IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S81 of 2015**

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

RESPONDENT'S SUBMISSIONS

Part I:

1. I certify that this submission is in a form suitable for publication on the internet.

Part II:

2. The Court of Appeal found that considered, on the footing that the trial judge's finding as to non-involvement of the older brothers was correct,[1] the trial judge had failed *to apply the requirement to distinguish carefully between inference and conjecture or speculation and in concluding that the inferential approach favoured the Appellant's hypothesis as to the cause of his fall.*[2]

3. The issue before the Court is whether the Court of Appeal erred in holding[3] that *On the objective evidence the Respondent's accident could have happened even if the CSA properly discharged his duties.*[4] and *...not less probable hypotheses that do not involve the Appellant protruding from the train as it left the station in such a way that he should have been seen by the CSA exist.*[5]

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[1] Court of Appeal judgment, at [7], [32].
[2] Ibid, at [2], [5], [7], [8], [11(i)], [12], [33] – [37].
[3] Ibid, at [5], [33] and [72].
[4] Ibid, at [6].
[5] Ibid, at [32], [33].

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4. The Appellant asserts that[6] a question of procedural fairness in the Court of Appeal arises. The Respondent is not able to identify any question of procedural fairness.

Part III:

5. It is certified that no matter arises under the Constitution or involving its interpretation; accordingly section 78B notices are not required.

Part IV:

10 6. The Respondent does not accept a number of characterisations by the Appellant as *facts found by the Court of Appeal* that are found in his submissions in Part V.[7] The matters submitted by the Respondent to be wrongly characterised as facts form the basis of the Appellant's argument, but are not themselves directly relevant to the appeal. The Respondent addresses them separately within these submissions at Part VI, Part B.

Part V:

7. No matter arises under the Constitution or involves its interpretation.

Part VI: Part A, Respondent's Argument

20 Background

8. In 2001 three brothers obtained their mother's permission to travel alone for the first time by suburban train from Sydenham to St Peters, Sydney suburbs. They were then aged approximately 15, 11½, and 8½ years. They travelled instead to Central Station, where they boarded an intercity service to Newcastle, taking a position immediately behind the driver's cabin.

9. Prior to departure the doors of that train, which lock automatically when fully closed were inspected and found to be in normal state. The train reached Morisset, a curved station. A Customer Service Attendant (CSA) was present on the platform. His duties included positioning himself adjacent to
30 the second carriage to observe the forward section of the train during the brief time that it was stationary there,[8] and having done so, to signal the train guard standing adjacent to his cabin at the rear of the carriages that the section of the train that he was observing was in a safe condition for the guard to close the doors and signal the driver to move off.

10. The guard's duty involved him observing the rear section of the train, closing the doors after receiving the CSA's signal and sounding the bell to

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[6] Notice of Appeal filed 29 April 2015, paragraph 6.
[7] Appellant's Submissions of 1 May 2015; hereafter, *Appellant's Submissions.*
[8] Black Appeal Book p302, line 40.

the driver.[9] He would watch the CSA on the platform until the train had passed him.[10] The train departed Morisset Station normally at 12.07pm, the guard noting nothing untoward.[11]

11. Two to three minutes later, at 12.09pm the Appellant fell from the train and sustained injury. He asserted in evidence[12] that whilst standing in the forward vestibule adjacent to the front doors, the doors opened without warning and he was sucked or thrown out of the train.

The Train

12. Each carriage had two sets of double doors at the front and rear on each side. The doors on the side adjacent to platforms at which the train stopped were released and closed by the action of the guard releasing and energising pneumatic pressure; they latched in the middle with handles that passengers utilised to slide open doors for ingress and egress whilst no pneumatic pressure was present.

