IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY **No. S66/2011**

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES, COURT OF APPEAL

BETWEEN: **LITHGOW CITY COUNCIL**
Appellant

and

CRAIG WILLIAM JACKSON
Respondent

APPELLANT'S SUBMISSIONS

Part I: CERTIFICATE

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

Part II: ISSUES

2. Whether the matter *? fall from 1.5 metres onto concrete* contained in a retrieval record prepared by ambulance officers, who were not eye-witnesses to the matter or event, was admissible, pursuant to the exception created by s.78 *Evidence Act* 1995 (NSW)(the Act) to the exclusionary opinion rule established by s.76 of the Act, to prove how the respondent was injured.

Part III: S.78B CERTIFICATE

3. The appellant has considered the question and decided that no notice is required to be given in compliance with s.78B *Judiciary Act 1903.*

Part IV: CITATION

4. There are four relevant prior decisions:

   (a) The first instance decision of the District Court of New South Wales in matter no. 1111 of 2005, unreported Wednesday, 13th June 2007;
   (b) The 2008 decision of the New South Wales Court of Appeal reported at (2008)Aust. Torts Reports 81 – 981;

Dated: 11 March 2011
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(c) The first decision of the Court on Friday, 31st July 2009 in matter No. S569 of 2008 ([2009] HCA Trans. 184);
(d) The 2010 decision of the New South Wales Court of Appeal [2010] NSW CA 136.

Part V: NARRATIVE OF FACTS AND HISTORY OF LITIGATION

5. The respondent sued the appellant for damages arising from personal injuries received by him on 18th July 2002. His case is that he fell by tripping on the lip of an unfenced retaining wall in Endeavour Park, Lithgow (the park) onto a concrete dish drain 1.5 metres below, in the darkness of the early hours of the morning.

6. The hearing in the District Court of New South Wales occupied 8 days between 26th March 2007 and 4th April 2007. In her judgment dated 13th June 2007, the primary judge found in the respondent's favour on the contested issues of the existence of a duty of care, its content, and the breach of it, but against him in relation to the issue of whether his injuries were caused by the negligence of the appellant.

7. The respondent had left his home in Lithgow at about 3:30 a.m. on 18th July 2002 in a moderately intoxicated state after an argument with his partner. He took his 2 dogs with him.

8. Because of the nature of his injuries, the respondent had no recollection whatsoever of any material event. Nor was there any other evidence of where he went after he left home, what route he followed, how he came to be in the park, what time he arrived in the park, what he did after getting there, how he received his injuries, how he came to be in the dish drain, or of the position in which he was actually lying by the time his presence in the dish drain was detected around dawn. There was photographic evidence *of dried blood and other fluids* 2.6 metres from the vertical face of the wall. (AB 1-40).

9. The primary judge found (AB 1-40):

> *The plaintiff was badly injured. He sustained a traumatic brain injury, probable fracture of thoracic vertebra 11, fracture of the right wrist and other less serious injuries.*

10. There was no direct evidence, whether from an eyewitness or otherwise, as to what happened to the respondent. Nor were there other circumstances through which an inference might be drawn.

11. The primary judge described the drain at AB 5 [24] – [27]. She found(AB 11 [57]) that *the structure had been there for sometime at least since 1992.* There was no evidence of any other injury occurring in or around the drain at all, and in particular, by falling over the wall. From the time of its construction up to and beyond July 2002 there was no fence at the top of the wall. A temporary fence was erected some unspecified time after

February 2006 and a permanent one in November 2006 (AB 6 [28]). At AB 9 [48] the primary judge found:

> *There was no evidence of how the plaintiff came to be in the park or for that matter in the drain. He had not been there before and usually exercised his dogs at another area in the opposite direction from the park not far from where he lived.*

12. The primary judge noted an argument (AB 9 [49]) about *the only rational route* for the respondent to have taken. Her Honour made no finding that that was the route he followed or any finding as to how the respondent got to the park.

