HIGH COURT OF AUSTRALIA

FRENCH CJ,
BELL, GAGELER, KEANE AND NETTLE JJ

COREY TRAVIS FULLER-LYONS BY HIS TUTOR
NITA LYONS APPELLANT

AND

STATE OF NEW SOUTH WALES RESPONDENT

Fuller-Lyons v New South Wales
[2015] HCA 31
2 September 2015
S81/2015

ORDER

1. *Appeal allowed with costs.*

2. *Set aside orders 2, 3, 4 and 5 made by the Court of Appeal of the Supreme Court of New South Wales on 9 December 2014 and, in lieu thereof, order that the appeal to the Court of Appeal be dismissed.*

3. *Remit the matter to the Court of Appeal to determine the costs of the appeal to that Court.*

On appeal from the Supreme Court of New South Wales

Representation

C T Barry QC with G J Davidson for the appellant (instructed by AC Lawyers)

R J Burbidge QC with A C Casselden for the respondent (instructed by Hicksons Lawyers)

CATCHWORDS

Fuller-Lyons v New South Wales

Torts – Negligence – Personal injury – Liability – Inferential fact-finding – Where appellant suffered severe injuries when he fell from train operated by respondent – Where primary judge found appellant fell from train as consequence of respondent's negligence – Whether New South Wales Court of Appeal erred in rejecting primary judge's finding on basis of alternative hypotheses about appellant's fall, not entailing negligence by respondent, being equally open – Whether Court of Appeal erred in rejecting primary judge's finding on basis appellant failed to exclude other possible explanations for known facts – Whether Court of Appeal erred in rejecting primary judge's finding on basis appellant failed to exclude hypothesis not explored in evidence.

Words and phrases – "inferential fact-finding".

1 FRENCH CJ, BELL, GAGELER, KEANE AND NETTLE JJ. On 29 January 2001, Corey Travis Fuller-Lyons suffered severe injuries when he fell from a train. Corey was eight years old at the time. Corey brought proceedings in the Supreme Court of New South Wales (Beech-Jones J) by his tutor claiming damages in negligence against the State of New South Wales ("the State") as the legal entity responsible for the operation of the rail network.

2 There was no direct evidence of the circumstances of Corey's fall. The ultimate conclusion of negligence rested on inferential fact-finding. The primary judge found that, shortly before he fell, Corey had become trapped between the doors of the train before it left Morisset Station[1]. His Honour held the State vicariously liable for the negligent failure of a railway employee to keep a proper lookout before signalling to the guard that it was safe for the train to depart from the Station[2]. Judgment was entered for Corey in the amount of $1,536,954.55.

3 The State appealed to the Court of Appeal of the Supreme Court of New South Wales (McColl and Macfarlan JJA and Sackville AJA) against the finding of liability. There was no appeal against the assessment of damages. The Court of Appeal identified alternative hypotheses that did not entail negligence on the part of railway staff[3]. These alternative hypotheses were, in the Court of Appeal's estimate, of equal or greater probability than the hypothesis upon which the primary judge based his conclusion of negligence[4]. The appeal was allowed, orders of the primary judge were set aside and judgment was entered for the State.

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1 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,753 [6]; [2013] NSWSC 1672.

2 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,753 [7], 66,775 [145].

3 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,004 [7] per McColl JA, 68,010 [43] per Macfarlan JA (Sackville AJA agreeing at 68,014 [72]); [2014] NSWCA 424.

4 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,004 [8] per McColl JA, 68,010 [43] per Macfarlan JA (Sackville AJA agreeing at 68,014 [72]).

4 On 17 April 2015, Bell and Gageler JJ granted Corey special leave to appeal to this Court[5]. Five grounds of appeal express the same complaint in different ways, which is that the Court of Appeal did not undertake a "real review"[6] of the evidence or the primary judge's reasons before concluding that alternative hypotheses were equally open. One aspect of this complaint is the assertion that the Court of Appeal identified an alternative hypothesis based on facts that were not in evidence. A sixth ground contends that Corey was denied the opportunity to deal with this hypothesis.

