IN THE HIGH COURT OF AUSTRALIA

No. S81 of 2015

SYDNEY OFFICE OF THE REGISTRY

On Appeal from the New South Wales Court of Appeal

BETWEEN:

COREY FULLER-LYONS
by his Tutor, NITA LYONS
Appellant

and

STATE OF NEW SOUTH WALES
Respondent

APPELLANT'S REPLY

Part I:
This reply is in a form suitable for publication on the internet.

Part II:
Introduction

The respondent's submissions contain the same vices as the judgment of the Court of Appeal.

The primary judge's finding of fact was that the **only** realistic way that the appellant could have the strength to force a door apart was from a position where he was trapped between them.[1] This is a fact "established by the findings of the trial judge"[2] The Court of Appeal found that the appellant could open the doors from another position, from inside the doors, by creating a gap then enlarging it.[3]

On what basis was the Court of Appeal entitled to approach the appeal on the basis of an "hypothesis" that he could do this when there was a finding of fact to the opposite effect by the primary judge?

The respondent's submissions do not demonstrate a basis, consistent with well-established principles[4] upon which the Court of Appeal could do what they did.

In addition to failing to deal with that fundamental issue on this appeal, particular paragraphs of the respondent's submissions ("RS") require a reply. This is best done by reference to the paragraphs in the respondent's submissions.

Paragraph 2
There are two errors in this paragraph:

(i) The first is that a finding of fact is not "speculation" or "guesswork" but a legitimate inference if there are primary factual bases upon which it can be made. There were five primary facts upon which the primary judge made the finding of

1 [2013] NSWSC 1672 at [76]
2 *Warren v. Coombes* (1979) 142 CLR 531 at 551]
3 [2014] NSWCA 424 at [34]-[36]
4 *Fox v. Percy* [2003] 214 CLR 118

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entrapment. These are set out in the appellant's submissions ("AS").[5] On what basis does the respondent say that the Court of Appeal conducted a "real review...of the trial judge's reasons"[6] if they did not even address the primary facts relied upon by the primary judge from which he drew the inference of entrapment? How does the respondent claim that it has shown that the Court of Appeal discharged its obligation to establish "the embedded requirement for the demonstration of error"[7] in the findings of the primary judge?

(ii) The second error is that exculpation of the respondent's customer services attendant only became a relevant issue if the finding of the manner of the appellant's entrapment was set aside which it was not.

Paragraph 4

The want of procedural fairness arose because the "distinct possibility"[8] of the use of "a backpack or other bag, a shoe placed lengthways or even a ball such as a basketball or soccer ball being placed between the doors as they closed" was not raised in evidence or submissions during the trial or on appeal.

Paragraph 6

AS 1/43-3/11[9] identify the facts which were not in dispute between the parties. AS 3/15-3/42[10] identify the findings of fact made by the Court of Appeal which the appellant contends were erroneous.

The identification of erroneous findings of fact is relevant to the disposition of the appeal.

Paragraph 11

The respondent had not "asserted in evidence..." that "he was sucked or thrown out of the train". He did not know how he came to part company with the train.[11]

Paragraph 13

The last sentence of paragraph 13 is not correct. Mr Meiforth's evidence was that the guard could not see if a passenger was "just holding something inside that recess you wouldn't see it, sir" and then the primary judge directed the witness's attention to the alternative proposition:

> *"Q: What about where the CSA?*
> *A: He should be able to see it, sir, yes."*[12]

Footnote 14 is incorrect. The expert evidence was that the ordinary closing mechanism of the door had been interfered with and that the 100mm gap at the base of the door "was a consequence of interference".[13] There was no dispute at the trial that there had been interference with the closing of the doors.

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[5] AS 4/40-6/12
[6] *Fox v. Percy* [2003] 214 CLR 118 at [25]
[7] *Yarrabee Coal Company Pty Ltd v. Lujans* [2009] NSWCA 85 at [4]
[8] [2014] NSWCA 424 at [34]
[9] Paragraphs Part V(i)-(xviii)
[10] Paragraph Part I(xix)-(xxviii)
[11] Black Appeal Book p.18/30-19/4 [AB]
[12] As noted in AS 11/41, when read in the context of the cross-examination followed by these answers in re-examination what was clear to the primary judge was "ambiguous" to Macfarlan JA. The difference between the two judges depended entirely upon one having the advantage of seeing and hearing the ebb and flow of questioning and the other taking the question and answer out of the context in which it appeared in the trial process involving examination, cross-examination and re-examination, which is where the answer appears in the transcript.
[13] Blue AB Vol 3 p.998 [AB]

The respondent's case was that that interference had been caused by the appellant's brothers. The appellant's case was that the interference with the functioning of the doors had been caused by his being trapped between them. This is what caused them to "ride up".[14]

Paragraph 16

There was no reformulation of the appellant's case. The case that was opened was the case that was run and the case that was proven. The exchange between the primary judge and Queen's Counsel for the respondent on the morning of the second day of the trial makes that clear.[15] The proposition that the door suddenly opened was abandoned before any expert evidence was called.[16]

Paragraph 18(b)

The primary judge did not make a finding that forcing the door back "could most readily be effected by the appellant having his back to one door".[17] The finding was that this was the "**only** realistic means" by which the appellant could "open the door **far enough for him to fall out**" (emphasis added).[18] He only needed to prise the door apart "far enough for him to get out" which is very different from having the strength to open them from a position inside, or mostly inside the train, which was the finding of the Court of Appeal.