13. In its 2008 judgment, the Court of Appeal essentially accepted the findings of the primary judge with one exception. Allsop P accepted that the route contended for by the respondent was *a natural route to walk* from the appellant's home (AB 47 [21]), but noted, as had the primary judge, that *there was no direct evidence of the route that he took.* (AB 48 [26]). Such considerations, however, did not lead to the inference that the respondent fell in the way he alleged (AB 50 [35]). The one exception referred to related to the probable time of the receipt by the respondent of his injuries. At AB 15 [77] the primary judge held that *there is no evidence which would permit a finding that [the respondent] approached the drain when it was dark, rather than some time later when it was lighter.* Allsop P (at AB 46 [17]; 55 [51]) held *if one accepts that he fell over the wall ... this occurred in the dark some not too lengthy time after leaving home.*(Emphasis added.)

14. The lacuna in the known facts which opened after the respondent left home terminated with the information contained in a *retrieval record* completed by ambulance officers who attended upon the respondent at the park. That record indicated that a call for an ambulance had been made by an unnamed person at 6:57 a.m.

15. There were in fact two ambulance records (2010 decision [8], [11], [15] – [18]). Nothing turns upon the lack of *clear differentiation in the 2008 decision* at [37] (AB 86[7]).

16. In the 2008 decision at AB 50 [34] Allsop P, with whom Basten JA and Grove J agreed, said:

> *Neither side called the ambulance officers. They were available to both sides to be called. Of course, there was no obligation on either side to call the ambulance officers. In particular, the defendant was not under any obligation to call them if the plaintiff had not made good his case.*

17. There was no question at the trial that the *retrieval record* was clearly admissible as a business record. Much of its contents is relevant and not otherwise objectionable. However, immediately upon its tender, the appellant applied for a direction under s.136 *Evidence Act* 1995 (NSW)

(the Act) to limit the use to be made of the evidence. (See AB 51 [39] – [43]; AB 86 [6]; AB 97 [51] – [55]). The primary judge made a ruling favourable to the appellant and in the event did not use the contentious material as evidence against the appellant. The contentious material is as follows:

> *Found by by-standers – parkland*
> *? fall from 1.5 metres onto concrete*
> *No other HX (history)*
> (AB 51 [37]; AB 84 [2]; AB 113 [94])(the contentious material)

18. The critical mass of the primary judge's reasoning is at AB 14 [76] – 15 [77]. Her Honour was unable *to find that the conclusion the plaintiff 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.* Accordingly, he had failed to win on the critical issue of causation. Moreover, (as already stated) her Honour was unable to make a finding about the likely time of injury, *the absence of this evidence would also lead ... to a conclusion that the plaintiff does not prove that his action occurred because he did not see the wall and the drain in the dark and thus fell over the wall and was injured.*

The 2008 Decision

19. It is important in understanding the somewhat tortuous route by which these proceedings have arrived at this point to note that there was no ground of appeal complaining about the primary judge's *rejection* of the history contained in the ambulance retrieval record raised in the first appeal. No particular attention was directed to the ambulance retrieval record in preparation of written submissions and both parties failed to pick up that the copy of the ambulance retrieval record utilized to prepare the appeal books had been copied in such a manner as to cut off the question mark (AB 85 [2]; AB 94 [41]). However, during the course of oral argument, because of questions asked by the Court of Appeal, the focal question became whether the narrative appearing under the heading *patient history* in the first retrieval record should be used as evidence of the truth of its contents justifying an inference on causation favourable to the respondent. Given the events that have since occurred, the appellant no longer complains about the manner in which the question was raised.

20. At AB 50 [34], Allsop P said that the contentious material was *crucial in the resolution of this appeal.* His Honour identified the matter (from the incomplete record) *fall from 1.5 metres onto concrete* as opinion evidence. The learned President ruled that *there was insufficient material to permit the material to be admitted as one of a qualified expert.* (AB 53 [45]). In the same paragraph his Honour said:

> *The second line, however, can be taken on its face, to be the conclusion drawn by the ambulance officers as to <u>what had happened</u>, they having <u>the</u> <u>inert unconscious body</u> 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. (Emphasis added)

21. At AB 43 [56], his Honour noted the exclusionary opinion rule expressed in s.76 of the Act and the exception relating to lay opinions contained in s.78, which his Honour set out in full. At AB 54 [47] his Honour concluded the following:

> *Given the terms of s.78 and the fact that this document was quite plainly a business record within the terms of s.69, it seems to me that if the line is read as a statement of the opinion of the ambulance officers upon their observation of the scene, it can be taken as their opinion as to <u>what happened.</u> If this is so, this is some evidence that the appellant fell from the wall. It can also be taken as some evidence of a position of the body consistent with a view to that effect.* (Emphasis added).

