fact" in s 69 includes an opinion in relation to a matter of fact. There is authority that it does[9]. But the construction of "asserted fact" to include an opinion in relation to a matter of fact, though convenient, is a little strained. In one sense every person who holds an opinion has personal knowledge of it, and indeed is the only person to have personal knowledge of that person's opinion. But to hold an opinion that the respondent fell in a certain way (or that there is a question about it) is different from having personal knowledge that he fell in that way (or that there is a question about it): that personal knowledge could normally only be derived from seeing or perhaps hearing the event, not by drawing inferences from other circumstances observed some time later. However, it was not argued in this Court that the authorities

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9 *Ringrow Pty Ltd v BP Australia Ltd* (2003) 130 FCR 569 at 573 [18]; *Australian Securities and Investments Commission v Rich* (2005) 216 ALR 320 at 366-367 [206]-[207]. See also *Connex Group Australia Pty Ltd v Butt* [2004] NSWSC 379 at [3] (document admissible under hearsay exception created by s 64(3) of the Act).

which state that "asserted fact" includes an opinion in relation to a matter of fact are wrong. It is not necessary further to deal with this point, which the parties did not debate at any stage. That is because, even if it is assumed that the s 69 difficulty does not exist, the evidence must be held inadmissible on other grounds.

Must a statement of lay opinion in a business record comply with s 78?

18 There is another question not debated in the courts below. It was, however, adverted to by Basten JA in the second Court of Appeal decision and briefly debated by the parties in this Court. The question is whether a statement of opinion in a business record has to comply with ss 76-79. There is authority that it does not have to, ie that ss 76-79 apply only to evidence of opinions given by witnesses in court[10]. If not, and subject to the s 69 problem just discussed, the impugned representation was admissible. However, Basten JA doubted the "statutory basis" for the conclusion that ss 76-79 apply only to evidence of opinions given by witnesses in court.

19 There are strong textual reasons supporting Basten JA's doubts and indicating that the conclusion is not merely to be doubted, but is wrong. Section 69 is in Pt 3.2 of the Act. Sections 76-79 are in Pt 3.3. Section 56(1)[11] contemplates that relevant, ie otherwise admissible, evidence may be excluded by more than one exclusionary rule in Pts 3.2-3.11. One exclusionary rule is the hearsay rule. If evidence satisfies s 69, then by s 69(2) the hearsay rule does not apply. But s 69(2) does not provide that the evidence is admissible. It is only admissible if no other exclusionary rule applies. Section 76 excludes "[e]vidence of an opinion" – not "evidence *by a witness* of an opinion". There is no indication in any other provision in Pt 3.3 that it operates only in relation to the opinions of witnesses.

20 The respondent resisted the conclusion that ss 76-79 applied to hearsay evidence to which the hearsay rule does not apply, such as business records, by relying on two groups of arguments.

21 The first turned on the difficulties of complying with ss 78 and 79. The respondent had in mind that, while these difficulties can be met where evidence

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10 *Australian Securities and Investments Commission v Rich* (2005) 216 ALR 320 at 367-369 [208]-[218]; leave to appeal refused in *Rich v Australian Securities and Investments Commission* (2005) 54 ACSR 365 at 367 [17].

11 See above at [10].

is received through witnesses by careful preparation and by the precise formulation of questions, they cannot be met in relation to hearsay representations like those in a business record. That is because the makers of hearsay representations do not contemplate the need to comply with the rules regarding the mode of expression of opinion evidence in future litigation. Any deficiencies in hearsay representations, unlike those in testimony, are immutable and incapable of correction. The answer to this submission is that the evils of opinion evidence which have resulted in its prohibition by s 76(1) unless there is compliance with the specific requirements of ss 77-79 are just as great when the evidence appears in hearsay representations as when it is given through witness testimony. If opinion evidence which was inadmissible when elicited through questions to a witness were admissible if it appeared in a hearsay representation, a bizarre premium would be placed on calling hearsay evidence in preference to direct evidence. If there are inconveniences, they are necessary inconveniences, and they are not so acute as to compel a construction to the contrary of what the clear words suggest.

22 The second group of arguments advanced by the respondent turned on s 60 in its form at the time of the trial. It provided:

> "The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation."[12]

The respondent submitted that this provision would be inconsistent with the application of s 78 to business records, but it did not explain why, and its reference to the Australian Law Reform Commission[13] did not explain why

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12 Section 60 now provides:

> "(1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.
>
> (2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of subsection 62(2)).
>
> (3) However, this section does not apply in a criminal proceeding to evidence of an admission."

13 Australia, The Law Reform Commission, *Evidence*, Report No 38, (1987) at 79-80 [144].

either. Section 60 in its old form provided in effect that hearsay evidence admitted for one *non-testimonial* purpose may be used for a *testimonial* purpose despite its hearsay character. The submission begged the question of whether the evidence had been or could be admitted for a non-testimonial purpose: the reception of the evidence under s 69 meant only that the hearsay rule did not apply to it, not that it was admissible for a non-testimonial purpose.

The appellant's submissions on admissibility in outline

23 The appellant put four submissions on admissibility. First, the impugned representation was irrelevant. Secondly, it did not express an opinion. Thirdly, even if it did express an opinion, it was not an opinion satisfying the condition stated in s 78(a). Fourthly, that even if it were an opinion satisfying the condition stated in s 78(a), it did not satisfy the condition stated in s 78(b).

24 At the outset it should be said that s 78 conceals so many problems that it is desirable to concentrate closely on the issues which the parties wished to raise, lest other difficulties be prejudged without proper argument.

Was the impugned representation relevant?

25 The appellant's first submission was that even if the impugned representation satisfied s 78, it was inadmissible because it was so ambiguous as to be irrelevant. The point of the submission was that the statement does not say "? Fall from vertical head wall". A fall from top to bottom of the vertical face was a fall of nearly 1.5m (ie 1.41m), and perhaps as much as 1.9m if the respondent's head struck an indentation out from the wall. Whatever the actual extent of the fall, the impugned representation referred to a fall of 1.5m onto concrete. It does not say where the fall took place. A fall from one of the non-vertical sides meant a vertical fall of the same distance as a fall from the vertical face, albeit one which might have been potentially less injurious because the non-vertical sides might arrest its velocity. An opinion that there had been a fall of 1.5m from one of the non-vertical sides would be relevant within the meaning of s 55(1) because it could rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding: its relevance would lie in negating the respondent's case that he fell from the vertical head wall, not one of the sides. An opinion that there had been a fall of 1.5m from the vertical head wall would be relevant for the opposite reason: it would support the respondent's case. But the appellant submitted in effect that the statement was so ambiguous that it had no probative value: it supported neither the theory of a fall from the vertical head wall nor the theory of a fall from one of the sides, and for that reason did not satisfy s 55(1).

26 The appellant's submission as to relevance should be accepted on the basis that the impugned representation was so ambiguous that it could not rationally affect the assessment of the probability of a fall from the vertical head wall. Assuming, contrary to that conclusion, that the impugned representation was relevant, the question then arises: What kind of statement was it? Was it, as the Court of Appeal found, an opinion, admissible by operation of s 78 as an exception to the opinion rule in s 76?

Was the impugned representation an "opinion"?

27 *The respondent's submission.* The respondent submitted that the impugned representation was an opinion because it was an inference from observed and communicable data. The data observed by the ambulance officers were the respondent's injuries and physical condition, his position in relation to the vertical wall and the pool of dried fluids and the scene generally.

28 *The respondent's submission rejected.* The respondent's submission must be rejected. What the ambulance officers did observe and could have observed could have caused them to draw an inference from the observations. But the present question is whether they actually did do so, not whether they could have. The question turns on the form of what they said in the context in which they were speaking. That is because what it means to raise a query about something can vary with the context. "I query whether that is so" can mean "That is probably so, though I am not sure" or "That may well be so, though I am not sure". But it can also mean: "I raise a question about whether it is so", or "I speculate whether it is so", or "I raise the possibility that it is not so", or "I doubt that that is so". It can even mean "I deny that that is so".

