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 SUBMISSIONS

**Part I:**

The submission is in a form suitable for publication on the internet.

**Part II:**

The issue on appeal is whether in the judgment given and orders made the New South Wales Court of Appeal erred in making orders 2, 3, 4 and 5 on 9 December 2014.

**Part III:**

Consideration has been given to whether this appeal involves "a matter arising under the Constitution or involving its interpretation" and it does not. Accordingly, Section 78B notices are not required.

**Part IV:**

*Fuller-Lyons v. State of New South Wales (No. 3)* [2013] NSWSC 1672.
*State of New South Wales v. Fuller-Lyons* [2014] NSWCA 424.

**Part V:**

The following facts were found by the Court of Appeal:

(i) At 12.09pm on Monday 29 January 2001 the appellant who was then aged 8 fell at Dora Creek, near Morisset, from an intercity train travelling to Newcastle at about 100kph and he was severely injured [9] [AB ].

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(ii) The doors from which the appellant fell were not affected by any defect when the train left Central Station [14] [AB ].

(iii) Inspection after the accident disclosed a gap of approximately 100mm at the foot of the doors from which the appellant must have fallen [14] [AB ].

(iv) The gap at the foot of the door did not prevent the door from closing and locking properly when inspected at Newcastle after the accident but the gap at the foot of the doors did not enable anyone to exit [14] [AB ].

(v) The presence of the gap at the foot of the doors indicated there had been some interference with the doors on the journey [14] [AB ].

(vi) The doors were designed to remain closed and locked whilst the train was in motion [15] [AB ].

(vii) On arrival at a station the train guard, situated in the rear carriage, would activate an unlocking mechanism which would enable passengers to pull levers to open the doors where required [15] [AB ].

(viii) When the train was ready to depart from the station, the guard would activate the door closing mechanism which would result in an electro-pneumatic pressure being applied to each of the double doors to push them together. When they were together, they would lock automatically [15] [AB ].

(ix) There was no electronic device on the train in question to warn the guard if one or more sets of double doors had not properly closed and locked [15] [AB ].

(x) The pneumatic pressure applied to the double doors was 7kgs (70 Newtons of force) for the first 230mm of their travel, building to approximately 16kgs to 20kgs (160 to 200 Newtons of force per door) [16] [AB ].

(xi) An eight year old boy would have had the strength to open one of the doors far enough to get out if he had his back against one door and used his arms to force the other open [17] [AB ].

(xii) Due to the curvature of the station platform at Morisset it was not possible for the guard at the rear of the train, without stepping away from it for some distance, to see the whole length of the train when it was at the platform [18] [AB ].

(xiii) There was a Customer Services Attendant (CSA) present on the day of the accident who was deceased by the time of the trial who would stand where he could see the front of the train and signal to the guard when the train was ready to depart [18] [AB ]

(xiv) If a guard or CSA was looking along the station he or she would only see "if someone is hanging out, if there is anything sticking out a foot or so" but if they were "just holding something inside that recess you wouldn't see it" [19] [AB ].

(xv) The appellant did not return after leaving his brothers Nathan and Dominic "*to get a drink of water*" [21] [AB ].

(xvi) That there was "*no reason to exclude the possibility that, when the train was about to leave Morisset Station, the appellant used an object to keep the doors open to a sufficient extent to enable him to put at least his shoulder into the space between the doors*" [34] [AB ]

(xvii) The expert evidence did not indicate what precisely would have been a sufficient space to enable this to occur but Mr Meiforth referred to his experience of glass "coke" or "cordial" bottles of 20 to 25 cm in length being used to keep train doors from closing. [34] [AB ]

(xviii) That it was a "distinct possibility" that the appellant used a backpack, or other bag, a shoe placed lengthways or even a ball such as a basketball or soccer ball placed between the doors as they closed. [34] [AB ]