22. The appellant interpolates that there is no evidence at all contained in the document identifying the position of the respondent in relation to the wall and the drain. It contains no evidence of any observation of the scene made by any ambulance officer. The retrieval record sets out nothing of what any ambulance officer *saw, heard, or otherwise perceived* about any *matter or event.* If the *matter or event* is a fall of 1.5 metres then it can be said that the ambulance officers (or any of them) *saw, heard or otherwise perceived* nothing about that *matter or event.*

23. At AB 54 [49] the learned President took the information contained in the retrieval record, read in conjunction with matters he had referred to at AB 50 [35] to actually draw an inference *that the appellant walking in an easterly directly (from the west) down the hill, fell over the wall and down onto the concrete striking his wrist and head making him unconscious.*

24. His Honour made it ineluctably clear, that the inference could not have been drawn without the ambulance retrieval record. At AB 56 [56] he said:

> *... 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 is not possible to infer the accident happened in the way asserted by [the respondent]. All the other material, while consistent with that being the case, does not permit in my view, any inference that it occurred in that fashion. Critical is understanding the place of the body, its configuration and its relationship to the surrounding structures.*

The First Special Leave Application and Appeal to the Court

25. The appellant lodged an application for Special Leave to Appeal on 19th December 2008. In circumstances explained in affidavits filed for the parties just prior to the hearing on 31st July 2009, in preparing its

application, the appellant included a complete copy of the ambulance retrieval record including the question mark. (Previous application book 116). This matter was noticed by the Court during its preliminary review of the material prior to the hearing and notice was given by the Court to the parties that questions were likely to be asked about it. At the hearing there was no *serious debate ... about whether the exhibit at trial had the question mark on it* ([2009] HCA Trans. 184). Hayne J gave reasons which became those of the Court, which included the following:

> *In the circumstances where evidence crucial to the resolution of the appeal was not accurately before the Court of Appeal, it is in the interest of justice that there be a grant of special leave to appeal in this matter, but that in addition to there being a grant of special leave to appeal, further orders be made to the effect the appeal be treated as instituted, heard instanter and that the judgment and orders of the Court of Appeal made on 21st November 2008 be set aside and the matter remitted for further hearing before the Court of Appeal.*

26. Orders were made to that effect and, with respect, Hayne J made some additional remarks which made it clear that the order for remitter was unlimited.

The 2010 Decision

27. Notwithstanding the generality of the order for remitter, the argument before the Court of Appeal did not amount to a complete re-argument of all issues. Rather, *the parties focused on the documents in question .... and the significance that their accurately stated content had ...* for the 2008 decision. (AB 85 [4] and [45]; cf [47] – [50] per Basten JA).

28. Allsop P noted the existence of two ambulance documents (as previously stated) at AB 94 [36] and ruled that both ambulance records were admissible and that the material *? fall from 1.5 metres onto concrete* was an opinion within the meaning of s.78 of the Act, which:

> *...in all the circumstances, when added to the totality of the evidence, made it more likely than not that Mr. Jackson had fallen from the wall in the manner I described in my earlier reasons.* (Emphasis added).

Orders allowing the appeal were made at AB 95 [44].

29. It is clear that the contentious material remained critical to the reasoning process in the manner described at AB 56 [56].

30. Grove J maintained his agreement with the orders proposed by the President, for the reasons which the President had given. Basten JA delivered a separate concurring judgment. His Honour dealt with the evidential question at AB 97 [51] – [76]. His Honour arrived at his decision

about admissibility by a route somewhat different from that followed by the President. His Honour found it unnecessary to consider the question of the admissibility of the second ambulance document because he *did not obtain assistance* from it (AB 140 [90] and AB 160 [107]).