29 The appellant submitted that the impugned representation did not state an inference that the respondent had fallen 1.5m onto concrete. It did no more than raise a question whether he had, or speculate whether he had, or raise as a possibility that he had.

30 The respondent's submission depends on the idea that the ambulance officers drew an inference from observed data. What data did they observe?

31 The Court of Appeal in its first judgment said that "the most important piece of information which could throw light on what had happened was the position of the [respondent's] body"[14]. And it also said: "Critical is understanding the place of the body, its configuration and its relationship to the

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14 *Jackson v Lithgow City Council* (2008) Aust Torts Reports ¶81-981 at 62,466 [37].

surrounding structures."[15] The impugned representation revealed these things indirectly, in the Court of Appeal's opinion, because the makers of it saw the position and the configuration, and for the Court of Appeal that indirect revelation was the significance of the impugned representation.

32 The force or otherwise of this reasoning depends on the answers to two questions. Where was the respondent when seen by the passers-by and the ambulance officers? Was that his position earlier, when he fell? Even on the Court of Appeal's view, the ambulance officers' records said nothing about the position of the respondent's body and its relationship with the wall and the drain. And there was no other evidence of where he was lying when he was found. It cannot even be concluded that the position which the respondent was in just after his fall was the same as his position, whatever it was, when help came.

33 Despite that lack of evidence, the Court of Appeal in its first decision made two findings about the data observed by the ambulance officers. The first was that the impugned representation was made by the ambulance officers "having the inert unconscious body in front of them and they having the advantage of being able to assess the position of the body and its relationship with the wall and the drain."[16] The second finding was that the impugned representation was "some evidence of a position of the body consistent with a view" that the respondent fell from the vertical wall[17].

34 The first finding was supported by a hospital record made after the respondent had been taken to Nepean Hospital stating that he was found "unconscious". But the hospital record reflects a chain, perhaps a long chain, of hearsay, and contains errors. The first finding did not in fact long survive. It was withdrawn in the second decision because of a lack of support for it either in the impugned representation or in other parts of the ambulance officers' records. In the second decision, Allsop P and Grove J accepted that the evidence "was not sufficient to conclude that the ambulance officers saw a still, prone and unconscious body"[18]. The ambulance officers' records identified a "[d]ecreased level of consciousness", but that did not lead to the conclusion that the

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15 *Jackson v Lithgow City Council* (2008) Aust Torts Reports ¶81-981 at 62,468 [56]. See also at 62,467 [45] and [47].

16 *Jackson v Lithgow City Council* (2008) Aust Torts Reports ¶81-981 at 62,467 [45].

17 *Jackson v Lithgow City Council* (2008) Aust Torts Reports ¶81-981 at 62,467 [47].

18 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [20].

ambulance officers came upon the respondent "unconscious and prone"[19]. And although the ambulance officers may have been able to "assess" the position of the respondent's body, there is no evidence that they did so.

35 The second finding assumes, without proof, that the respondent had not moved in any respect between the moment he fell and the time when the ambulance officers saw him. It is also invalidated by the withdrawal of the first finding. The ambulance officers' records recorded the respondent as being "combative"; and while this may only have been because painful stimuli were being administered, it is not open to find that he was incapable of changing his position. That meant that the respondent did not establish that his body position had not changed between when he fell and when the ambulance officers saw him. The respondent appeared to rely on Glasgow Coma Scale readings which were described as "low", but without expert medical opinion as to the likely consequence that those readings had on the respondent's capacity for physical movement after the accident, the evidence has no probative value. The respondent also contended that the fact that while his extremities were cold his trunk was warm, indicating an absence of circulation and therefore movement, is a matter from which no conclusion could be drawn without expert medical opinion evidence. Indeed the Court of Appeal rightly rejected the latter submission in its first decision.

36 In short, the material preceding the impugned representation recorded what apparently were personal observations by the makers of the statement. But that material said nothing about what could be observed of the precise location of the respondent in relation to the physical features of the location. And it said nothing about what the makers of the statement actually observed in those respects.

37 *Opinion that there was a question.* The appellant drew attention to the fact that, in the second Court of Appeal decision, Allsop P (Grove J agreeing) found that the Ambulance Service statement was "an opinion, in the sense of an inference drawn, that there was a question whether [the respondent] had fallen the 1.5 metres onto concrete."[20] They also said that the facts observed by the makers "caused them or one of them to raise the question whether he did not fall from the 1.5 metre wall. It did not cause the maker to posit any other possible cause."[21] But, the appellant submitted, to characterise the impugned

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19 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [18].

20 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [19].

21 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [19].

representation as an opinion that there was a question whether there had been a 1.5m fall was to render it inadmissible. In the circumstances of some cases a statement that a question existed might be an "opinion" within the meaning of s 76. But in the circumstances of this case anything less than a statement that on the balance of probabilities there had been a fall would be outside s 76. An inference that the accident happened in a particular way would be an opinion. An inference that there was a question whether it happened in a particular way would not.

38 With respect, it is necessary to reject both the appellant's submission and the Court of Appeal's finding. The impugned representation cannot be said to have stated an "opinion" even in the Court of Appeal's sense. The ambulance officers' records are so shrouded in obscurity about what data they observed and suggest so great an unlikelihood that that data could support, or were seen as pointing to, any definitive inference that it is not possible to find on the balance of probabilities what the impugned representation was stating. It is therefore not possible positively to find that it stated an opinion.

Is s 78(a) satisfied?

39 On the other hand, if it is assumed that the impugned representation did express an opinion, and a relevant one, the next question is whether s 78(a) is satisfied. Section 78(a) goes to questions of form. It must be possible to extract from the form of what the person stating the opinion said, construed in context, that the opinion is about a "matter or event", and that it is "based" on what the person stating the opinion "saw, heard or otherwise perceived" about that matter or event.

40 *What matter or event?* The appellant submitted that the only matter or event about which the opinion was expressed was the respondent's fall which caused his injuries. The opinion expressed a question about that fall. That was the point of the respondent tendering it. In contrast, in the second Court of Appeal decision Allsop P (Grove J concurring) considered that the "matter or event" was everything to be perceived about the respondent at the scene – "his state of reduced consciousness, his injuries, his position, the position of blood and urine and the surrounding structures."[22] If the Court of Appeal's approach were correct, however, s 78(a) would not be satisfied. While the matters to which the Court of Appeal referred go to an opinion about the extent of the respondent's injuries, the impugned representation was not stating an opinion on that subject, only about their cause. On that approach, s 78(a) would not be

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22 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [20].

available because the position would be analogous to that considered by the New South Wales Court of Criminal Appeal in *R v Howard* when it held inadmissible evidence of a witness who had viewed some cannabis and estimated the period since it had been harvested. Hunt AJA, Grove and James JJ said[23]:

> "The only matter or event was the viewing and identification of the cannabis. The opinion evidence was an assertion of something said to have happened beforehand (harvest) and specifying the time which must have elapsed between the harvest and the viewing, a progression which [the witness] did not purport to see, hear, or otherwise perceive."

41 *Is it necessary for the holder of the opinion to have witnessed the matter or event?* In fact the appellant's submission is correct: the opinion stated a question about the "matter or event" of the fall. It then submitted that since the persons who stated the opinion did not see, hear or otherwise perceive anything about the fall, their "opinion" could not have been based on it, and hence it is outside s 78(a). The appellant submitted that s 78 only applies to opinions given by those who actually witnessed the event about which the opinion is given. That submission, although it was contested by the respondent, is also correct.