5 The appeal must be allowed. To explain why that is so, it is necessary to refer to the evidence in some detail. The trial was heard over seven days. A number of issues that were explored in evidence may be put to one side because they fell away during the hearing or because they are the subject of unchallenged findings. Relevantly, the evidence established the following facts.

The facts

6 Corey and his older brothers, Dominic (aged 11 years) and Nathan (aged 15 years), boarded an intercity electric V-set train bound for Newcastle at Central Railway Station, Sydney. The train consisted of four double-decker cars. Corey and his brothers travelled in the lead car. External doors were located at the front and back of the car on the eastern (right-hand) and western (left-hand) sides. Each set of doors opened into a vestibule. The front and rear vestibules were separated from the saloon compartments of each deck by internal doors. Nathan and Dominic were seated in the saloon compartment. When they last saw him, Corey was in the front vestibule. A guard, Mr Meiforth, was stationed in the rear car.

7 The train left Morisset Station at around 12:07pm. Corey fell from the train near Dora Creek at approximately 12:09pm. This was about 15 minutes after Corey parted from his brothers, leaving them in the saloon compartment. At the time Corey fell, the train was negotiating a right-hand bend at about 100 kilometres per hour. Corey landed on the western side of the train line. The western doors of the train were adjacent to the platform at Morisset Station.

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5 [2015] HCATrans 096.

6 The reference is to *Fox v Percy* (2003) 214 CLR 118 at 126 [25] per Gleeson CJ, Gummow and Kirby JJ; [2003] HCA 22.

8 The four pairs of external doors of the lead car were hung from the top. They were suspended from rollers that ran on an overhead track attached to the car's superstructure. The base of each door formed an inverted "U" which ran over a bar inside the threshold of the door on the floor. The doors were inset by what the primary judge estimated to be "about six inches" from the exterior of the car[7]. They were fitted with electro-pneumatically controlled locking motors which were centrally operated by the guard. When locked, the doors could only be opened by the guard engaging the door release switch. Once the switch was engaged, passengers were able to open the doors with the door handles.

9 The adoption of the locking door system was intended to eliminate the known risk of passengers falling from the train. It was a controversial policy since, in the event of a loss of power or an accident, passengers remained locked in the cars until rescued.

10 Mr Meiforth checked the external doors of each of the four cars at the terminal before the train commenced its journey. The doors were closed and Mr Meiforth conducted a "walk-through", giving them a shake to see if they could be opened. They were working properly and Mr Meiforth did not detect any sign of interference with them.

11 After Corey's accident, a railway officer tested the doors of the lead car. The officer attempted with the aid of an assistant to force the doors apart after they had been closed. The locking mechanism was working correctly on each pair of doors. However, the officer observed signs of disturbance with both sets of doors at the front of the car. On the western side, when locked, each door was about 50mm off plumb at the base. This created a gap of about 100mm at the base of the doors. Corey could not have fallen through this gap. On the eastern side, the doors stalled momentarily during closing, creating a gap of about 350mm, and then continued to close and lock.

12 A newton is the force capable of giving a mass of one kilogram an acceleration of one metre per second per second. The closing force of the doors for the first 230mm of travel was equivalent to approximately 7kg or 70 newtons. After the initial 230mm, the "normal closing force" of approximately 16kg or 160 newtons applied. The initial force, described as "soft nosing", was designed to prevent injury to a passenger in the event the passenger became caught between the doors as they closed. If the door came into contact with an object,

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7 Six inches converts to 152.4mm.

including a person, in the last 230mm of closing, the force would reduce to around 7kg but then gradually increase to exert a force equivalent to approximately 20kg or 200 newtons.

13 The electro-pneumatic locking mechanism applied pressure at the top of the doors. The stresses produced by an obstruction at the base of the door would tend to cause the door to ride up. Mr Cowling, an engineer called in the State's case, considered that the 100mm gap at the base of the front, western side doors suggested that they had been held open at Morisset Station and later forced.