31. Basten JA conducted a full review of the evidence led at the trial concerning causation from AB 107 [77] to 113 [93] and, without the ambulance officer's report, he *would have been comfortably satisfied that, on the balance of probabilities, [the respondent] fell over the wall by moving downhill, and without seeing the drain* (AB 113 [93]). His Honour acknowledged that this conclusion was inconsistent with the reasoning of Allsop P and the 2008 decision, with which Basten JA had agreed. The appellant says for the purpose of the present argument, his Honour's reasons in this regard may be put to one side. In context they represent a minority view. Neither Allsop P nor Grove J joined in his Honour's reasons.

Part VI: THE APPELLANT'S ARGUMENT

32. S.76 of the Act (see part vii hereof) establishes an exclusionary rule of evidence referred to as the Opinion Rule. Opinion is not confined in the Act. One may accept, as the Court of Appeal did, (AB99 [57] – [58]) that opinion in context has the meaning of *an inference from observed and communicable data: All State Life Insurance Co. v. Australia and New Zealand Banking Group Limited (No. 5)* (1996) 64 FCR 73 at 75 per Lindgren J: *Guide Dog Owners and Friends Association Inc. v. Guide Dog Association of New South Wales and Act* (1998) 154 ALR 527 at 532 per Sackville J. The word therefore has the same meaning in s.78 which establishes the exception in relation to lay opinions.

33. The first question is whether the contentious material constituted an opinion at all. That the ambulance officers qualified the material written by use of a question mark indicated that the author had drawn no inference at all about what happened from what he or she had observed upon arrival at the scene. Indeed, the ordinary meaning of the expression incorporating the question mark is that the author questioned whether the respondent had fallen from the wall. He or she had merely raised the question. Allsop P seems to acknowledge this at AB 99 [19] when his Honour said:

> *The line is 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* (emphasis added).

At AB 90 [20] his Honour said:

> *Although the opinion was less positive than it would be without the question mark, I do not think that the question mark robs the opinion or inference of all probative force.*

His Honour thought the material was *still sufficient to tip the balance* (AB 90 [20]). Basten JA considered that the question mark indicated a level of

uncertainty, but did not demonstrate that no assertion of an opinion was intended(AB100 [57]).

34. However, bearing in mind that the ambulance officers were not eyewitnesses to what had happened, the natural inference is that the contentious material recorded no more than the author's speculation. And if this is so, no opinion is expressed.

35. What the ambulance officers saw was the aftermath, and not even the immediate aftermath of what had happened. At AB 55 [51] it was held that *the [respondent's] injuries occurred in the dark some not-too-lengthy time after leaving home* at 3:30 a.m.. But plainly, *the observed and communicable data* from which the ambulance officers may have drawn any inference when they first attended the respondent at 7:09 a.m. did not support an inference about what had happened some hours earlier.

36. From what is written at AB 53 [45], it is clear that the 2008 decision proceeded on the premise that *the conclusion drawn by the ambulance officers as to what had happened* was founded on them *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.* With respect, as Allsop P acknowledged at AB 89 [18] this was erroneous. However, the significance of this error was not given full weight by the Court of Appeal in the 2010 decision and it was wrong for the Court of Appeal to find on the basis of the second retrieval record that the respondent had been *inert and unconscious* at the time he was *found by by-standers* for the simple reason that that idea is not supported by the first ambulance note and the information contained the second note was clearly wrong as to time and location: AB 88 [16] – 89 [16].The second note was made by Air-Ambulance officers who first attended the respondent at 10 30a.m.. These officers conveyed the respondent from Lithgow to Nepean Hospital.

37. Rather, the only available finding was that the respondent was not unconscious when the ambulance arrived at the scene. (AB 87 [13] – 88). In fact he was *combative.* And his injuries did not preclude the use of his limbs. The word *combative* strongly suggests that the respondent was resistant and moving, even if *he was not on his feet walking about.*(AB89[18]). He was not *inert.* If he was capable of movement, he may have moved before the arrival of the ambulance officers. If this is valid, the ambulance offices cannot have enjoyed any advantage. Considerations such as these demonstrate that the proposition that the ambulance officers saw the respondent in the position to which he fell is no more likely than the contrary. But even if one assumes against the appellant the matters referred to at AB 89 [19], 90 [20], 92 [30] and 93 [35], the presence of the question mark speaks against the idea that the author had actually drawn the relevant inference. The evidence just did not establish that the author had formed an opinion.