42 *Authorities on witnessing matter or event.* The appellant referred to two authorities. In *Smith v The Queen*[24] Kirby J dealt with the opinion of two police officers who had not witnessed a robbery that the accused was one of the robbers. He said that it did not satisfy s 78(a) because it was only based on their examination of security photographs recording the robbery: it was not based on what they "saw, heard or otherwise perceived about a matter or event". It was not necessary for other members of the Court to deal with this point. In the other case, *Angel v Hawkesbury City Council*[25], the Court of Appeal of the Supreme Court of New South Wales (Beazley and Tobias JJA, Spigelman CJ concurring) held that a conclusion about the "deceiving" nature of a defective slab in a footpath was within s 78(a), because it was based on what a witness had seen at the scene of the accident moments after it had occurred. The case is distinguishable from *Smith v The Queen*, but the Court's reasoning is not inconsistent with that of Kirby J. In the language of s 78, the Court described the "matter" to which the witness's "perception" related as "the effect on the visibility of the defective slab of the shadow over it at the time."[26] The witness perceived

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23 *R v Howard* (2005) 152 A Crim R 7 at 14 [29].

24 (2001) 206 CLR 650 at 669-670 [60]; [2001] HCA 50.

25 (2008) Aust Torts Reports ¶81-955 at 61,756-61,758 [51]-[56].

26 (2008) Aust Torts Reports ¶81-955 at 61,757 [54].

that personally. In contrast, here the "matter" was the respondent's fall, which the ambulance officers had not perceived personally.

43 *Ordinary meaning of "perceived".* The approach of Kirby J corresponds with one of the ordinary meanings of "perceive" – to observe by one of the five senses of sight, hearing, smell, taste or touch. That is the first of the two meanings which the *Macquarie Dictionary* gives for "perceive"[27]:

> "1. to gain knowledge of through one of the senses; discover by seeing, hearing, etc. 2. to apprehend with the mind; understand".

It is also the third meaning of "perceive" given by the *Oxford English Dictionary*[28]:

> "To apprehend (an external object) through one of the senses (esp sight); to become aware of by sight, hearing, or other sense; to observe; 'to discover by some sensible effects'".

The view that "perceived" is used in s 78(a) in the first *Macquarie* and the third *Oxford* meanings is supported by the use of the words "saw, heard or otherwise" before "perceived". Kirby J's approach is also supported by the fact that the expression "saw, heard or otherwise perceived" appears in s 69(5), as part of a definition of "personal knowledge of a fact": the meaning there plainly corresponds with the first *Macquarie* and the third *Oxford* meanings. For what it is worth, that construction of s 78(a) appears to correspond with the intention of

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27 Federation edition, (2001), vol 2 at 1417. In *Connex Group Australia Pty Ltd v Butt* [2004] NSWSC 379 at [21]-[27] White J held admissible a lay opinion in a document admitted under s 64(3) giving the effect of a telephone conversation as distinct from its precise words. In the course of doing so he said of the person who expressed the opinion: "I include in his perception of the conversation his understanding of it. A person's perception includes what the person understands about the matter perceived of which he or she has gained knowledge through the senses." He then cited the first *Macquarie* meaning. He criticised other authorities for adopting an unduly narrow approach to s 78. It is not necessary to decide in this appeal whether that criticism is correct, and whether an "understanding" is always within "perception"; it suffices to say that the quoted passage is limited to conversations, and does not seem wrong when so limited.

28 2nd ed (1989), vol XI at 520.

the Australian Law Reform Commission, which spoke of "the witness' personal perception of a matter or event" and frequently used words to that effect[29].

44 *Respondent's construction.* The respondent rejected the construction of s 78(a) propounded by the appellant on the ground that to limit s 78 "to those witnesses who actually saw the fall renders the section otiose, because such evidence would be direct evidence." He submitted that on the appellant's construction s 78 "would have no function whatever because it would leave no room for inferences and mean that opinions in relation to observations or perceptions after the event could not be put in." The respondent submitted that s 78 "clearly envisages not just what has been observed in relation to a particular event, but the opinions in relation to the surrounding circumstances. The words in [s] 78(a) 'or otherwise perceived' clearly intended that." That does not follow. The respondent's submission as a whole must fail. Section 78 would have a function even on the appellant's construction. It would have the same broad function as the corresponding common law rule.

45 *Function of common law rule.* The common law permitted the reception of non-expert opinion evidence where it was very difficult for witnesses to convey what they had perceived about an event or condition without using rolled-up summaries of lay opinion – impressions or inferences – either in lieu of or in addition to whatever evidence of specific matters of primary fact they could give about that event or condition. The usual examples are age, sobriety, speed, time, distance, weather, handwriting, identity, bodily health and emotional state, but a thorough search would uncover very many more[30]. The problems which arise in examples falling into this category would have been reduced, though not completely solved, if, at the time of the observation, the observer had foreseen that one day he or she would be questioned by a police detective or a barrister, for then the observer might have made some conscious contemporaneous attempt to sort out the primacy facts so as to facilitate their future recollection and expression. But in many cases, to endeavour to describe the primary facts underlying the inference may be ineffective or misleading without stating the inference. The reason why it is very difficult for the observer is that it is almost impossible to separate the inferences from the primary facts on which they are

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29 Australia, The Law Reform Commission, *Evidence*, Report No 26, (1985), vol 1 at 410-411 [739]-[740]. For the use to be made of the report, see *Dasreef Pty Ltd v Hawchar* (2011) 85 ALJR 694 at 721-722 [106]-[107]; 277 ALR 611 at 643-644; [2011] HCA 21.

30 See, for example, Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1978), vol 7 at 44-204, §§1933-1978.

based, and often very difficult to identify and recollect the primary facts themselves.

46 There is controversy about whether s 78 is precisely identical with the common law[31]. But it is clear that s 78 is dealing with the same problem as the common law did in instances within the category just described. In words of Gibson J approved by Wigmore:

> "It is a good general rule that a witness is not to give his impressions, but to state the facts from which he received them, and thus leave the jury to draw their own conclusion; and wherever the facts *can* be stated, it is not to be departed from[32]. But every man must judge of external objects according to the impressions they make on his senses; and after all, when we come to speak of the most simple fact which we have witnessed, we are necessarily guided by our impressions. There are cases where a single impression is made by induction from a number of others; as, where we judge whether a man is actuated by passion, we are determined by the expression of his countenance, the tone of his voice, his gestures, and a variety of other matters: yet a witness speaking of such a subject of inquiry, would be permitted directly to say whether the man was angry or

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31 In *Guide Dog Owners' & Friends' Association Inc v Guide Dog Association of New South Wales & ACT* (1998) 154 ALR 527 at 531, Sackville J said:

> "Section 78 substantially alters the common law … While lay opinion evidence was admissible in certain classes of cases under the common law …, s 78 expands the scope for such evidence."

This is a common view: see, for example, *Daniel v Western Australia* (2000) 178 ALR 542 at 546-547 [17]. Its correctness depends on the assumption that the common law "classes of cases" comprised a narrow closed category – "an apparently anomalous miscellany of 'exceptions'": Australia, The Law Reform Commission, *Evidence*, Report No 26, (1985), vol 1 at 410 [739]. To the extent that the common law "exceptions" were very numerous, and were only examples of a broader category, the differences between the common law and s 78 dissolve.

32 This common law prohibition may now be qualified by a difficult provision: s 80(a) of the Act. It provides:

> "Evidence of an opinion is not inadmissible only because it is about:
>
> (a) a fact in issue or an ultimate issue."

Its meaning was not debated in these proceedings.

> not. … I take it, that wherever the facts from which a witness received an impression are too evanescent in their nature to be recollected, or are too complicated to be separated and distinctly narrated, his impressions from these facts become evidence"[33].