14 Mr Clemens, an engineer called in Corey's case, considered it unlikely that an eight-year-old boy forced the doors against the pressure of the door motors. Mr Clemens had experimented with forcing the doors of a V-set intercity car on an occasion in February 2000. He found that he had to use a lot more force than he had expected. He took hold of the two door handles and tried to force the doors apart with his hands. He succeeded in opening the doors "an inch, 2 inches perhaps"[8]. Whether the pressure on this occasion was the same as the pressure of the locking mechanism of the doors through which Corey fell was not established.

15 Mr Meiforth said that forcing the doors against the pneumatic pressure of the locking mechanism was "very, very hard". Mr Meiforth estimated that he could force one door back over a period of 20 or 30 seconds. Mr Meiforth said he could not force both doors back under any circumstances. He considered that forcing a door apart would be "[m]uch too hard" for an eight-year-old boy, although a boy of that age could be capable of doing so if the boy had his back against one door and used both his arms to force the opposing door open.

16 It was the State's case that Corey had deliberately interfered with the doors and that he had been assisted in this endeavour by his older brothers. In its closing submissions at trial, the State argued that the brothers' accounts – that they had searched the train looking for Corey before reporting that he was missing to Mr Meiforth – were made up to avoid either of them getting into trouble. Dominic and Nathan denied any involvement in interfering with the doors. It was not put to either brother that he had lied to Mr Meiforth, nor that he was motivated to do so by a desire to cover up his own involvement in Corey's fall.

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8 Two inches converts to 50.8mm.

The primary judge's findings

17 The primary judge accepted Dominic's and Nathan's denials. Nathan was 27 years old at the time of the trial and the primary judge assessed him as having been a reasonably intelligent and capable 15-year-old at the time of the incident. The primary judge reasoned that, had Nathan witnessed his younger brother fall from the train and been worried about his own complicity, the likelihood is that he would have immediately raised the alarm and made up some story to cover his role in the affair. The primary judge found that Nathan and Dominic were in the saloon compartment at the time of Corey's fall and that neither had interfered with the front doors of the car.

18 It was not in dispute that Corey must have fallen through the front, western doors of the lead car. It was also not in dispute that this could not have occurred as the result of the doors suddenly opening or being prised open from a locked position. The locking system was such that, when the doors were locked, it was not possible for any person to open them no matter how hard the person tried[9]. It followed that at the time of Corey's fall, the front, western doors of the lead car could not have been locked, despite Mr Meiforth having engaged the electro-pneumatic locking system before the train left Morisset Station.

19 The primary judge was satisfied that the only realistic means by which Corey could have generated sufficient force against the pneumatic power of the door motors to open the doors far enough to fall out was if he had his back to one door and pushed with his arms or a leg against the other. His Honour concluded that the most likely hypothesis was that, as the train left Morisset Station, Corey was caught between the doors with his back to one of them[10]. His Honour considered that Corey would have been able to generate sufficient power to force the doors a little further apart in the short interval before his fall. Acceptance of this hypothesis entailed that the doors closed against the span of Corey's body between his shoulders. It followed that, as the train left the Station, at least one of Corey's arms and legs was outside the train, as was part of his torso.

20 The platform at Morisset Station is curved. It is not possible for a guard standing at the rear of the train to see all the cars of a four-car V-set intercity

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9 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,762 [74].

10 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,763 [77].

train as it stands alongside the platform. Usually, a customer service attendant ("CSA") or other officer stood on the platform adjacent to the third car, from which position the officer could see the front cars. It was that officer's duty to signal to the guard when the train was ready to depart. On the occasions when the guard was assisted by a CSA, it was their joint responsibility to make sure members of the public were safely on the train before it departed. On the occasions when a CSA was on duty at Morisset Station, Mr Meiforth depended on the CSA to ensure that no passenger was stuck in the doors of the front cars. If no CSA was on duty, Mr Meiforth would walk out further onto the platform to a position from which he was able to see the front cars. A CSA was on duty at Morisset Station on the day of Corey's accident and Mr Meiforth accepted that he would have relied on the CSA's observations of the front cars. The CSA who had been on duty that day was deceased at the date of trial.