(xix) That the appellant could have inserted his shoulder into a gap created by a backpack or other bag, a shoe placed lengthways or even a ball such as a basketball or soccer ball. [35] [AB ]

(xx) That the appellant could have "sought to enlarge" the gap created by the insertion of a backpack or other bag, a shoe placed lengthways or even a ball such as a basketball or soccer ball by pushing one of the doors with both hands while obtaining leverage from part of his back leaning against the other door. [35] [AB ]

(xxi) That findings of fact in (xvii), (xviii) and (xix) above were "consistent with Mr Meiforth and Mr Clemens' evidence". [35] [AB ]

(xxii) "That the appellant may well have had sufficient strength to push the door back, at least a little if he was in the position of pushing one of the doors with both hands whilst obtaining leverage from part of his back leaning against the other." [35] [AB ]

(xxiii) The appellant would have needed to make very little progress in doing this to obtain a gap sufficient for his body to slip through. [35] [AB ]

(xxiv) There was an implied finding that his body could "slip" through a gap thus created. [35] [AB ]

(xxv) That the appellant made a "wedge" that initially kept the doors from closing using his shoulder, arm and leg. [36] [AB ]

(xxvi) That a shoulder, arm and leg in a "wedge" would not have protruded significantly. [36] [AB ].

(xxvii) That the matters of fact found in (xix) to (xvii) above were not "less likely" than found by the primary judge. [37] [AB ]

(xxviii) That there was no reason to suppose that the appellant did not have available to him an object such as a backpack or other bag or a large ball that would not have been sturdy enough to prevent the doors from closing.

**Part VI:**

(a) The first error by Macfarlan JA was that his findings in xix to xxix in Part V above could only be correct if he overturned the finding of fact by the primary judge that "*the only realistic means by which Corey could generate sufficient force on his own to open the door far enough for him to fall out was by having his back to one door and pushing with his arms or a leg against the other*".[1]

This was a finding of fact that he could only generate enough force to open the doors far enough to enable him to fall out if he was trapped between them.

Rather than examine the primary facts from which the primary judge drew that inference of fact Macfarlan JA engaged in hypothesising about other possible scenarios as to how the appellant came to fall out of the train. Had he done what the appellant submits he should have, analyse the trial judge's reasoning,[2] rather than speculate about other "possibilities" the appeal to that court would have been dismissed.

The reasoning of the primary judge contained findings of fact in relation to five matters.

There was no examination by Macfarlan JA of the primary judge's reasoning in relation to those matters.

Without analysing the findings of primary fact and the reasoning of the primary judge based on those findings of primary fact it was not open to the Court of appeal to find that the trial judge's reasoning were "conjecture" or "guesses".[3] Whether a finding of fact made by inference from facts otherwise found is "speculation" or "guess work" requires an analysis of the primary facts upon which the inference is based. It also requires an intermediate appellate court to be satisfied that either the findings of fact were wrongly made or the inferences drawn from facts otherwise established to the satisfaction of the primary judge were not available. Neither of these two steps occurred in this case.

The primary judge made findings of fact in relation to five matters.

Those five matters were as follows:

(i) "*The characteristics of the door*". This is referred to in [78] of the primary judgment and it was the first matter about which findings of fact were made by the primary judge.

The relevant findings of fact made by the trial judge were:

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[1] [2013] NSWSC 1672 [76]
[2] (1991) 65 ALJ 720
[3] (2013) NSWCA 424 at [2], [31] [AB ]

a) "*They were hung from the top of the vestibule using two adjustable roller brackets attached to the top of each door leaf. At the top of the doors rollers ran on an overhead track attached to the carriage superstructure. The base of each door formed an inverted 'U' which ran over a bar inside the door threshold on the floor.*"[4]

b) "*Once the door was closed it was locked and could not open without metal being sheared or cut*".[5]

c) Each door exerted between 160 and 200 Newtons of force.[6]

d) The doors took "four seconds to close, give or take a second"[7]