In words of Loomis J, also approved by Wigmore, the principle rests:

> "[O]n the ground of necessity, where the subject of the inquiry is so indefinite and general as not to be susceptible of direct proof, or where the facts on which the witness bases his opinion are so numerous and so evanescent that they cannot be held in the memory and detailed to the jury precisely as they appeared to the witness at the time. …
>
> The very basis upon which … this exception to the general rule rests, is that the nature of the subject matter is such that it cannot be reproduced or detailed to the jury precisely as it appeared to the witness at the time."[34]

But the "impression" which the witness received must be based on a "fact" which the witness perceived – as Gibson J said, "the facts from which the witness received an impression", or as Loomis J said, "the subject matter … precisely as it appeared to the witness at the time." In contrast, the respondent's submission appears to adopt the following account of Basten JA[35]:

> "The ambulance officers appear to have reasoned backwards from their perceptions of the [respondent] when they first saw him, to his position at an earlier point in time, which they did not see. Perceptions of the aftermath can properly be described as perceptions 'about' the event which led to that result."

That is to give too wide a meaning to "about". There is, with respect, no indication in the statutory language that so wide a departure from the common law rule was made.

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33 *Cornell v Green* 10 Serg & Rawle 14 at 16 (Pa 1823) (emphasis in original), quoted by Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1978), vol 7 at 12 §1918.

34 *Sydleman v Beckwith* 43 Conn 9 at 12-14 (1875), quoted by Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1978), vol 7 at 13 §1918.

35 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [65].

Is s 78(b) satisfied?

47 *The Court of Appeal's opinion.* Allsop P and Grove J concluded that s 78(b) was satisfied for the following reasons[36]:

> "[H]ad the ambulance officers been called to give evidence as to their perceptions of all the aspects of [the respondent] and his surroundings, they may or may not have been able to express themselves in a way to give an account of their perceptions as to [the respondent's] body position, state of consciousness, injuries, position of blood and urine and surrounding structures. Whether the note containing their opinion in those circumstances would have been 'necessary' to obtain an adequate account of their evidence might depend on what they are able to say. If, however, they were unable to recall any or many of their perceptions then to obtain an adequate account of their perceptions one would need to accept the inference (the opinion) into evidence as the only evidence bearing on the nature of what they saw. Those perceptions, whatever they were, caused the officers at the time to draw the inference (and thus form an opinion) that there was a question whether [the respondent] fell from the 1.5 metre wall.
>
> Not being called, likewise, the only way to get any account of their perception was to admit the documents and the opinion contained therein."

48 *Consideration of the Court of Appeal's opinion.* With respect, the Court of Appeal's reasoning is unsound. Evidence about a place in which a person has fallen and about the injuries of that person is not within the category of cases where lay opinion evidence was admissible at common law and is admissible under s 78. The function of the law in relation to that category is to permit reception of an opinion where the primary facts on which it is based are too evanescent to remember or too complicated to be separately narrated. Where the evidence is that a person appeared to be drunk or middle-aged or angry, for example, it is impossible in practice for the observer separately to identify, remember and narrate all the particular indications which led to the conclusion of drunkenness, middle age or anger. For that reason, s 78 permits the conclusion to be stated: without it the evidence does not convey an adequate account or generate an adequate understanding of the witness's perception of the sobriety, age or emotional state being observed. But in cases of the present type the

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36 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [30]-[31]. Below the first paragraph of this quotation will be called "the long paragraph" and the second will be called "the short paragraph".

primary facts are not too evanescent to remember or too complicated to be separately narrated. It would be possible for an observer to list his or her perceptions of specifically identifiable medical circumstances of someone found in a drain, perceptions of specifically measurable distances between limbs and other objects and perceptions of specifically describable angles of limbs. Professional investigators like police officers, for example, commonly make precise measurements of that kind and compose diagrams to illustrate what they have measured. Those persons can often remember what they have measured even without recourse to their notes. The process is not one where component observations are made which are incapable of meaningful expression without stating the composite opinion to which they led. It is not necessary, in order to obtain an adequate account or understanding of perceptions of that kind, that the opinion be received. Whether it would be possible for an observer who had compiled these details then to say at which point the person found in the drain fell into it would depend on whether the tender was relying on s 78 or s 79. At common law, expert opinion evidence can be given as to the cause of injuries by inference from their nature[37]. There is no reason to doubt that similar evidence in suitable form, from suitably qualified experts, about the causation of injuries is admissible under s 79. Had the ambulance officers given evidence of the medical and physical details they observed, it would have been admissible. But a statement of a conclusion by them that the respondent fell from a particular place would be opinion evidence banned by s 76. It would not have passed through the s 79 gateway into admissibility because they were not experts. It would not have passed through the s 78 gateway into admissibility because it failed to satisfy s 78(b)[38].

49 For those reasons the conclusions stated in the paragraph quoted above[39] are incorrect. Those conclusions therefore afford no valid basis for the conclusion stated in the short paragraph that the ambulance officers' opinion is admissible even though they were not called.

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37 *R v Middleton* (2000) 114 A Crim R 258.

38 The appellant submitted that it would also have been inadmissible because, as the trial judge observed, it would have trespassed on the functions of the trier of fact. That reasoning was certainly sound at common law: see *Carter v Boehm* (1766) 3 Burr 1905 at 1918 [97 ER 1162 at 1168-1169] and see above at [46]. Its validity now would depend in part on s 80(a) of the Act, set out above at [46] n 32. Section 80(a) was not discussed in the courts below or referred to in argument in this Court.

39 At [47].

50 *Meaning of "necessary".* The meaning of the word "necessary" in statutes may vary from statute to statute. Its construction depends on the function it performs in the context of a particular statute. Allsop P and Grove J in the second Court of Appeal decision treated "necessary" in s 78(b) as meaning that the opinion could not be admitted unless it was "the only way" to obtain an account of the ambulance officers' perceptions[40]. Correctly understood, that test is sound in substance but it was not satisfied in this case.

51 The function of s 78(b) is to make up for incapacity to perceive the primary aspects of events and conditions, or to remember the perception, or to express the memory of that perception. But the ambulance officers were not shown to be suffering from incapacity in perception, memory or expression. Their record showed a gap in expression in fact – they had said nothing about what they perceived about the position of the respondent's body. It did not follow that there was any incapacity to perceive, to remember what they had perceived, or to say what they had perceived about it. Allsop P and Grove J thought that the "only evidence bearing on the nature of what they saw" was the alleged opinion stated in the impugned representation[41]. That is true in the sense that it was the only evidence *tendered*. But if they had been called, they might have been able to give more evidence bearing on the nature of what they saw. That possibility was not excluded by the respondent. Exclusion of that possibility on the balance of probabilities was an unfulfilled precondition of admissibility.

52 Basten JA adopted, in one place, a less strict test than that of Allsop P and Grove J. He said[42]:

> "When used in the [Act], the term 'necessary' connotes a higher hurdle to surmount than that which is 'helpful', 'convenient' or 'desirable', but does not require absolute necessity, in the sense of being the sole means of proof. Whether the exception is satisfied in a particular case may need to take account of the purpose or purposes underlying the general exclusion and the purpose of the exception."

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40 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [31].

41 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [30].

42 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [71].

A little later he stated an even less strict test[43]:

> "[T]hat which is 'necessary' should be understood as subject to a purposive interpretation, so that it will be effective, in practical terms, to permit the admission of non-expert opinion evidence which will have probative value."

He then decided that in view of the (unproved) expense involved in calling the ambulance officers and the (unproved) unlikelihood that they could remember anything useful, "it was not unreasonable" to admit the impugned representation[44].

53 It is true, as the respondent submitted, that in some statutory contexts "necessary" does not mean "sine qua non". It can mean merely "conducive". But it is not correct to construe "necessary" as meaning "not unreasonable" in s 78. That is particularly so because s 78 is an exception to a rule of exclusion, and is not to be construed so amply as to nullify the rule of exclusion. It is also so because that construction would radically depart from the common law without any sign from the Australian Law Reform Commission that this was contemplated. In particular, the Commission rejected a "helpfulness" test[45]:

> "It is important that witnesses give evidence as closely connected to their original perception as is possible to minimise inaccuracy and encourage honesty. In addition, the term 'helpful' sets such a low threshold and is so flexible that it would be impossible for appellate courts to exercise any real control over the exercise of the power."