21 The primary judge found that the CSA had failed to observe parts of Corey's body protruding from the train as it departed from Morisset Station. Viewed from another perspective, as the primary judge acknowledged, the presence of the CSA on the platform in a position to see the front, western doors of the lead car was a factor weighing against the inference that Corey was visibly trapped when the signal to depart was given[11]. However, his Honour considered that the balance of the circumstances, including the characteristics of the door and the short interval between the train departing from Morisset Station and Corey's fall, were in favour of a finding that Corey had been trapped when the doors closed[12].

22 The primary judge found that it was the responsibility of railway staff to observe that the doors were properly closed before the train departed and he held the State vicariously liable for the failure of the CSA to do so[13].

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11 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,763 [78].

12 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,763 [78].

13 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,775 [143], citing *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438 at 455-456 per Dixon and McTiernan JJ; [1938] HCA 35.

The Court of Appeal

23 In the Court of Appeal, the State challenged the primary judge's finding that Nathan and Dominic had not been involved in interfering with the doors at the front of the car. This challenge was rejected[14]. The Court of Appeal implicitly accepted the primary judge's inferential finding that Corey had fallen from the front, western doors of the lead car. The Court of Appeal also accepted the primary judge's inferential finding that the only realistic means by which Corey could have generated sufficient force to open the door far enough to fall out of the train was by having his back to one door and pushing with his arms or a leg against the opposing door[15]. This was an acceptance of the evidence of the capacity of an eight-year-old child to open the doors (assuming the doors had not locked) against the pneumatic pressure of the locking mechanism[16].

24 However, the Court of Appeal differed from the primary judge with respect to the capacity of the evidence to support the inference that Corey came to be positioned between the doors in this way as the result of being trapped by the doors (either accidentally or intentionally) as they closed at Morisset Station.

25 Macfarlan JA gave the leading judgment, with which McColl JA and Sackville AJA agreed. McColl JA added some further observations in a short concurring judgment. Macfarlan JA identified two alternative hypotheses[17]. McColl JA may have identified a third[18]. Each hypothesis was based upon the

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14 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,013 [67] per Macfarlan JA (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

15 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,009 [39] per Macfarlan JA (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

16 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,005 [17] per Macfarlan JA (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

17 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,009 [34], [36].

18 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,003-68,004 [6]-[7].

assumption that the front, western doors of the lead car were open while the train was at Morisset Station and that Corey had prevented the doors from closing fully before the train departed. On each of these hypotheses, it was said that any gap in the doors would not have been visible to the CSA exercising reasonable care[19].

26 The first hypothesis, to which all members of the Court subscribed, was that Corey might have used a backpack or other bag, a shoe placed lengthways, or a ball such as a basketball or soccer ball, to prevent the doors from closing ("the large object wedge hypothesis")[20]. A gap of this magnitude, it was said, would have permitted Corey to insert his shoulder into it and to enlarge it by pushing one of the doors with both hands whilst obtaining leverage by leaning part of his back against the other door[21]. Contrary to the primary judge's conclusion, the Court of Appeal considered that a manoeuvre of this kind could have been accomplished in a matter of seconds[22].

27 The second hypothesis, to which all the members of the Court also subscribed, was that the wedge that initially kept the doors from closing was Corey's shoulder, arm and leg[23] ("the body wedge hypothesis"). Their Honours considered that Corey would have had the strength to make the gap larger by

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19 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,009 [36] per Macfarlan JA (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

20 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,009 [34] per Macfarlan JA (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

21 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,009 [34], [35] per Macfarlan JA (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

22 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,010 [40] per Macfarlan JA (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

23 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,009 [36] per Macfarlan JA (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

using his arms, back and perhaps his leg[24]. Again, their Honours considered that Corey could have accomplished this manoeuvre within a matter of seconds[25].