(ii) That passengers trapped in doors was "not an unknown or even unusual occurrence."[8] The findings supporting that conclusion were

a) The introduction of technical means "to enhance passengers' safety by reducing the risk of passengers being caught in doors, dragged by the train, or falling from the train in motion."[9]

b) The realisation that passengers were being caught in the doors of trains "well before Corey's accident".[10]

(iii) That the appellant as "an eight year old unsupervised child is exactly the category of person who might become unwittingly trapped in the doors as they close".[11]

(iv) That Mr Meiforth found it "very, very hard" to force a door open[12]. The primary judge said that this was "very important evidence".[13]

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[4] [2013] NSWSC 1672; [17] [AB ].
[5] [2013] NSWSC 1672; [20] [AB ]
[6] [2013] NSWSC 1672; [20] [AB ]
[7] [2013] NSWSC 1672; [79] [AB ]
[8] [2013] NSWSC 1672; [79] [AB ]
[9] [2013] NSWSC 1672; [95] [AB ]
[10] [2013] NSWSC 1672; [106] [AB ]
[11] [2013] NSWSC 1672; [79] [AB ]
[12] [2013] NSWSC 1672 [50], [AB ]
[13] [2013] NSWSC 1672; [25] [AB ]

The primary judge stated:[14]

> *"I found Mr Meiforth's reaction to the proposition that an eight year [old] boy might prise or push the door open particularly telling."*

(v) That *"the lesser part of Corey's body that was inserted or caught between the doors the more difficult it was for him to insert himself and exert the strength necessary to force them back, especially in the limited time between the train's departure from Morisset Station and his fall from the train"*.[15]

The primary judge's findings on these five matters led him to the conclusion that the accident could only have occurred by reason of the appellant being trapped between the doors when the train left Morisset Railway Station.

Macfarlan JA did not engage with the reasoning of the trial judge in relation to these five bases for the critical finding made by the primary judge of entrapment at Morisset Station.

On what basis then did the Court of Appeal set aside the orders made by the trial judge?

The first basis upon which this was done was the "hypothesis" of the existence of some object used to keep the doors open.

The primary judge dealt with that "hypothesis" in argument with Queen's Counsel for the respondent[16] and Mr Burbidge QC recognised that what was ultimately found by the Court of Appeal was "nothing more than speculation".[17]

Three further points need to be made about the "hypothesis" concerning the use of an object to keep the doors open. First, there was no evidence to support the existence of such an object. Secondly, it was never part of the respondent's case that the appellant could have used a Coke bottle or some other object. Thirdly, that would not have enabled the appellant to get through the doors in any event even if he had and used such an object.

The reason why it was never part of the respondent's case was that the only evidence in relation to the use of such objects to get outside a train, was that they were used to stop the doors from fully closing so as passenger could smoke a cigarette contrary to railway regulations.[18]

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[14] [2013] NSWSC 1672; [76] [AB ]
[15] [2013] NSWSC 1672; [78] [AB ]
[16] Black AB 431/2-15; [AB ]
[17] Black AB 431/15; [AB ]
[18] Black AB 314/5; [AB ]

There was a lot of evidence about passengers being trapped in doors but no evidence that passengers ever used objects to make unauthorised exits from trains.

Of equal importance is that if any of the matters identified by the Court of Appeal in findings xx to xxix in Part IV above had been raised as issues at the trial they could have been dealt with.[19] Had these been raised in evidence, evidence could have been called in the appellant's case to deal with those hypotheses.

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The first a mention of soccer balls, basket balls, inflexible shoes or uncollapsible backpacks was that made in the judgment of the Court of Appeal. Even if raised in argument in the Court of Appeal the untenable nature of the "hypothesis" could have been readily pointed out so as to prevent that Court from falling into error.

The effect of what the Court of Appeal has done is to set aside orders in favour of the appellant on bases that he never had the opportunity to deal with at trial or on appeal.