The same would be true if the test were "not unreasonable" or "possessing probative value".

54 The word "necessary" is not directed to meeting difficulties that arise where it is impossible or inconvenient to call the person propounding the opinion as a witness. It is not analogous to the provisions permitting evidence of hearsay statements where better evidence is unavailable (eg ss 63 and 65 of the Act) or where to call better evidence could cause undue expense or undue delay or would not be reasonably practicable (s 64 of the Act). Section 78 is not a "best

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43 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [73].

44 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [75].

45 Australia, The Law Reform Commission, *Evidence*, Report No 26 (1985), vol 1 at 410-411 [740].

evidence" provision, permitting reception of the evidence if there is no better evidence. The word "necessary" is instead directed to a relationship internal to the evidence of the perceiver – the relationship between the perceiver's perceptions and the perceiver's opinion.

55 *The respondent's appeal to "commonsense".* The respondent submitted that the impugned representation "was a conclusion based on the position and condition etc of the respondent, and was a commonsense conclusion, in circumstances where the respondent was found at the foot of and facing away from a concealed drop." This is fallacious. It rests on an assertion made many times in the respondent's submissions that the ambulance officers perceived and relied on the position of the respondent relative to his environment. For reasons given above, that assertion is inconsistent with the evidence and with the Court of Appeal's second decision[46].

56 It is therefore not possible to say what perception it was that the makers made of the respondent's position. And it is also not possible to say what "account or understanding" of that perception would be adequate, and whether the statement was necessary to obtain an adequate account or understanding. These difficulties cannot be overcome by appealing to "commonsense".

57 *Is it required that the primary perceptions be identified by the holder of the opinion?* The appellant submitted that s 78 could not apply in the present circumstances where the ambulance officers had not identified the perceptions and observations on which their conclusion was based, because that left such a "disconnection" between their ultimate conclusion and any underlying observations that it cannot be said that the evidence of opinion is necessary to obtain an adequate account of their perception of the matter or event. It is not necessary to decide the point, but that submission, which, according to the Court of Appeal, contradicts a concession before it, is probably not correct. There is authority against it[47]. The common law rule does not require a full statement by witnesses of perceptions and observations – though gaps of this kind may well go to weight. Indeed the whole point of the common law rule is that it cures the difficulty that an observer may be confident about a conclusion reached from

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46 See above at [32]-[36].

47 *R v Harvey* unreported, New South Wales Court of Criminal Appeal, 11 December 1996; *R v Van Dyk* [2000] NSWCCA 67 at [132]-[133]; *Guide Dog Owners' & Friends' Association Inc v Guide Dog Association of New South Wales & ACT* (1998) 154 ALR 527 at 531; and *Connex Group Australia Pty Ltd v Butt* [2004] NSWSC 379 at [25].

observations without being able to perceive, remember or state the primary materials which led to it. There is nothing in s 78(b) to suggest any different position. It is possible to conclude – not in this case, but in other cases – that a person's opinion is based on what that person perceived without the person providing an exhaustive list of what the person perceived. It is true, though, that the less the witness or other observer states his or her primary perceptions, the harder will it be for the tendering party to establish the condition of admissibility in s 78(a) (because of the difficulty of establishing that the opinion is "based" on the perceptions) and the condition of admissibility in s 78(b) (because of the difficulty of establishing that the opinion is necessary to obtain an adequate account or understanding of the person's perceptions).

Notice of contention

58 The respondent filed a notice of contention. The contention of which notice was given was:

> "[T]he fact that the [appellant] was responsible for the creation of a particular scope of risk, as posed by the concealed, unguarded, and precipitate drain wall, and, the [respondent] had injuries consistent with a heavy fall from height, at that location, was sufficient, in the absence of other evidence, to establish causation."

That was not the contention in fact advanced. The contention of which notice was given should thus be rejected: in any event, sparse though the evidence of causation was, it was arguably sufficient to defeat the reasoning underlying the notice of contention.

59 Instead of relying on the notice of contention, the respondent supported what was said to be the reasoning of Basten JA in the Court of Appeal.

Invulnerability of the Court of Appeal majority

60 The appellant pointed out that in the first decision of the Court of Appeal, the content of the impugned representation without the question mark was treated as decisive in the sense that the other evidence did not permit an inference in the respondent's favour. It also pointed out that in the second decision of the Court of Appeal Allsop P and Grove J regarded the impugned representation including the question mark as essential if the respondent were to succeed. It followed that if Allsop P, Basten JA and Grove J had thought the impugned representation to be inadmissible in the first decision they would have found against the respondent. But in the second decision, unlike the first, Basten JA did not consider the admissibility of the impugned representation to be essential.

61 The appellant submitted that the appeal to this Court was a strict appeal, not a rehearing, and the fact that Basten JA later departed from his view in the first decision that the impugned representation was essential if the respondent were to succeed was not a basis for overruling the decision of the other judges, reached twice, to the contrary. Whether or not that submission is sound, it is preferable to examine the reasoning of Basten JA and the submissions of the respondent on their factual merits.

Basten JA's reasoning and the respondent's submissions

62 In the respondent's submission, Basten JA's conclusion that the respondent fell over the vertical western wall when moving downhill in the dark without seeing it rested on three considerations. The first was the "nature of the respondent's injuries being severe and consistent with an unprotected and unanticipated fall from a height greater than body height". Those injuries included a fractured skull, traumatic brain injury evidenced by the respondent's post-traumatic amnesia for 23 days, a fracture of the eleventh thoracic vertebra, many facial injuries including a broken front tooth, and a fractured right wrist. The second was the "distribution and collection of bodily fluids, being both urine and blood, at a point 2.7m from the western wall, but about 4.5m from the northern wall". The third was "the configuration of the drain".

63 The problem with these submissions is that they do not correspond with the evidence.

64 *Nature and severity of injuries.* Thus Basten JA said that the nature and severity of the respondent's injuries were "more likely to be caused by a fall from 1.5 metres than by stumbling when seeking to traverse the sloping wall of the drain."[48] He mentioned that near the pool of bodily fluids the drain was approximately 1.9m vertically below the top of the wall. It is plain that the injuries to the respondent's head were the result of a fall in which his head struck concrete. The respondent accurately submitted that the fact that the respondent had brain damage and a fractured skull self-evidently meant that he "clearly has hit his head very hard on something". It is common ground that wherever he fell from, his head hit a part of the concrete drain near the pool of bodily fluids. Basten JA concluded that the injuries were unlikely to have been caused while the respondent was "seeking to traverse the sloping wall of the drain"[49].

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48 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [88].

49 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [88].

65 It is desirable to start by pointing out that there is no reason to suppose that the respondent was seeking to traverse either a sloping wall or the western vertical wall. However his injuries occurred, the accident which caused them was unanticipated and unexpected. If the respondent had anticipated or expected it, it would probably not have happened.

66 The respondent's proposition is that it was not probable that his injuries resulted from a stumble onto the drain from one of its sides and a heavy fall, but that it was probable that they resulted from a fall from the vertical wall. That proposition is not self-evident. To establish it would call for more than the application of "commonsense" or the court's experience of ordinary life. The proposition turns on an inference from the nature of the respondent's injuries to their probable cause. That inference could only be drawn in the light of expert medical evidence. No expert medical evidence from any medical practitioner was tendered. Mr William Bailey was an engineer called by the appellant, but he claimed to have specialist knowledge of and experience in anatomy and physiology. He considered that the respondent's injuries were not caused by falling from the vertical wall. Though his conclusion is not implausible, it rests on a process of reasoning from the nature of the respondent's injuries. His process of reasoning is unsatisfactory because it reveals an incomplete understanding of those injuries.