28 A third hypothesis, identified by McColl JA, was that a small object might have been used to prevent the doors from closing ("the small object wedge hypothesis")[26]. Her Honour said that the evidence of Mr Meiforth and Mr Clemens established that an eight-year-old boy could open the doors, assuming that there was such a gap[27]. Her Honour reasoned that it was an available inference that Corey had kept the doors open with a small object that was not visible to the CSA, and that after the train had left Morisset Station he had used this opening to enlarge the gap to a point that allowed him to be propelled from the car as the train rounded the bend[28].

The small object wedge hypothesis

29 The evidence concerning the use of small objects to obstruct the closing mechanism of the doors came from Mr Meiforth and Mr Clemens. Mr Meiforth explained that, occasionally, smokers place a small object, such as a key or a bottle, between the doors presumably to permit the smoke to escape. Mr Meiforth would remove obstructions of this kind when he encountered them. It required quite a bit of strength to remove the obstacle. Once the obstacle was removed, the doors came together and locked as they were designed to do.

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24 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,010 [40] per Macfarlan JA (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

25 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,010 [40] per Macfarlan JA (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

26 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,003-68,004 [6]-[7].

27 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,004 [6].

28 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,004 [7].

30 Mr Clemens also gave evidence that small objects could be used to obstruct the doors. He accepted that Corey might have obstructed the doors with his foot and progressively worked himself into the middle of the doors as the train proceeded. The cross-examiner asked whether the doors might be forced open sufficiently to allow a shoulder to pass between them. At this juncture the primary judge asked:

> "Q. Could an eight year old boy do that? Would he have the strength to do that?
>
> A. I've had an eight year old boy, he couldn't do it. But I could imagine some boys could, yes."

31 The primary judge rejected the likelihood that Corey had obstructed the door with his foot or a small object. His Honour took into account Mr Meiforth's reaction to the proposition that an eight-year-old boy might prise or push the door open, which he characterised as "particularly telling"[29]. It was not open on Mr Meiforth's evidence to conclude that Corey had obstructed the doors with his foot or a small object and thereafter widened the opening sufficiently to fall from the train. Such an inference may be thought barely open on Mr Clemens' evidence.

32 It is not evident how the small object wedge hypothesis sits with the finding, with which each member of the Court of Appeal agreed, that the only realistic means by which Corey could have generated sufficient force on his own to open the door far enough to fall out of the train was if he had his back to one door and was pushing with his arms, and perhaps a leg, against the opposing door[30]. A small opening would not have permitted Corey to obtain leverage with his back or shoulder. Moreover, were he successful in widening the gap created by a small object, there was the likelihood that the endeavour would dislodge the object. In that event, the doors would close and lock as they were designed to do.

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29 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,762 [76].

30 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,009 [39] per Macfarlan JA (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

The large object wedge hypothesis

33 There was no evidence that Corey had access to a basketball, soccer ball, backpack or other bag. The State did not submit at the trial or in the Court of Appeal that Corey may have used an object of this kind to prevent the doors from closing. When Corey was located after his fall, he was missing one shoe. There was no evidence about what type of shoes Corey was wearing and the possibility that Corey had obstructed the doors by placing the shoe lengthways was not raised. The possibility that Corey used his foot or a small object such as a soft drink can to obstruct the doors was raised by the State in its closing submissions at the trial. The submission relied on Mr Meiforth's evidence that a small object such as a glass soft drink bottle was sometimes used to prevent the doors of a V-set car from closing. Mr Clemens accepted in cross-examination that a person could stop the doors of a V-set car by placing his foot between them.

34 The primary judge considered and rejected the suggestion that Corey might have kept the doors open at Morisset Station with his foot or a small object, such as a soft drink bottle or the like[31]. His Honour thought it unlikely that Corey could have squeezed himself into a small gap and somehow wiggled into a position from which he could generate the force required to open the doors sufficiently far apart to fall out[32]. His Honour observed that a potentially more plausible scenario was that some larger object was placed in the doors which created a larger gap making it easier for Corey to insert himself between the doors[33]. His Honour said it was difficult to conceive of an object large enough and sturdy enough that was available to Corey to allow this to happen[34].