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The reasoning of Macfarlan JA about the appellant's failure to "exclude" these possibilities has two further difficulties. The first is there was no evidence to support them. The second is they could not rationally explain how the accident could have occurred.

Where does one find a backpack or other bag or a child's shoe which can withstand the combined force of between 320 and 400 Newtons of force without being squashed? Even apart from the fact that there was no evidence to support the existence of "a basketball or soccer ball being
30 placed between the doors as they closed" how, with respect, did his Honour envisage that the appellant would get past it? Would he climb under the ball or over the ball and when he "pushed the door at least a little" would not the ball fall out so that he would lose it?

And when it did so, would not the doors then slam shut driven by the pneumatic pressure and lock as Mr Meiforth said occurred when he removed obstacles put between the doors by smokers.[20]

Although neither the primary judge nor the Court of Appeal analysed the
40 expert evidence relating to the condition of the doors when examined after the accident at Newcastle this evidence also demonstrates that unless the

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[19] It is worth noting that the respondent's only positive case was that his brothers were complicit in his fall and although the appellant's brothers Nathan and Dominic were called to give evidence in his case neither was cross-examined upon the case sought to be made out by the respondent that they had been involved in the accident. Indeed, the first mention of their involvement appears at Black AB 199/11 and the reference is somewhat obtuse: "Q: That neither of the boys was there and nobody has suggested that they were? A: Okay." The brothers were recalled to deal with the "hypothesis" based on their involvement at Black AB T368-369 [AB ] and Black AB 371-373 [AB ].

[20] Black AB 314/45; [AB ].

appellant was a child of gargantuan strength the Court of Appeal's analysis cannot be correct.

The point of Mr Cowling's analysis was that there had been some very significant interference with the normal closing function of the doors, not just by a passenger trying to stop them from closing because that interference had "forced the doors out of alignment by 50mm or so" permanently.[21] The Court of Appeal has found that the appellant not only had the strength to resist the pneumatic force being applied by the door but, in addition, the strength to permanently deform the door in the course of opening it so that he could get through it. This is improbable.

Although a minor matter it is also worth observing that Macfarlan JA misunderstood what the primary judge meant when he said: "*it is difficult to conceive of an object large enough and sturdy enough* ***that was available to Corey*** *to allow this to have happened*" (emphasis added.)[22]

The primary judge was referring to what the evidence established, not some theoretical possibility for which there was no evidence.

The evidence in relation to his leaving the company of his brothers was that he went "to get a drink of water".[23]

The final matter about which Macfarlan JA made a substituted finding of fact was that the appellant could "slip through" a gap in the doors.[24]

As Mr Cowling explained in evidence the way the doors are designed to work is that they have a "soft nosing" which means that when the closing process is interfered with by anything, presumably, a person in the doorway, the closing force reduces to 7kgs and then it increases to "around 20 kilos".[25]

Presumably this is to enable persons to step back if they are caught by the doors and to reduce the risk of their being trapped between the doors that fully close in 3 to 5 seconds. If they do not get out of the way the door continues to close then pins any person between the doors with a force of

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[21] The report of Mr Cowling stated: That a lengthy and determined effort was applied so as to hold the doors open" and that this effort was much greater than simply obstructing the doors because "*it would certainly not be reasonable to suggest that every time the base of the doors was obstructed that ipso facto a resulting gap would remain – to the contrary*" Black AB Vol 3 995-996 [AB ]. Two further matters follow from Mr Cowling's report at those pages. First, that if a small object had been used, as "hypothesised" by the Court of Appeal the doors would still have locked at the top as they did with the 100mm gap when tested after the accident at Newcastle. Secondly, the doors being forced out of alignment permanently by 50mm or so is consistent with a larger object, such as the appellant's torso being trapped between them.
Blue AB Vol 3 996K; [AB ]
[22] [2913] NSWSC 1672 [76] [AB ]
[23] Black AB 369/40 [AB ]
[24] [2014] NSWCA 424 [35] [AB ]
[25] Black AB 338/1-14 [AB ]

200 Newtons.[26] Nathan Lyons' evidence at Black AB 39/5 that this occurred on trains he drove "a couple of times a week".