38. Secondly, if the author formed the posited opinion about what happened, the correct starting point for any discussion is that the opinion rule excludes the admission of it into evidence. It is necessary to keep this very firmly in mind, lest by focusing upon the exception one eliminates the rule.

39. Thirdly, the language of s.78 is conjunctive. Both limbs (a) and (b) must be satisfied before an opinion is exceptionally admitted. Dealing with paragraph (a) the logical starting point is the identification of the *matter or event.* Here, in terms, the only opinion expressed in the ambulance record was about the cause of Mr. Jackson's injuries. Accordingly, a *fall* and a *fall* alone, is the only candidate for the *matter or event* for the purpose of s.78. At AB 91 [23] Allsop P rejected this argument and with respect his Honour was in error in doing so.

40. At AB 102 [65] Basten JA sought to overcome this argument, based upon the plain meaning of the language used in the section, by stating:

> *Opinions, or inferences, are drawn in order to fill in gaps in knowledge. An opinion that a person is drunk at a particular time is an opinion as to the person's behavior or appearance. The witness should not be excluded from giving such evidence because he or she did not witness a person drinking alcohol and the present case is no different.*

With great respect, the present case is entirely different. An opinion that a person is drunk when the witness saw him is <u>not</u> an opinion as to the cause of the person's behavior or appearance. Rather, it is an opinion about that person's present condition. From this opinion the tribunal of fact may infer that a person had taken drink. In the present case, witnessing Mr. Jackson lying in the dish drain bearing the marks of his injuries may enable an inference to be drawn about his condition i.e. he was injured. But unlike the simple example, drunkenness, which by and large is due to only one cause, to infer that a person was injured says nothing about how he came to be in that state even though one may speculate by reference to the physical features of the surrounding area.

41. Even if the tribunal of fact could have drawn an inference about how Mr. Jackson came by his injuries, had the ambulance officers given evidence about what each of them *saw, heard or otherwise perceived of his position and its relationship with the wall and drain,* the ambulance officers gave no evidence about those latter matters or events.

42. Given that *the matter or event* about which the opinion was expressed was a fall <u>and</u> the ambulance officers did not see it (the only form of perception relevant) paragraph (a) of s.78 is not satisfied in the present case. See *Smith v. R.* (2001) 206 CLR 650 at 670 [60] per Kirby J; *Angel v. Hawkesbury City Council* (2008) Aust. Torts Reports 81 – 955 at [51] – [57].

43. Fourthly, the exceptional admissibility of lay opinion evidence is strictly limited by the requirement for compliance with paragraph (b). Evidence of the opinion is not admissible unless it is necessary to obtain an adequate account or understanding of the person's perception of the matter or event. With respect, the learned President did not define *necessary* in its statutory context. His Honour focused on the particular forensic context presented by the way the respondent had chosen to run his case. At AB 92 [30] the President said that had the witnesses been called there may have been difficulties of recall or expression. And as they had not been called (AB 93 [31]) *the only way to get any account of their perception was to admit the documents and the opinion contained therein.* (Emphasis added). This point seems to pick up the commentary in *Uniform Evidence Law* 8th Edition Law Book Company (2009) at pp 303-304. However, the author of the contentious material was not shown to be in any sense unavailable and difficulties of expression or recall were not proved. It was thus not established that the tender of the document was *the only way* to obtain an adequate account of the author's perception.

44. It is well to interpolate here the summary of the Common Law Position with regard to the admission of lay opinions stated by the learned author of *Cross on Evidence,* 8th Australian Edition, Lexis Nexis Butterworths, (2010) at p.923 [29015]:

> *...it will be recognised that statements concerning speed, or temperature, or the identity of persons, things and handwriting are indissolubly composed of fact and inference. The law makes allowance for these borderline cases by permitting witnesses to state their opinion with regard to matters not calling for special knowledge whenever it will be virtually impossible for them to separate their inferences from the facts on which those inferences are based.* (Emphasis added).