35 Macfarlan JA acknowledged that there had been no exploration in evidence of the availability to Corey of items such as a backpack, basketball or

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31 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,762-66,763 [76].

32 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,763 [76].

33 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,763 [76].

34 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,763 [76].

soccer ball[35]. Nonetheless, his Honour said that it was a distinct possibility that Corey had used an item of this kind and that his case had failed to exclude it[36].

36 It appears clear that Macfarlan JA's reference to backpacks, soccer balls and the like was a response to the primary judge's comment that it was difficult to conceive of a larger object that was available to Corey. It was, however, an error to reject the primary judge's inferential factual finding upon a view that Corey had failed to exclude an hypothesis that had not been explored in evidence.

The body wedge hypothesis

37 The body wedge hypothesis is the only hypothesis open on the evidence which commanded the support of more than one member of the Court of Appeal. It will be recalled that this was the hypothesis that the doors were prevented from closing by Corey's shoulder, arm and leg but not to the degree that any part of his body protruded sufficiently from the train such that it would, or should, have been visible to the CSA[37]. On this hypothesis, after the train left Morisset Station, Corey must have manoeuvred himself into a position with his back against one door such that he could push the opposing door sufficiently far back to fall from the train. Before considering whether it was open to conclude that this was an inference as probable as, or more probable than, the inference drawn by the primary judge, there should be reference to a controversy concerning the evidence of what the CSA should have been able to see.

What should the CSA have seen?

38 Macfarlan JA addressed this question in the course of dealing with Corey's application to file a notice of contention. Corey was seeking to uphold the primary judgment on the footing that the State was vicariously liable for the

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35 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,009 [34] (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

36 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,009 [34] (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

37 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,009 [36] per Macfarlan JA (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

CSA's failure to observe *any* gap in the doors of the lead car[38]. Leave was refused because the Court of Appeal found that the contention was bound to fail[39]. The correctness of that conclusion is not an issue in this appeal.

39 Corey submits that Macfarlan JA's reasons in dealing with his application reveal a misunderstanding of Mr Meiforth's evidence. This misunderstanding, he submits, may have infected the conclusion that it was reasonable to find that part of his body might have protruded from the train and not been observed by the CSA exercising reasonable care.

40 The suggested misunderstanding arises from evidence given by Mr Meiforth in re-examination[40]:

> "Q. If something were happening at the very front doors of the train, and you were looking either from the position where the CSA was, or alternatively, to the point where you would walk in the absence of a CSA, could you observe a small opening on the doors at the front left-hand end to the car in the front?
>
> A. No I couldn't see it. The doors are recessed and it is very hard to see that because you are looking along a [curve], you can only see if someone is hanging out, if there is anything sticking out a foot or so, you could see it but if they are just holding something inside that recess you wouldn't see it, sir.
>
> HIS HONOUR: What about where the CSA –
>
> A. He should be able to see it sir, yes."

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38 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,011 [48] per Macfarlan JA (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

39 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,012 [54] per Macfarlan JA (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

40 Extracted in *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,758 [46].

41 Macfarlan JA considered that the last answer was ambiguous[41]. His Honour noted that the previous answer responded to a question directed to the position at which the CSA would ordinarily stand and to the position to which the guard would move if there was no CSA present[42]. Macfarlan JA said that Mr Meiforth's answer to the second question only made sense if it were understood as evidence that the CSA would see "if someone is hanging out, if there is anything sticking out a foot or so"[43].

42 Macfarlan JA considered that this conclusion gained support from the primary judge's acceptance that a small impediment preventing the doors from closing might not have been observed by a CSA exercising reasonable care[44].