13. V-Sets were fitted with an additional electronic lock that engaged automatically when the double doors were fully closed. When locked they could not be opened by passenger action. The automatic lock did not lock if the double doors were prevented from coming together in any manner, and passengers on occasion prevented the doors from fully closing by placing objects such as bottles between the doors before they closed. The doors are recessed within the carriage and unless something is protruding a foot or so beyond the doors will not necessarily be seen by station staff.[13]

14. Investigation when the train reached Newcastle disclosed that the double doors on both sides of the front of the lead carriage though operating normally, had been distorted. The opinion of the Respondent's expert was that the distortion had been occasioned at more than one station by deliberate interference[14] was not challenged.[15]

Trial

15. At trial, the Appellant gave evidence that the doors had opened without warning in transit. His two older brothers gave evidence that they were sitting in the lower section of the carriage adjacent to the steps to the relevant vestibule and saw nothing of the manner in which the Appellant fell.

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[9] Black Appeal Book o303, lines 40-50.
[10] Trial judgment, at [45].
[11] Black Appeal Book, p302, line 20.
[12] Ibid, p12, line 35; p14, line 17.
[13] Ibid, p328, line 29.
[14] Blue Appeal Book 3, Exhibit 8, p998, O-T.
[15] Black Appeal Book, p339, line 30.

16. The Appellant's senior counsel foreshadowed in opening that the Appellant's case would be put in alternate ways.[16] After the evidence of his two experts and that of the engineering expert called by the Respondent had been taken, he abandoned the Appellant's direct evidence and did not cross-examine the Respondent's expert on his reports or his viva voce evidence. Immediately prior to the Respondent closing its case he reformulated the Appellant's case to one of inference of casual negligence on the part of one of the Respondent's servants.[17]

Trial Judge's Judgment

17. The learned trial judge found that the older brothers were not present when the Appellant fell and accepted that the Appellant's own evidence was to be disregarded. The Court of Appeal considered the matter on the basis of an assumption that his Honour's finding was correct. Accordingly, there was no eye witness account of the manner in which the Appellant fell. The matter became one of the drawing of inferences from facts that were or became common ground, or facts found by the learned trial judge.

18. The trial judge made the following findings

(a) The Appellant was trapped by the closing doors.[18]

(b) That as some strength was required to force one door back against the pneumatic pressure and that could most readily be effected by the Appellant having his back to one door, the *most likely scenario* was that the doors had closed across the span of his shoulders.[19]

(c) That, whilst he could not determine whether the Appellant had been unwittingly trapped, deliberately interfered with the doors, or deliberately impeded them for the purposes of opening them during transit, the Appellant *was located between the doors with at least one arm, one leg and part of his torso protruding from the carriage.*[20]

(d) That it was *very unlikely* that the Appellant had kept the door from locking at Morisset Station with his foot, a soft drink bottle or the like[21] and thereafter wriggling into the space, because it was *very*

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[16] Black Appeal Book p1 line 30.
[17] Ibid, p354, line 20.
[18] Trial judgment, [6], [77], [82], [145].
[19] Ibid, at [77].
[20] Ibid, at [6], [77]. The Appellant made no reference in his written submissions at trial to the possible position of the Appellant; his Honour introduced the subject during address, at Black Appeal Book p376, line 30 and during the Appellant's reply, at Black Appeal Book p449, line 40.
[21] Trial judgment, at [76].

unlikely[22] that he could have done so in the two to three minutes between the train leaving Morisset and the time of his fall.[23]

(e) The CSA must have failed *to observe (at least) Corey's leg, arm and part of his torso as they protruded outside the exterior of the door as they closed before he signalled the guard for the train to depart...This scenario is a far more likely inference than all others.*[24]

19. There was no evidence adduced in respect of any of those five findings, and no submission was made in respect of matters numbered (c), (d), or (e). There was no evidence as to how, had the Appellant been caught in the doors, the position in which he was caught might have resulted. The question of the position that might have resulted from the Appellant having the doors close upon him only in address.[25] The consequences in terms of visibility of parts of his body to the CSA was not advanced during the trial. It emerged in paragraphs [6] and [77] of the trial judge's reserved judgment.