67 A pervasive fallacy in the respondent's submission about his injuries is the appeal it made to their seriousness. That appeal seeks to point the Court towards assuming that a fall from the vertical western end was capable of producing most damage, and inferring that it was that fall which did cause the respondent's injuries. Even if the assumption is correct, the inference underrates the fragility of the human body, particularly the human head. It also overlooks the fact that it was not proved – and proof would have had to rest on expert medical evidence – that a fall down one of the sides was incapable of causing the respondent's injuries. Indeed this was not suggested by the Court of Appeal or submitted to this Court. It is thus accepted that there was a possibility that the cause of the injuries was falling down one of the sides. The evidence does not permit the view that it was only a bare possibility. Since each of the three possible causes (a fall from the vertical western end, a fall from the northern side or a fall from the southern side) is capable of causing the respondent's injuries, at least in the circumstances of this case, a conclusion that the cause was the cause capable of producing the most damage does not follow. That is because that cause was a sufficient but not a necessary condition for the injuries: the other causes would have been sufficient as well.

68 *The position of the pool of bodily fluids and the configuration of the drain.* It is convenient to take together the second and third factors identified by the respondent as being persuasive to Basten JA.

69 The second factor was the "distribution and collection of bodily fluids, being both urine and blood, at a point 2.7m from the western wall, but about 4.5m from the northern wall". Basten JA found, conformably with the evidence, that the pool of bodily fluids was approximately 2.7m from the western vertical wall. Basten JA also said that "the sloping sides of the drain … appear to have been further away from the stain than was the wall."[50]

70 The third factor was what the respondent called "the configuration of the drain". In that regard Basten JA said[51]:

> "The vertical wall was at its higher end and *extended for a length which does not appear to have been identified in the evidence* but which the photographs and measurements in evidence suggests was *about 10 metres*. The stains appear to have been roughly in the middle of the drain, which had sloping sides. At the lowest point in the vicinity of the accident, the drain may have been almost two metres deep. One side of the concrete drain appears to have been slightly higher than the other, or at least the wall of the drain on that side was somewhat steeper than on the other. On the south side, the slope was relatively shallow. On the north side, the slope was steeper, at the lip, but quickly became similar to the shelving on the other side. *The position of the blood stain would appear to be some 4-5 metres from the relatively steeper slope on the north side of the drain*. If the [respondent] 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*. Assuming he did not see the drain (which would have required a deviation of only a few metres from his assumed direction to head above the wall) he would have presumably stumbled for several metres before losing his footing completely and falling. It is not impossible that he would have fallen in a manner which resulted in him landing on his face, but it is unlikely. The nature of the injuries are more consistent with an unprotected and unanticipated fall from a height greater than body height."

71 The respondent advanced a related submission to the effect that the vertical wall was a great deal closer to the pool of fluids than the sides, and that the pool was "at the very foot of the vertical drop".

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50 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [89].

51 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [91] (emphasis added).

72 With respect, this reasoning rests on an error. One aspect of the error lies in the statement that the length of the vertical wall "does not appear to have been identified in the evidence", and the suggestion that it was about 10m. In fact there is photographic evidence to which this Court was taken by counsel for the respondent and which he described as showing "some dimensions which might be helpful". That evidence showed that the tops of the side walls were 5m apart, not 10m, and that the pool of bodily fluids was about equally distant between the side walls. Counsel for the appellant said without contradiction that that was the only evidence of the length of the vertical wall. Basten JA correctly stated that the pool of fluids was roughly in the middle of the drain. It follows that it was about 2.5m from either side, not 4-5m from the northern side. Thus the sloping sides of the drain were nearer the pool of fluid than the western vertical end, not further away. Hence the location of the pool, once it is correctly identified, does not suggest any inherent improbability in the proposition that the respondent stumbled down one of the sides of the drain and fell in the centre of the drain, where the pool was found. And it does not support a conclusion on the balance of probabilities that he fell from the vertical end.

73 Another error concerns the statement that if the respondent did not fall from the vertical wall, he must have stumbled heading across the drain from north to south, in a direction going away from his home. The point that that direction was away from his home lacks significance, since he would also have been heading away from his home if he had fallen from the vertical end, for his home was to the north-west of the drain. Indeed the respondent submitted that the direction from which he would have come was from his home towards the vertical end. The respondent submitted, and the Court of Appeal accepted, that it was for the respondent a "natural route". The respondent relied on the trial judge's finding that the respondent's mother used that route to traverse Endeavour Park while moving from her residence to her son's and back again. This is speculative. The respondent was to some extent intoxicated. He left home in an unknown direction. He could have walked anywhere in Lithgow for some time. He could have approached Endeavour Park from any number of directions. Further, the respondent gave evidence that he could not recall ever having been in Endeavour Park in his life. For him there was no "natural" or usual route.

74 Further, the respondent submitted that the side walls had a "relatively gentle slope". Considered in relation to the vertical drop, that is true. Photographs can be untrustworthy, but at least some of the photographs suggest that the slope was not particularly gentle. The vertical depth at the centre was the same as the vertical depth from the end. It has not been demonstrated that the depth and the slope were insufficient, if the respondent, cold on a mid-winter night on the western side of the Blue Mountains, and intoxicated, stumbled from the edge of one of the sides in such a fashion that his limbs became entangled

with each other and he fell head first, to cause the respondent's injuries. At all events the respondent has not demonstrated the contrary.

75 *Conclusion.* Allsop P concluded the Court of Appeal's first judgment in relation to liability by saying[52]:

> "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 [respondent]. All the other material, while consistent with that being the case, does not permit … any inference that it occurred in that fashion."

As noted earlier[53], the Court of Appeal in its second decision withdrew the finding that the ambulance officers had the respondent's inert unconscious body in front of them and had the advantage of being able to assess its position and its relationship with the wall and the drain. This withdrawal ought to have led to the dismissal of the appeal after the second Court of Appeal hearing. Once it is concluded, as it has been, that the impugned representation was inadmissible, the same result follows, for the Court of Appeal's conclusion is deprived of any support. The alternative reasoning propounded by Basten JA cannot supply support to a sufficient degree. The reasoning of Basten JA does not establish what the position of the respondent's body was when the fall took place. In the absence of that evidence, or satisfactory expert evidence, the conclusion that a fall from the vertical face took place cannot be drawn on the balance of probabilities.

Orders

76 The appeal should be allowed. The judgment entered and the orders pronounced by the Court of Appeal of the Supreme Court of New South Wales on 11 June 2010 should be set aside and instead it should be ordered that the respondent's appeal to that Court be dismissed with costs, including costs of and incidental to the first hearing in the Court of Appeal. The respondent must pay the appellant's costs, including the costs of matter number S569 of 2008, in this Court.

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52 *Jackson v Lithgow City Council* (2008) Aust Torts Reports ¶81-981 at 62,468 [56].

53 See above at [34].

77 GUMMOW J. I agree with the conclusions and reasoning in the joint judgment respecting the construction and application of the provisions of the *Evidence Act* 1995 (NSW) ("the Act"). In particular, I agree not only with their Honours' construction of s 78 of the Act, concerning the admission of "lay opinions", but also that the relationship between Pts 3.2 and 3.3 of the Act, read with the general provision in s 56(1) (which is in Pt 3.1), is such that a statement of lay opinion in a business record must comply with s 78.

78 There remains the issue of causation raised by the respondent in the submissions on the notice of contention. The issue may be seen from the following passage in the reasons of the trial judge, Ainslie-Wallace DCJ. Having held that it was entirely foreseeable that the wall, which was close to the ground and concealed a considerable drop on the other side, would pose a risk of injury to a person walking in the park at night, because that person might fall heavily onto the concrete below the wall and be seriously injured, her Honour continued:

> "These findings do not dispose of the question of whether the Council ought to have taken steps to avoid the risk. That requires a consideration of what a reasonable person (or entity) in the position of the council would have done in relation to the risk foreseen. Matters such as those referred to in [*Wyong Shire Council v*] *Shirt*[54] are to be taken into account.
>
> Since the [respondent's] accident, the Council has erected a fence in front of the wall. According to such documents as were tendered, the permanent fence was erected in 2006. It was not suggested that this step was other than cheap and effective. The effect of the erection of the fence would prevent people from falling over or off the wall.
>
> These matters persuade me that the foreseeable risk of harm to a person from falling over the wall while in the park at night was one which required reasonable steps by the council to avoid. In this case it was as simple as erecting a fence on the uphill side of the wall which, from the photographs, make the presence of the wall immediately apparent. In coming to this decision, I take into account that there was a clear utility in having the drain in the park as can be seen from photographs taken of the drain after rain.
>
> I am satisfied that the [appellant], in not taking any steps to avoid the risk of injury, was in breach of its duty of care to the [respondent]."