Sackville AJA agreed with Macfarlan JA. It is necessary to say something about the judgment of McColl JA where her Honour added some further observations. Her Honour's further observations contained a factual finding which was plainly wrong. The relevant finding was "*The evidence from Mr Meiforth and the respondent's expert, Mr Clemens, established that an eight year old boy could open the doors, assuming there was a gap*".[27]

Mr Meiforth's evidence has already been referred to and it was to the effect that to be able to exert enough force to push the door open the appellant would have to have been in a position where he was trapped between the doors.

The reliance placed upon Mr Clemens' evidence by her Honour was misconceived. Mr Clemens was called as a witness on safety management and maintenance procedures. He was cross-examined from Black AB Book T147- Black AB T296. During that nearly 149 pages of cross-examination Queen's Counsel for the respondent demonstrated his lack of understanding as to how the doors operated and his ignorance of the forces that they exerted. The only relevant evidence that he gave was that when he tried to force the doors apart against the pneumatic pressure they exerted he could only do so to the extent of "just an inch, two inches perhaps".[28]

He did not know that the doors had a locking mechanism.[29]

The following questions and answers were given by him in cross-examination in relation to the pneumatic cylinder:

> *"Q: Do you have any idea how that actually operates, that machine, if it is as I have suggested to you?*
>
> *A: Um, no.*
>
> *Q: Any idea as to the relative sizes of the plug against which the air pressure operates within the tubular systems?*
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> *A: Plug? No."*[30]

He did not examine any part of the mechanism.[31]

He did not know how the door cylinder worked. He said his knowledge was "*only in principle, I have never examined that mechanism*"[32] and he agreed

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[26] Black AB 338/33-37; [AB ].
[27] [2014] NSWCA 424 at [6]
[28] Black AB 79/17; [AB ]
[29] Black AB 78/40; [AB ]
[30] Black AB 88/45 [AB ]. This evidence was on the *voir dire* but it was subsequently admitted as "evidence in the case" – Black AB T134/30 [AB ].
[31] Black AB 91/41 [AB ]

with the proposition that the totality of his understanding of the pneumatic cylinder was that "*air is supplied at one end and it pushes the cylinder out at the other end*".[33]

He was not familiar with the design of the suburban V set doors[34] and had not had "the benefit of having seen the installed door".[35]

The answers that he gave as to whether the appellant could have forced the doors open were at best equivocal:[36]

> *"Q: I take it you don't know whether or not the plaintiff, an eight year old boy, has the strength to move the doors open some distance after they have come to a stop for whatever reason?*
>
> *A: No I don't know that.*
>
> *Q: So one scenario that is possible at least is that at some point the doors were stopped and that the plaintiff in one way or another himself forced the doors open a little further. That is a possibility?*
>
> *A: I guess it is, yes."*[37]

The whole of his evidence and his acceding to propositions that the appellant may have been able to get a shoulder, arm or leg into the door[38] needs to be viewed in the light of the evidence referred to above and his evidence in relation to the pneumatic pressure[39]: "***We don't actually know what the pressure was.***"[40]

Although Mr Clemens did not know what the pressure was, the primary judge did because of the expert evidence and report of Mr Cowling and he used that to make a finding of fact which was the opposite to the "objective fact" found by McColl JA.

(b) The first point of principle that arises in this appeal is that referred to by Kirby J in *State Rail Authority of New South Wales v. Earthline Constructions Pty Ltd* (in liquidation).[41] This trial proceeded over eight days. The transcript and the written submissions of the parties occupied over five hundred pages and the exhibits in three appeal books occupied thirteen hundred pages of evidence.