Respondent's Submissions

20. The common ground upon which the Court of Appeal considered the Appeal included

(a) For the doors to lock automatically, they needed to travel to a fully closed position, and when locked, could not be opened by passenger action. The front doors of the lead carriage on both sides had sustained deliberate interference after leaving Central Station at Sydney.

(b) The locking mechanism could be prevented from operating by preventing the double doors from fully closing, and passengers did prevent locking by insertion of objects between the closing doors; examples included keys, feet, and bottles 8 to 10 inches in length.[26]

(c) The guard electronically released the automatic door lock and depressurised the pneumatic closing mechanism on the appropriate side of the train during stops at stations en route. Following the release of pressure at the station the doors remained closed and mechanically latched unless opened by means of door handles by alighting or disembarking passengers.

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[22] Trial judgment, at [76].
[23] The Court of Appeal disagreed with the trial judge on his Honour's view as to time; Court of Appeal judgment, at [40].
[24] Trial judgment, at [78].
[25] Black Appeal Book p376, line 30; p449, line 40.
[26] Mr Meiforth, Black Appeal Book p314 C-L.

(d) It was important that trains adhere to timetables Railway staff did not have time to inspect all doors to ensure that the electronic closing lock had operated and it was no practicable to do so. A Safe Working Unit required the guard to *ensure that...no person is observed to be caught in the doors before giving the all right bell signal to the driver.* The guard described his role as stepping onto the platform, *looking to make sure the passengers are safely on the train, that there is no-one near, close to the doors where the train is, anyone travelling, make sure they are back clear.*[27]

(e) Morisset Station has a curved platform at which a CSA when present would station himself towards the front of the train to assist the guard in his duties. When he had made the relevant observations of the forward section of the train he would display a white flag[28] to signal the guard.[29] The guard after satisfying himself to like effect would return to his compartment, engage the doors[30] and signal the driver that he was back on the train and he was cleared to put the train in motion.

(f) The carriage doors were recessed into the carriage to an extent that anything protruding from within the carriage beyond the doors would not be seen by staff on the station unless it protruded a foot or so.[31]

21. It was not suggested that Mr Meiforth, who had observed nothing unusual at Morisset Station, failed in his duty. His observation of the CSA until he passed him and his own continued observation of the train until past the station,[32] by when the line had straightened, imply that there was nothing unusual for the CSA to see. On the fifth day of the trial immediately prior to the parties closing their cases on liability,[33] senior counsel for the Appellant enunciated the manner in which he then put the case as

> *...A member of the staff who gave the signal to Mr Meiforth, that person failed to observe the presence of the plaintiff trapped in the front doors of the train...that's the way in which it is put.*

22. His Honour the trial judge summarised that case[34]

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[27] Black Appeal Book, p303, lines 8-15; He was not cross-examined on this description.
[28] Trial judgment, at [44], [141].
[29] The trial judge found at [143/10] *the adoption of such a system leaves open the possibility...that small impediments that prevented the door opening* (scil., *closing*) *might not be observed with the exercise of reasonable care by the CSA..*
[30] Mr Meiforth at Black Appeal Book p303, line 34.
[31] Evidence of Mr Meiforth at Black Appeal Book p328, line 23; The question was not further explored.
[32] Black Appeal Book, p303, line 49.
[33] Black Appeal Book, at p354 l.
[34] Trial judgment, at [111/10].