79 The trial judge then asked whether the respondent had shown that his injuries were caused when he tripped or stumbled over the low wall and fell onto the concrete drain below; a competing proposition put by the appellant was that

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54 (1980) 146 CLR 40 at 47-48; [1980] HCA 12.

he had stumbled down the side of the drain and fell on the concrete. Her Honour concluded that "the [respondent] has not proved that his accident occurred because he did not see the wall and the drain in the dark, and thus fell over the wall and was injured".

80 The ultimate question before the District Court on the matter of causation had been whether the evidence established facts which positively suggested, that is to say provided a reason for thinking it more probable than not, that the respondent's injuries were sustained because he had not seen the wall and the drain in the dark and thus had fallen over the wall and been injured[55].

81 On the facts as they have been analysed in submissions on the notice of contention, did the nature of the injuries suffered by the respondent found an inference that it is more probable than not that the injuries were sustained as he alleges? The foundation of that inference must link the nature of the injuries to their probable cause. I agree with what is said in the joint reasons to the effect that the linkage must be the result of more than the application of experience of ordinary life and that in the absence of medical evidence to support the drawing of that inference, the respondent must fail.

82 Orders should be made as proposed in the joint reasons.

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55 See *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111 at 132-133 [51], 134-135 [62]; [2010] HCA 5.

83 CRENNAN J. The issues, the facts, the history of the litigation, and the legislation appear from the reasons for judgment of French CJ, Heydon and Bell JJ. I agree with their Honours' reasons for concluding that the Court of Appeal of the Supreme Court of New South Wales erred in concluding that relevant parts of the ambulance officers' record contained a lay opinion which was admissible pursuant to the exception created by s 78 of the *Evidence Act* 1995 (NSW) ("the Act") to the exclusionary opinion rule in s 76 of the Act.

84 That leaves for consideration the respondent's notice of contention, which turns on the sufficiency of the evidence (other than the ambulance officers' record) to establish causation and therefore the liability in negligence of the appellant Council ("the Council") in respect of the respondent's injuries.

85 Shortly before 6:57 am on 18 July 2002, passers-by found the respondent lying unconscious in a concrete drain in Endeavour Park, Lithgow ("the park"), which is bound by the Great Western Highway ("the highway") and Amiens Street. This drain runs downhill in an east-west direction at the Amiens Street end of the park. There was a pool of dried blood and other bodily fluid 2.69 metres from the vertical face of the drain's retaining wall which extends a sheer 1.4 to 1.7 metres on the west and protrudes between 90 and 280 millimetres from the grass at all points ("the retaining wall"). The drain has sloping sides to the north and south. The respondent had no memory of how he came to be in the drain, no-one witnessed his accident, and there was no evidence of exactly where he was lying when found.

86 The respondent brought an action in negligence against the Council (which was responsible for the care and management of the park), alleging that he had sustained his injuries after falling 1.5 metres from the top of the retaining wall onto the concrete drain below. At the time of the accident, there was no fence between the retaining wall (which was painted dark green) and the grassy hillside, and there were plants growing against the wall on the uphill side of the drain, obscuring the lip of the wall. The respondent's case before the primary judge was that the "only rational route for him to have taken" from his house to the park on the morning of 18 July 2002 was to walk along the highway, cross the road, enter the park and walk downhill towards Amiens Street. He contended that the most probable explanation for his injuries was that he fell over the edge of the retaining wall whilst walking downhill in this fashion, falling heavily onto the concrete apron of the drain.

87 The primary judge found that the Council owed the respondent "a duty to take reasonable care to avoid foreseeable risks of injury to a person in his position." On the question of the foreseeable risk of harm her Honour said of the retaining wall:

> "It is entirely foreseeable that the wall, which is close to the ground and which conceals a considerable drop on the other side would pose a risk of injury to a person walking in the park at night. That a person might fall heavily onto the concrete below the wall and be seriously injured is certainly foreseeable.
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> …
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> I find that a sober person walking through the park at night and taking reasonable care for his or her own safety would not have seen the wall and recognised that it represented a drop on the other side. I am not persuaded that the risk presented by the wall and the drop off the side into the drain was obvious."

88 Her Honour went on to find that the foreseeable risk of harm was one which required reasonable steps by the Council to avoid that risk and that in not taking such steps the Council was in breach of its duty of care to the respondent. The only question on appeal was causation.

89 Given the circumstantial nature of the evidence in the proceedings, the key issue in relation to causation was whether a reasonable inference could be drawn that the respondent fell over the retaining wall and down approximately 1.5 metres onto the concrete drain below. The Council contended that the evidence would equally support a finding that the respondent stumbled down the side of the drain and rolled or fell into it, or was assaulted in the park and left there, or a number of other conclusions. The suggestions of an assault in the park and other possibilities were not pressed in this Court.

90 That the respondent sustained severe head injuries associated with organic brain damage was not contested. A CT scan of the respondent's brain taken on 18 July 2002 showed considerable brain damage with haemorrhagic contusions of the right frontal lobe and the temporal lobes. The respondent had post-traumatic amnesia for 23 days after the accident, accepted as being indicative of a very serious traumatic brain injury. He suffered a fracture of the right wrist, requiring internal fixation with plate and screws and a plaster cast until early September 2002, and half of his front top tooth was broken off. He also had abrasions to the knees and suffered a probable fracture of the 11th thoracic vertebra. He had extensive bruising to the right side of his face and had haemorrhaged from the nose and the right eye. The CT scan showed no fracture in the skull vault, but there was prominent soft tissue swelling over the right orbit and forehead and there appeared to be a fracture of the floor and medial wall of the right orbit. The injuries shown on the CT scan were not disputed by the Council.

91 In a report of November 2005, Dr Peter Conrad, Fellow of the Royal Australasian College of Surgeons, recorded under the heading "X-rays" a

reference to the CT scan and noted: "Fracture of floor and medial wall of right orbit." Whilst it is not absolutely clear whether that statement is based on Dr Conrad's own reading of the CT scan, it matters not for present purposes, because that evidence was not challenged. Dr Conrad was not required for cross-examination. There was no expression of opinion in any written medical report, or otherwise in the medical evidence, as to the type of fall into the drain onto the concrete which would be consistent with such injuries.

92 Following established principles, the respondent had the onus of proving causation on the balance of probabilities[56]. Causation is essentially a question of fact, the determination of which involves common sense[57].

93 By reference to the following quotation made by Dixon CJ in *Jones v Dunkel*[58], the primary judge recognised correctly that it was possible to make a finding of causation in the absence of direct evidence:

> "All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood."

94 Whilst "a more probable inference" may fall short of certainty, it must be more than an inference of equal degree of probability with other inferences, so as to avoid guess or conjecture[59]. In establishing an inference of a greater degree of

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56 *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 428 per McHugh J; [1992] HCA 27, citing *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 at 620; see also *Tubemakers of Australia Ltd v Fernandez* (1976) 50 ALJR 720 at 724 per Mason J; 10 ALR 303 at 310.

57 *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 515, 522-523; [1991] HCA 12; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 413.

58 (1959) 101 CLR 298 at 305; [1959] HCA 8, quoting from *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 6. This passage is also reproduced in *Holloway v McFeeters* (1956) 94 CLR 470 at 480-481; [1956] HCA 25.