43 The conclusion fails to take account of the primary judge's discussion of the evidence. The primary judge set out the passage extracted at [40] above and said[45]:

> "Although the first question in this extract asked him to consider whether a small opening would be visible from the position of 'where the CSA was, or … to the point where you would walk in the absence of a CSA', *Mr Meiforth's answer was only directed to the latter alternative*. He stated that, from the position that a guard walks to when no CSA is on

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41 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,011 [50] (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

42 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,011 [50] (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

43 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,012 [52] (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

44 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,012 [52] (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]), citing *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,775 [143].

45 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,758 [47].

> duty, the guard cannot observe a small opening in the door, but can observe something protruding by a foot or so. In the second answer he indicated that a person in the position of a CSA should be able to see even a small opening in the door." (emphasis added)

44 As Macfarlan JA observed, the primary judge did not consider that the failure to observe a small impediment amounted to a want of reasonable care. Nonetheless, it is clear that the primary judge did not detect any ambiguity in Mr Meiforth's last answer: Mr Meiforth's evidence was that, from his position at the rear of the train, he would not see a small opening in the doors of the front car but the opening would be visible to a person in the CSA's position.

45 It is unnecessary to determine whether the Court of Appeal's conclusion based on the body wedge hypothesis was tainted by the misconception concerning the evidence of what the CSA should have been able to see.

Discussion

46 Corey's case depends upon proof of three inferences of fact: that as the train left Morisset Station he was trapped between the front, western doors of the lead car; that his arm, leg and part of his torso were protruding from the car; and that the protruding parts of his body were visible to a person standing in the CSA's position on the platform. Corey's case fails if any of these inferences is not a definite conclusion of which the trier of fact is affirmatively satisfied, as distinct from merely a possible explanation for the known facts[46].

47 The conclusion that Corey fell from the front, western doors of the lead car is inevitable. The conclusion that immediately before the fall Corey must have been between the doors with his back to one (as he pushed against the opposing door) is accepted by the primary judge[47] and the Court of Appeal[48] to be the correct inference. If the primary judge's conclusion, that the reasonable and probable explanation for this state of affairs is that Corey was trapped

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46 *Jones v Dunkel* (1959) 101 CLR 298 at 305 per Dixon CJ; [1959] HCA 8.

47 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,762 [76].

48 *State of New South Wales v Fuller-Lyons* (2015) Aust Torts Reports ¶82-189 at 68,009 [39] per Macfarlan JA (McColl JA agreeing at 68,003 [1], Sackville AJA agreeing at 68,014 [72]).

between the doors as they closed at Morisset Station, is a correct finding, it remains correct notwithstanding that other possible explanations for the known facts cannot be excluded[49].

48 Mr Clemens considered it probable that Corey had become trapped in the doors, or was standing in the doors, as they closed. In cross-examination, he was asked:

> "Q. Well then, how do you envisage that he was entrapped? Which part of him?
>
> A. Oh, I've got no evidence to say which part of him was trapped. But given that he fell out I'd suggest a good portion of him was caught in the doors.
>
> Q. All right. And then what, this is at Morisset?
>
> A. It seems most likely to me, yes."

49 The cross-examiner obtained Mr Clemens' agreement that Corey might have been seeking to stop the doors from closing. The cross-examination continued:

> "Q. He may have simply, for example, put his foot in the door, right?
>
> A. Yes. More likely his body I would have thought."

50 While Mr Clemens' evidence allowed of the possibility that some eight-year-old boys might have the strength to force an opening in the doors of a V-set car against the pneumatic pressure, his evidence did not support a conclusion that this was a likely occurrence.

51 Mr Meiforth's evidence, which impressed the primary judge, was against acceptance of the body wedge hypothesis.

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49 *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5-6; *Luxton v Vines* (1952) 85 CLR 352 at 358 per Dixon, Fullagar and Kitto JJ, 362 per McTiernan J; [1952] HCA 19; *Strong v Woolworths Ltd* (2012) 246 CLR 182 at 196-197 [34] per French CJ, Gummow, Crennan and Bell JJ; [2012] HCA 5.