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[32] Black AB 161/10-162/5; [AB ] [AB ] [AB ]
[33] Black AB 170/5; [AB ]
[34] Black AB 173/1; [AB ]
[35] Black AB 175/25l; [AB ]
[36] T203/42.
[37] T209/22.
[38] Black AB 209/22-Black AB 210; [AB ]
[39] Black AB 210/N; [AB ]
[40] It is in this context that the only reliable expert evidence in relation to the operation of the doors and the pneumatic pressure was the evidence of Mr Cowling, a matter of which the Court of Appeal directed no attention.
[41] (1999) 73 ALJR 306 at [90]; [1999] HCA 3 at [90].

As the observations in relation to the evidence of Mr Clemens above have demonstrated, taking particular questions and answers from witnesses' evidence without an appreciation of the other relevant parts of that witness's evidence can lead to an entirely false finding of fact.

The primary judge had the evidence of Mr Clemens who did not know the pneumatic force exerted by the doors and the evidence of Mr Meiforth which was of an entirely different quality. Unlike Mr Clemens, he had had practical experience over many years of trying to force the doors apart.

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The second point of principle is that the Court of Appeal should not underestimate the advantage that a trial judge has in seeing the witness give evidence in relation to an issue joined between the parties.

There are two very good examples of this principle in this appeal in the evidence of Mr Meiforth.

Mr Meiforth was cross-examined about his ability to force the doors apart[42] and whether an eight year old boy could do this.

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The primary judge observed him as he dealt with that suggestion and those observations plainly influenced the fact finding of the primary judge.[43] The Court of Appeal did not have that advantage. It is an advantage that should not be underestimated.

The specific scenario put to Mr Meiforth at Black AB329/28-47 is what the primary judge found. It was a finding about the only way he could force a door back i.e. from a trapped position. Neither the evidence nor the primary judge's finding permitted of any alternative finding by the Court of Appeal as

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to how he may have got into that position i.e. otherwise than being trapped between the doors.

The second very good example of the principle that an intermediate appellate court should not underestimate the advantages enjoyed by the trial judge may be found in the reasoning of Macfarlan JA on the notice of contention.

His Honour found Mr Meiforth's evidence of what a CSA should see an open door to be "ambiguous".[44]

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The primary judge did not think it was "ambiguous".[45] His finding was "*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.*"

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[42] Black AB 313/1-45; [AB ]
[43] [2013] NSWSC 1672 [76]
[44] [2014] NSWCA 424 [50; [AB ]
[45] [2013] NSWSC 1672 [47] [AB ]

The reason why the primary judge made this finding of fact in relation to this answer was because it was given in re-examination in relation to matters about which Mr Meiforth had been cross-examined at Black AB 322/35 to Black AB 323/47; [AB ].

When it is appreciated that the finding of the primary judge was made because the primary judge had sought during re-examination to be clear in his own mind about the fact that the CSA had the responsibility to ensure all doors to "the front half of the train" were "fully closed" that there was no ambiguity in the answer given.

The Court of Appeal was not involved in the same dynamic process inherent in the giving and receiving of evidence at a trial and should not underestimate the advantage in fact finding that this gives a trial judge.

The third point of principle that arises from this appeal is that "when a Court of Appeal is reviewing by way of rehearing the findings of fact made by a trial judge who has had the advantage of hearing and observing the witnesses the Court of Appeal should not treat the appeal as a hearing *de novo*".[46] It is not part of the function of an intermediate appellate court to "hypothesise" about other factual scenarios when the trial judge has determined what the facts were.