59 *Luxton v Vines* (1952) 85 CLR 352 at 358 per Dixon, Fullagar and Kitto JJ; [1952] HCA 19; *Jones v Dunkel* (1959) 101 CLR 298 at 304-305 per Dixon CJ. Cases concerning the line to be drawn between conjecture and inference have been usefully collected by Spigelman CJ in *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262 at 275-276 [85]-[88].

likelihood, it is only necessary to demonstrate that a competing inference is less likely, not that it is inherently improbable.

95 When dealing with the issue of causation, the primary judge noted that the Council had commissioned a report from Mr Bailey, an expert in mechanical and biomechanical engineering. Mr Bailey assumed that the respondent did not move after sustaining injury and stated that a factor which indicated the respondent did not receive injuries after a fall over the retaining wall was "that there was no contact fracture of the skull or neck injuries". This reason is not consistent with the fracture of the floor and medial wall of the right orbit and the breaking of the respondent's front tooth. Mr Bailey further opined that the nature and severity of the respondent's head and facial injuries in conjunction with abrasions appeared "consistent with a heavy forward stumble" if the respondent entered the drain "via the sloping sides". Whilst Mr Bailey had mentioned the respondent's abrasions, he had not noted either the fracture of the respondent's right wrist or the breaking of his front tooth. The primary judge noted that senior counsel for the Council at the trial did not place great reliance on Mr Bailey's report and, her Honour said, it was "of little assistance in determining the issue of causation." There was no complaint about that aspect of the primary judge's decision.

96 Without reference to the medical evidence, the primary judge noted that there were competing inferences which reasonably arose from the facts, and then made her key finding on causation as follows:

> "On the evidence of this case I am unable to find that the conclusion that the [respondent] fell off the wall was more likely than the conclusion that he stumbled down the sloping side of the drain or was standing on the wall and lost his balance. It follows that the [respondent] has failed to establish that the [Council's] breach of its duty of care caused his injuries."

97 On the second hearing of the appeal before the Court of Appeal, Basten JA reconsidered the material in evidence and stated that, disregarding the ambulance officers' record, he would have been "comfortably satisfied that, on the probabilities, the [respondent] fell over the wall when moving down hill, and without seeing the drain."[60] What weighed with his Honour in coming to that conclusion was the severity and nature of the injuries, the apparent position of the respondent's body when found and of bodily fluids 2.69 metres from the foot of the retaining wall, and the configuration of the drain. His Honour found that the severity of the injuries was "more likely to be caused by a fall from 1.5 metres than by stumbling when seeking to traverse the sloping wall of the

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60 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [93].

drain"[61] and that the nature of the injuries was "more consistent with an unprotected and unanticipated fall from a height greater than body height" than with a stumble down the side wall of the drain[62]. Further, because of the distance of the stain of bodily fluids from the retaining wall, his Honour found that it was more probable than not that the respondent fell over the wall whilst moving downhill rather than falling when standing on the wall and losing his balance[63]. That finding depended on a conclusion as to the distance of the bodily fluids from the retaining wall which was not affected by his Honour's apparently erroneous assumption that the length of the retaining wall was 10 metres. In advancing the notice of contention, the respondent supported Basten JA's reasoning.

98 As mentioned, this reasoning involved revisiting factual matters agitated at the first hearing of the appeal, a course which the other members of the Court of Appeal did not follow. On the rehearing of the appeal, Allsop P (with whom Grove J agreed) adhered to the view he expressed in the first hearing that whilst evidence, other than the ambulance officers' record, was consistent with the respondent's case, it was insufficient to permit the drawing of the inference that the accident happened as asserted by the respondent[64].

99 In his notice of contention, the respondent asks this Court to affirm the judgment of the Court of Appeal on the ground that its decision as to the circumstances of injury is supported by evidence other than the ambulance officers' record.

100 The Council submitted that the appeal to this Court is a strict appeal and no error had been shown in the decision of the majority of the Court of Appeal. Further, it was submitted that the matters to which Basten JA referred did not permit the drawing of the inference that the respondent's injuries were caused by a fall from the retaining wall, because there was no medical evidence that the respondent's injuries were inconsistent with stumbling into the drain from a side wall or overbalancing while standing on the retaining wall. Mr Bailey's evidence was also relied upon.

101 The respondent relied on his success at trial in establishing the existence of a duty of care, a foreseeable risk of harm, and an unreasonable failure to take measures to avoid such a risk, coupled with the fact that the respondent's injuries

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61 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [88].

62 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [91].

63 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [92].

64 *Jackson v Lithgow City Council* [2010] NSWCA 136 at [20].

were consistent with the manifestation of that risk. It was contended that in the absence of any other explanation a court was entitled to infer the accident occurred as alleged. The respondent submitted essentially that this Court could reconsider the whole of the evidence and that it should take a similar approach to that taken by Basten JA.

102 As explained in *Fox v Percy*[65], an appeal to this Court is a strict appeal. *Fox v Percy* was concerned with the circumstances in which an appellate court may set aside a finding of fact by a trial judge which is based on the credibility of a witness. That issue did not arise in this case.

103 The issue of causation was confined to the inferences to be drawn from the facts established. In *Warren v Coombes*[66], a majority of this Court said:

> "there is, in our opinion, no reason in logic or policy to regard the question whether the facts found do or do not give rise to the inference that a party was negligent as one which should be treated as peculiarly within the province of the trial judge."

104 On a strict appeal, this Court, as much as the Court of Appeal on a rehearing, is obliged to determine errors of factual inference[67].

105 As already mentioned, the evidence of the seriousness of the injuries and their nature was not disputed. Furthermore, it was not contested that the injuries were consistent with a heavy fall into the drain onto the concrete. The injuries were consistent with an accident arising from the risk created by the Council in respect of the unfenced retaining wall. The only question was whether they were equally consistent with other possibilities.

106 Photographs in evidence showed that the downwards gradient of the sides of the drain was moderate by comparison with the precipitate drop from the retaining wall. Whilst it could not be said that it was impossible for the respondent to have suffered his injuries, including fractures, whilst rolling into the drain after a fall from one of the sloping side walls, or stumbling and falling from them as the Council contended, the injuries – most particularly the seriousness of the brain injury and the fractures of the right wrist and the floor and medial wall of the right orbit and the breaking off of half of the respondent's

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65 (2003) 214 CLR 118 at 129 [32]; [2003] HCA 22.

66 (1979) 142 CLR 531 at 552 per Gibbs ACJ, Jacobs and Murphy JJ; [1979] HCA 9.

67 *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330 at 403 [266] per Callinan J, 415 [294] per Heydon J; [2007] HCA 42; see also *Warren v Coombes* (1979) 142 CLR 531 at 553.

front tooth – are more consistent with a heavy fall from the height of the retaining wall. It is not just the severity of the injuries which underpins this conclusion, it is their nature. There is a lesser degree of likelihood that the injuries, particularly fractures including the fractures to the right orbit and the broken tooth, were caused by a stumble or fall down a slope. The position of the stain of bodily fluids 2.69 metres from the foot of the vertical wall is also more consistent with an unexpected fall and consequential pitch forward of a body's length from the height of the retaining wall, than with a loss of balance whilst standing on the wall.

107 The more probable inference to be drawn from the facts, having regard to both the respondent's injuries and the position of the stain from bodily fluids in the drain, is that the respondent fell unexpectedly into the drain onto the concrete from the height of the retaining wall. Giving due weight to the conclusion reached by the learned primary judge, for the reasons given, she was in error in holding that causation was not made out.

108 The Court of Appeal was obliged to reach a conclusion about the inferences to be drawn from the whole of the evidence, excluding inadmissible evidence.

109 The Court of Appeal should have concluded that, even without the ambulance officers' record, the respondent's appeal should be upheld. The respondent's success on the notice of contention has the result that this Court can make the orders which the Court of Appeal should have made. That can be accomplished in this case by dismissing the Council's appeal to this Court with costs. The Council should also pay the respondent's costs in matter number S569 of 2008 in this Court.