45. At AB 104 [68], by reference to the judgment of Gummow and Crennan JJ in *Thomas v. Mowbray* (2007) 233 CLR 307 at [101], Basten JA pointed out, effectively, that *necessary* is a protean word. At AB 105 [71] his Honour said:

> *"Necessary" connotes a higher hurdle to surmount than that which is "helpful", "inconvenient" or "desirable", but does not require absolute necessity, in the sense of being the sole means of proof.*

At AB 106 [75] his Honour ruled, like Allsop P, by reference to unproved difficulties of recollection or expression on the part of the ambulance officers that, even had they been called, *it was not unreasonable to rely upon the contemporaneous document.* With respect, *necessary* must connote a higher hurdle than *not unreasonable.* Allsop P's phrase *the only way,* was closer to the mark, even if his context was not.

46. In *Kartinyeri and Anor. v. the Commonwealth* (1998) 195 CLR 337 at 365, Gaudron J, albeit in the context of s.51(xvi) of the *Constitution,*

distinguished *necessary* from *expedient* or *appropriate.* One might also distinguish *necessary* from *convenient* or *reasonable* or, even, *not unreasonable.*

47. The starting point in the context of the Act must be the exclusionary rule established by s.76 itself. In this context, and against the background of the common law, *necessary* ought be interpreted strictly to avoid the exception negativing the rule. It is for this reason the appellant draws upon the statement in *Cross* at p. 1040 [29085] citing *Wigmore:*

> *When* "the facts from which a witness received an impression are too evanescent in their nature to be recollected, or too complicated to be separately and distinctly related", *a witness may state an opinion or impression. This is because the witness was better equipped than a jury to form it, and it is impossible for the witness to convey to the jury an adequate idea of the premises on which the witness acted.*

48. The appellant accepts that one should not assume the statute does no more than re-state the common law (see s.9 of the Act). However, the common law remains an important part of the context in which the Act is to be interpreted. The appellant submits that *necessary* in context connotes that *the only way* the relevant primary perceptions can be conveyed is by expression of the opinion because otherwise *it is impossible* to obtain an adequate account or understanding of the person's perception of the matter or event. And to make good paragraph (b) in the present case the respondent bore the onus of establishing on the balance of probabilities that *the only way* of obtaining an adequate account or understanding of what the author of the ambulance reports saw, heard or otherwise perceived about the cause of the respondent's injuries was by admitting the opinion. Put this way, the the contentious material in the ambulance record was, with respect, clearly inadmissible for this purpose.

49. It seems clear that, in any event, the opinion was not used *to obtain an adequate account or understanding* of the author's perception but rather to found an inference as to *what happened.* This is impermissible. This was the critical issue to be determined by the Court and, as the learned author, Cross, states at page 1068 [29205]:

> *Factual questions of causation are within the exclusive function of a Court to decide.*

50. The Court of Appeal should have upheld the ruling of the primary judge and dismissed the respondent's appeal.

Part VII: APPLICABLE STATUTE LAW

51. The relevant provisions are ss. 9,55, 56, 76, 78 and 136 *Evidence Act* 1995 (NSW). The form of each of them as at the date of the tender of the retrieval record, 30th March 2007, is set out below. These provisions remain in force in the same form:

9 *Application of Common Law and Equity*

1) *This Act does not affect the operation of a principle or a rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment.*

2) ...

55 Relevant evidence

(1) 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.

(2) In particular, evidence is not taken to be irrelevant only because it relates only to

(a) The credibility of a witness, or
(b) The admissibility of other evidence, or
(c) A failure to adduce evidence.

56 Relevant evidence to be admissible

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible

76 The opinion rule

1) Evidence of an opinion not admissible to prove the existence of a fact about the existence of which the opinion was expressed.
2) Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the Regulations provide that the Certificate or other document has evidentiary effect.

.....

78 Exception: lay opinions

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

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

136 General discretion to limit use of evidence

The Court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

(a) Be unfairly prejudicial to a party, or
(b) Be misleading or confusing.

52. The exception in s.76(2) is immaterial to the present case. There is no regulation made under any other Act rendering the contentious material admissible.

PART VIII – ORDERS

53. The appellant seeks the following orders:

1. *Appeal allowed.*
2. *Set aside the judgment entered and orders pronounced by the Supreme Court of New South Wales, Court of Appeal on 11th June 2010 and instead order 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.*
3. *The respondent to pay the appellant's costs, including the costs of matter no. S.569 of 2008, in the Court.*

Dated 11th March 2011.

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