The fourth point of principle that arises in this appeal is that the Court of Appeal did not engage with the steps and the process of reasoning that the trial judge used. A failure to adequately consider the trial judge's findings is a failure by an intermediate appellate court to properly exercise its appellate jurisdiction. Therefore it did not conduct a proper review of the trial judge's findings.[47]

The fifth point of principle that arises in this appeal, which is related to the fourth, is that the Court of Appeal did not demonstrate which of any of the findings by the primary judge which have been referred to in the five matters in Part VI above was erroneous and more importantly why any of them was erroneous. This is an embedded requirement in appellate review by an intermediate Court of Appeal.[48]

In this case not only did the Court of Appeal fail to follow those five principles, it decided the case on findings of fact for which there was no evidence and which were never the subject matter of the case brought by the respondent at trial. The highest the evidence ever got was that Mr Meiforth stated that for purposes unconnected with persons trying to exit a train in transit passengers had sometimes tried to keep the doors open, apparently for the purposes of smoking a cigarette.

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[46] *Zuvela v. Cosmarnan Concrete Pty Ltd* (1996) 71 ALJR 29 at 31. See also *Fox v. Percy* (2003) 214 CLR 118, *Swain v. Waverley Municipal Council* (2005) 220 CLR 517 at [2], *Anikin v. Sierra* (2004) 79 ALJR 452, *CSR Ltd v. Maddelena* (2006) 80 ALJR 458, *Suvaal v. Cessnock City Council* (2003) 77 ALJR 1449 at [74]-[76].

[47] *Lujans v. Yarrabee Coal Co Pty Ltd* [2008] HCA 51.

[48] *Yarrabee Coal Co Pty Ltd v. Lujans* [2009] NSWCA 85

There was no basis upon which that evidence could be used by the Court of Appeal to make substituted findings and expand upon it to include references to backpacks, soccer balls, basketballs or apparently inflexible children's shoes.

Even if that were a permissible exercise of the functions of the intermediate appellate court on what basis was that court's views of the facts preferable to the views formed on matters of primary fact by the primary judge who had all of the advantages that the Court of Appeal did not enjoy, and in circumstances in which they did not identify any error in the primary judge's reasoning but simply took a different view of the "possibilities" based upon what they called "hypotheses" and used these "possibilities" to counteract the actual findings of fact made by the primary judge on the evidence before him?

In these circumstances and when the principles enunciated in paragraph (b) above are applied to what was done by the Court of Appeal in this case, in the appellant's submissions, the orders of the Court of Appeal should be set aside and the orders of the primary judge should be reinstated.

**Part VII:**

No constitutional provision or issue of statutory construction arises in this case.

**Part VIII:**

1. Appeal allowed.
2. Set aside orders 2, 3, 4 and 5 made and entered by the Court of Appeal on 9 December 2014.
3. Order that the appeal to the Court of Appeal be dismissed.
4. Order that orders 1 and 2 of Justice Beech-Jones made on 8 April 2014 and entered on 11 April 2014 be confirmed.
5. Matter remitted to the Court of Appeal to determine any special order for costs in that Court that could have been sought if the appeal to that Court had been dismissed.
6. Order that the respondent pay the appellant's costs of the appeal to the High Court of Australia.
7. Order that if any special order for costs of the proceedings in the High Court of Australia is sought in substitution for order 6 above:
    (i) The appellant is to file and serve a draft of the special order for costs within two (2) days;

(ii) The respondent is to advise the solicitors for the appellant within two (2) days of service of the draft special order for costs upon them whether the respondent opposes or consents to the special order for costs sought;

(iii) If the respondent opposes the special order for costs sought or does not respond within two (2) days the appellant is to file and serve any evidence by affidavit and any written submissions in support of the order sought within five (5) days;

(iv) The respondent is to file and serve any evidence or submission in opposition to the special order for costs within five (5) days of service upon it of any affidavit or submission from the appellant in support of the special order for costs;

(v) Any reply thereto by the appellant to be filed and served within three (3) days thereof;

(vi) The determination of any special order for costs in substitution for order 6 above and any additional costs associated with the application for a special order for costs of the appeal to the High Court of Australia is to be determined on the papers by a single justice in chambers unless the Court otherwise orders.

**Part IX:**

Estimate of the number of hours required for the presentation of the appellant's oral argument: 1.5 hours.

Dated: 1 May 2015.

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