LITHGOW CITY COUNCIL v JACKSON (S66/2011)

Court appealed from: New South Wales Court of Appeal
[2010] NSWCA 136

Date of judgment: 11 June 2010

Date of grant of special leave: 11 February 2011

The respondent was found unconscious with a serious head injury in a concrete drain in a park occupied by the appellant, having taken his dogs for a walk in the early hours of the morning whilst intoxicated. He had no memory of the events in question and there were no witnesses to the accident. He commenced proceedings against the appellant in negligence alleging that he had fallen over a low, unfenced retaining wall of the drain. At first instance, the respondent was unsuccessful with Ainslie-Wallace DCJ finding that he did not discharge his onus of proving how he fell and came to be injured. The Court of Appeal allowed an appeal against that decision. Allsop P found that on the available evidence, an inference could be drawn that the respondent fell over the wall whilst walking down the hill in the dark. Of particular importance was a record made by ambulance officers who attended the scene. The officers filled out a document referred to as a "retrieval record", a document admitted without objection. The retrieval record as extracted before the Court of Appeal relevantly stated "Fall from 1.5 metres onto concrete". Allsop P admitted the statement in the record pursuant to s 78 of the *Evidence Act* 1995 (NSW) finding that it constituted some evidence that the respondent fell from the wall and could be taken as some evidence of a position of the body consistent with a view to that effect. The respondent's injuries appeared somewhat more likely to have occurred from a serious fall rather than from stumbling from the side of the drain as the appellant contended.

When the appellant sought special leave to appeal to this Court, it became apparent that the retrieval record had not been accurately reproduced before the Court of Appeal in that a question mark preceded the statement "Fall from 1.5 metres onto concrete".

On 31 July 2009, a Court constituted by Gummow, Hayne and Heydon JJ granted special leave to appeal, treated the appeal as instituted, heard instanter and allowed. It set aside the orders of the Court of Appeal and remitted the matter to that Court for further hearing. This was done on the basis of the incomplete reproduction of the retrieval record referred to above.

The Court of Appeal was composed of the same Bench which heard the first appeal (Allsop P, Basten JA and Grove J). Again, the appellant's appeal was dismissed. Allsop P again found that the ambulance record was admissible and when added to the totality of the evidence, made it more likely than not that the respondent had fallen from the wall in the manner described in the first Court of Appeal decision. Grove J agreed with the orders proposed by the Allsop P for the reasons which the President had given. Basten JA delivered a separate judgment also finding that the evidence should have been admitted.

The grounds of appeal include:

- The Court of Appeal ought to have held that because the only inference open to be drawn from the ambulance records was that the authors questioned whether the respondent had fallen 1.5 metres onto concrete, the matter contained in the patient history was not an opinion.

The respondent seeks leave to file a notice of contention out of time. The respondent contends that the decision of the Court of Appeal should be affirmed on the ground that the judgment of the Court as to the circumstances of injury and the resultant findings on liability is supported by evidence other than that challenged.