> *The second*[35] *(precaution submitted) was the failure of the staff at Morisset to detect that the doors were not closed before signalling the train driver to depart.*

23. Their Honours in the Court of Appeal stated the relevant legal principles in terms that have attracted no submission.[36] The Court of Appeal having identified error in the court below[37] advanced to a consideration[38] of

> *If it be assumed in Corey's favour that his brothers' denials were truthful, was there was sufficient evidence to enable an affirmative conclusion to be drawn that a substantial part of Corey's body was protruding from the train doors when the train left Morisset Station? Alternatively, were there at least equally available hypotheses, first that his body prevented the doors from closing but did not protrude significantly or, secondly, that the doors were prevented from closing by some other object that had been placed between them?*

The court answered in the negative.[39]

24. The Court of Appeal concluded that the following specific aspects of the trial judge's inferred conclusion in favour of the Appellant's hypothesis as to the cause of his fall were not open

(a) Were the Appellant within the doors before the CSA signalled for the train to depart,[40] his particular position was not a *scenario far more likely than all others.*

(b) The Appellant had not negated the available inferences that the CSA had discharged his duties, as the doors may have been deliberately prevented from locking by the Appellant, enlarging the gap after the train left the station.[41]

(c) That two to three minutes was well within the time that it might take the Appellant to widen a gap sufficiently to fall out.[42]

(d) A significant gap might have been occasioned by the use of a large and sturdy object.[43]

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[35] The first was the failure to have operational a system that prevented the train from operating if the doors had not all locked; That case was rejected at trial.
[36] Court of Appeal judgment, at [2], [30], [31], and [72].
[37] Ibid, at [2], [5], [8]. [33], and [92].
[38] Ibid, at [11(i)].
[39] Ibid, at [12], [1] and [72]. His Honour was plainly not intending to answer the alternative question in the negative.
[40] Court of Appeal judgment, at [4] and [5]. The words quoted by McColl JA are those of the trial judge.
[41] Ibid, at [7] and [34] – [37].
[42] Ibid, at [40], [42].

(e) The Appellant might have prevented the doors closing by inserting his shoulder, arm and leg without them protruding significantly.[44]

25. These possibilities their Honour's determined to be reasonable hypotheses available on the evidence.[45]

26. The Respondent submits that no error is discerned on the part of the Court of Appeal.

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

Appellant's Submission page 4, line 1.

27. In Part V the Appellant characterises as *findings*[46] references in the judgment of Macfarlan JA. These he submits *could only be correct if (Macfarlan JA) overturned the finding of fact by the primary judge*. That *finding of fact* he identifies as that relating to the means by which the Appellant could have forced open the door.[47]

28. The Court of Appeal considered that matter on an assumption of that finding of fact by the trial judge, quoting the terms that the trial judge had himself employed.[48] None of the five matters identified by the Appellant as findings of the trial judge[49] needs to be overturned in order to validate the alternative hypotheses to which the Court of Appeal pointed.

Appellant's Submission page 9, line 5

29. The Appellant submits that her Honour McColl JA erred in making a factual finding, citing her Honour's observation on the evidence of Mr Meiforth and Mr Clemens that it ...*established that an eight year old boy could open the doors, assuming there was a gap.*[50]

30. The Appellant argues

> *Mr Meiforth's evidence was to the effect such that the Appellant would have to have been in a position where he was trapped between the doors.*

31. Mr Meiforth's evidence was not to that effect. In cross-examination he agreed[51] that it would be *much too hard for an eight year old boy to force*

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[43] Court of Appeal judgment, at [41].
[44] Ibid, at [43].
[45] Ibid, at [7], [32].
[46] Appellant's submissions, page 3, lines 7 to 20.
[47] Ibid, page 4, line 1. The extracts to which xix – xxix refers are set out on his page 3.
[48] Court of Appeal Judgment, at [39]; Appeal Book
[49] Appellant's Submissions, page 4, line 40 to page 6, line 10.
[50] Court of Appeal judgment, at [6].
[51] Black Appeal Book p325, line 24.

open a door on a different type of train, one not fitted with the automatic locking device at the top of the doors that was entirely reliant for closure upon a latch capable of use by passengers in transit, and the unknown closing pressure of its pneumatic system. In re-examination Mr Meiforth agreed that with his back against the door and using his arms an eight year old could force one door open. The Appellant declined the trial judge's invitation to cross-examine on that matter. There was no other evidence on the topic. As to the evidence of Mr Clemens the Appellant's expert, his evidence was to like effect.[52] No objection was taken to any question addressed to Mr Clemens on the basis of his lack of expertise. Whether one accepts the submitted interpretation of Mr Meiforth's evidence[53] or not, her Honour's observation was in any event correct on the basis that she stated.