Paragraph 19

The evidence consisted of the findings of primary fact and the inferences drawn from them. The visibility of parts of his body to the CSA was an identified issue during the trial.[19]

Paragraph 20(a)

The propositions in paragraph 20(a) were neither common ground nor correct. As the evidence of Mr Cowling made clear[20] the doors do lock at the top if impeded at their base because they are hung from the top and will "ride up" at their base if the closing operation is subjected to interference. But they still lock even with the gap at the bottom.[21] The doors on the opposite side were previously defective.[22]

Paragraph 20(b)

Paragraph 20(b) is incorrect. There was no evidence of passengers inserting feet between the doors. Passengers (other than children) inserted objects when they wanted to disguise the fact that they were smoking on the train and not to exit from it.[23]

Paragraph 20(f)

The primary judge made a finding to the opposite effect.[24]

Paragraph 21

Paragraph 21 of the respondent's submissions is also incorrect. This trial commenced on Monday 22 April 2013 and the three possible explanations for the accident were identified in opening.[25]

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[14] Blue AB Vol 3 p.998K [AB]
[15] Black AB 110/45 [AB]
[16] Black AB 129/15 [AB]
[17] RS 18(b)
[18] [2013] NSWSC 1672 at [76]
[19] See Black AB 376/16-376/49 [AB]
[20] Blue Appeal Book Vol 3 p.994-999 [AB]
[21] Blue Appeal Book Vol 1 p.191 [AB], Blue Appeal Book, Vol 3, p.999T.
[22] Blue Appeal Book Vol 3, p.1183 [AB]
[23] Black AB 314/3 [AB]
[24] [2013] NSWSC 1672 [47] [AB]
[25] Black AB 1/30-40 [AB]

On the second day of the trial the primary judge made it abundantly clear to Queen's Counsel for the respondent what the issues were.[26]

Paragraph 23
There was no dispute that the primary judge directed himself as to the correct principles to apply.[27]

Paragraph 24(a)
If the appellant was "within the doors" when the train left Morisset Railway Station he could not have fallen from the train because he could not have prised the doors apart, an objective that the respondent's "door security" policy was designed to achieve.

Paragraph 24(b)
"Enlarging the gap after the train left the station" would involve the appellant doing something which the primary judge said he could not do. As observed in the appellant's submissions[28] the alternative finding in the Court of Appeal was that not only did he force the doors back against the pneumatic pressure that they exerted but did so with such strength that it bent the doors out of alignment.[29]

Paragraph 24(c)
The timing of two to three minutes between the train leaving Morisset railway station and the accident is entirely consistent with the appellant attempting, during that period, to extract himself from the entrapped position.

Paragraph 24(d)
There was no evidence for the existence of such object nor could anyone realistically describe a child's shoe as a "sturdy object".[30] Even if the assumption is made that the appellant had such an object, as soon as he removed it the pent up pneumatic pressure in the doors would force them to immediately close with a degree of force which he was incapable of resisting.[31]

Paragraph 24(e)
The difficulty with paragraph 24(e) is that there was no finding that by use of a shoulder, arm and leg the appellant could get his body through the two doors.

Paragraphs 25 and 26
In accordance with well established principles of appellate review there was no basis upon which the Court of Appeal could make findings of fact in this case which contradicted the findings of fact made by the primary judge.[32]

Part VI:
Part B, Response to the Appellant's Submissions

Paragraphs 27 and 28
The findings Macfarlan JA said he would "accept"[33] are inconsistent with his reasoning in later parts of his judgment.

[26] Black AB 110/44 [AB]
[27] [2013] NSWSC 1672 at [68]-[72]
[28] AS 7/39-8/11
[29] Blue Appeal Book Vol 3, p.996L [AB]
[30] AS 7/25-AS 7/36
[31] Black AB 314/45; Black AB 313/16-27 [AB]
[32] See footnote 36.
[33] [2014] NSWCA 424 at [39]

Paragraph 29
The answers to the submissions in relation to Mr Clemens' evidence are dealt with in the appellant's submissions.[34]

Paragraphs 30 and 31
The submission that Mr Meiforth was not talking about one and the same type of train involved in this accident is plainly wrong.[35]

There was no need to further cross-examine Mr Meiforth following the re-examination. As noted above it was common ground that the appellant could "force it open **enough to be able to get out**" (emphasis added), otherwise he would not have fallen out of the train at all.

The Notice of Contention Issue
The respondent's submission in paragraph 32 misunderstands the point being made in the appellant's submissions on page 11/32-12/15, namely that the way in which Macfarlan JA erroneously dealt with the issue that arose on the Notice of Appeal illustrated the point of principle being made in the appellant's submissions.[36]

Paragraph 33
Paragraph 33 of the respondent's submissions confuses the evidentiary onus and the legal onus. The evidentiary onus shifts. The legal onus does not. The respondent's case at trial about the brothers' involvement is a good illustration of a shifting and evidentiary onus. Having been raised as a possible explanation for the occurrence of the accident it was necessary for the plaintiff to exclude it, which he did. There was no evidential onus on the plaintiff to exclude the use of soccer balls etc. because their existence, or possible existence, was not raised in evidence. A plaintiff is not required to "box at shadows".

Paragraph 34
This paragraph identifies the way in which the Court of Appeal fundamentally miscarried in the discharge of its functions. An appeal can never be allowed on the basis of "hypothetical explanations" when the primary judge has found what the facts actually were and where the reasoning in the Court of Appeal is inconsistent with those unchallenged factual findings.

Dated: 20 May 2015.

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[34] AS 9/15-10/29
[35] See Black AB 312/27 [AB]
[36] Other illustrations of the relevant principle are: *Jones v. Hyde* (1989) 63 ALJR 349 at 351.9, *Zuvela v. Cosmaman Constructions Pty Ltd* (1996) 71 ALJR 29 at 32, *SRA (NSW) v. Earthline Constructions Pty Ltd* (1999) 73 ALJR 306 at [90], *CSR Ltd v. Della Maddalena* (2006) 80 ALJR 458 at [180]