52 The evidence was that it was not unusual for passengers to become trapped in the doors of cars as they closed at stations[50]. As the primary judge observed, an eight-year-old, unsupervised child might well become trapped in the closing doors of a train either accidentally or intentionally[51].

53 Acceptance that Corey had his back to one door and that he was able to force back the opposing door with his arms and a leg carries with it that, at that time, one door was against the span of Corey's back at a point between his shoulders. Necessarily, at least part of his trunk and limbs must have been protruding from the train. In light of the Court of Appeal's acceptance that Corey was in that position before his fall, the further finding that Corey came to be in this position as the result of the doors closing on him at Morisset Station is correctly characterised as the most likely inference "by a large measure"[52]. The Court of Appeal erred in overturning the finding for the reasons that it gave.

Two further State submissions

54 Before leaving the appeal, there should be reference to two submissions made by the State on the hearing in this Court, which do not appear to have been made below. First, it is submitted that the primary judge's finding, that Corey became trapped by the closing doors before the CSA signalled the guard, was unsupportable. Shortly put, the submission is that the guard only switches on the locking mechanism when he receives the CSA's signal. Therefore, so the argument goes, Corey could not have been trapped by the closing of the doors when the CSA gave the signal. The submission misconceives the evidence and the primary judge's finding.

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50 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,763 [79], 66,765 [91]-[93], 66,767 [106].

51 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,763 [79].

52 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,763 [77].

55 The applicable Operation Manual for Electric Trains was in evidence in the State's case. Relevantly, as the primary judge noted, the manual contained the following instructions[53]:

> "It is the guard's responsibility to give the 'all right' signal to authorise the driver to proceed and to ensure that passengers are clear of the doors prior to closing them and before giving the 'all right' bell signal to the driver.
>
> …
>
> Before giving the 'all right' bell signal to the driver, the guard is to ensure that the 'doors open' indicator light (where provided on the guard's panel) is not shining and, *that no person is observed to be caught in the doors*." (emphasis added by the primary judge)

56 As might be expected, the manual required that, before the signal that informs the driver that it is safe to depart from the platform is given, railway staff ensure that no person is observed to be caught in the doors.

57 The State's second submission is that Mr Meiforth's evidence, that it would be "much too hard" for an eight-year-old boy to force open a door, was directed to a different type of train to the V-set intercity train from which Corey fell. The submission takes an answer out of context. It is unnecessary to set out the questions and answers leading to the statement. It suffices to observe that, when the evidence is read as a whole, it is clear that Mr Meiforth's opinion, that it would be "much too hard" for an eight-year-old boy to force open a door, was with respect to forcing the doors of the train in 2001. The conclusion accords with the primary judge's understanding of the evidence as it was given[54].

58 The appeal must be allowed.

Orders

59 The Court of Appeal ordered Corey to pay the State's costs of the proceedings at first instance and on appeal (order 5). Corey seeks orders setting

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53 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,775 [140].

54 *Fuller-Lyons v State of New South Wales (No 3)* (2013) Aust Torts Reports ¶82-150 at 66,758-66,759 [50].

aside orders of the Court of Appeal, including order 5. The orders that he seeks would leave in place Beech-Jones J's special costs order. Corey does not seek an order for his costs of the proceedings in the Court of Appeal. He asks for an order that the matter be remitted to the Court of Appeal to determine any special order for costs in that Court that could have been sought upon dismissal of the appeal. The State makes no submissions on the form of any costs order. In the circumstances, it is appropriate to make the order sought.

60 Corey seeks an order that the State pay his costs of the appeal in this Court. He also asks for directions in the event that he applies for a special order for the costs of the proceedings in this Court in substitution for the order that he claims. In the absence of an application for such an order, those directions will not be given.

61 The following orders should be made:

1. Appeal allowed with costs.

2. Set aside orders 2, 3, 4 and 5 made by the Court of Appeal of the Supreme Court of New South Wales on 9 December 2014 and, in lieu thereof, order that the appeal to the Court of Appeal be dismissed.

3. Remit the matter to the Court of Appeal to determine the costs of the appeal to that Court.