The Notice of Contention Issue

32. The Appellant submits[54] that his Honour Macfarlan JA erred in his treatment of the Appellant's application to the Court of Appeal by Notice of Contention. Neither the Draft Notice of Appeal of 22 December 2014 nor the Notice of Appeal filed 29 April 2015 contains any ground directed to the refusal of leave by the Court of Appeal to file a Notice of Contention, a matter drawn to attention by the Respondent in its Summary of Argument on the Special Leave Application.[55] The Notice of Appeal filed on 29 April 2015, Order 9, records under the heading *Orders Sought*

> *9. Orders of the Court of Appeal set aside except in respect of the refusal of leave to file a Notice of Contention.*

33. The Respondent does not respond to the arguments contained in the Appellant's submissions between page 6, line 15 to page 11, line 32, save to observe that the appear to impose an onus of proof on the Respondent,[56] to introduce matters not raised at trial,[57] to speculate on matters not explored in evidence,[58] to characterise evidence as *findings* of the Court of Appeal,[59] to elevate possibilities to findings,[60] and to ignore uncontested evidence – for example, objects as small as a key can prevent the doors locking.[61]

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[52] Black Appeal Book, p210, line 16; p262, line 49 to p264, line 10.
[53] Ibid, p325 D-N.
[54] Appellant's Submissions, at page 11, line 36.
[55] Respondent's Summary of Argument of 29 January 2015, paragraph 7.
[56] Appellant's Submissions, at page 6, line 34, page 7, page 8, line 18.
[57] Ibid, at page 8, line 10.
[58] Ibid, at page 8, line 34.
[59] Ibid, at page 8, line 21; see Black Appeal Book p369, line 40.
[60] Appellant's Submissions, at page 8, line 26; Court of Appeal judgment, at [35].
[61] Appellant's Submissions, page 8, footnote 21 – Compare Meiforth at Black Appeal Book, p314D.

34. The Respondent does not respond to the Appellant's argument from page 12, line 15 to page 13, line 20, save to observe that the assertion at page 12, line 40 as to the availability of evidence relating to passengers keeping the doors open in transit was not limited by Mr Meiforth as submitted.[62] The Appellant continues to assert that the Court of Appeal made findings of fact. It did not; it treated the matter, correctly it is respectfully submitted, as one in which a number of hypothetical explanations for the Appellant's fall that did not bespeak negligence on the part of the CSA were available on the evidence,[63] that were no less likely than that determined by the trial judge.

10 **Part VII:**

35. The Respondent has filed no notice of contention. There is no cross-appeal.

Part VIII:

36. The Respondent estimates that a period in the order of one and a half hours will be required for presentation of the Respondent's oral argument.

Dated 15 May 2015

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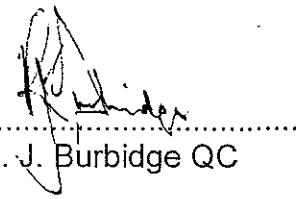
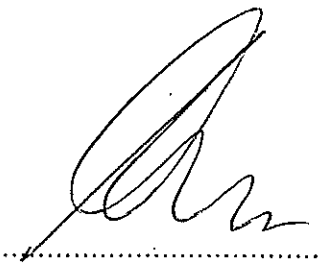


R. J. Burbidge QC



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[62] Mr Meiforth, at Black Appeal Book p313, line 48 to p314, line 2.
[63] Appellant's Submissions, page 12, line 39.