14/08; [2008] VSC 9

SUPREME COURT OF VICTORIA

STATE OF VICTORIA v SUBRAMANIAN

Cavanough J

16 August 2007; 5 February 2008 — (2008) 19 VR 335

CIVIL PROCEEDINGS – TORT – NEGLIGENCE – PERSONAL INJURY – STATE SCHOOL – HEAVY GRILLE OVER DRAIN IN SCHOOLYARD – OBJECT SEEN BY PUPIL IN DRAIN – GRILLE LIFTED BY TWO PUPILS INTENDING THIRD PUPIL TO RECOVER OBJECT – PUPILS LOST CONTROL OF GRILLE – GRILLE FELL AND INJURED THIRD PUPIL'S HAND – CLAIM BROUGHT BY THIRD PUPIL AGAINST THE STATE OF VICTORIA FOR DAMAGES – MAGISTRATE FOUND THERE WAS A NEGLIGENT FAILURE TO WARN ABOUT THE DANGER AND AWARDED DAMAGES – WHETHER WARNING SIGN WOULD HAVE BEEN EFFECTIVE – REASONABLENESS OF SCHOOL TO HAZARD – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, S109.

S., a pupil at a State school was injured when a heavy grille over a drain in the schoolyard fell on him when he was attempting to retrieve an object from the drain. The grille had been lifted by two other pupils who lost control of it thereby causing the injury. S. sued the State of Victoria for damages for the injury on the basis of alleged negligence on the part of the principal and a teacher at the school. In awarding damages to S., the Magistrate was not satisfied that there had been a lack of proper supervision but found that there had been a negligent failure to warn, in particular, by failure to erect a warning sign. Upon appeal—

HELD: Appeal allowed. Decision of Magistrate set aside. Remitted to the Magistrate for re-determination on the issues of breach of duty and causation in respect of S.'s claim of negligence constituted by the alleged failure to warn.

1. In the present case, the principal and the teacher owed S. a duty to take reasonable care for his safety – not a duty of insurance against harm but a duty to take reasonable care to avoid harm being suffered.

2. The elements of a negligence claim are duty, breach and consequent damage. The legal or ultimate burden of proof lies on the plaintiff in relation to each element. In the present case, the dispute was whether the injury was causally related to any negligence on the part of the principal or the teacher. In relation to the issue of causation and probably with the issue of the reasonableness of the response (or non-response) of the relevant school personnel to the risk of injury, the magistrate was bound to consider the question of how likely it was that a warning sign would have been effective in deterring S. and other pupils from lifting the drain cover. The issue of efficacy was not given any or any proper consideration by the magistrate. Accordingly, the Magistrate erred in law in failing to consider the issue of the claim constituted by the alleged failure to warn.

3. *Obiter*. There was some evidence to support a finding that the relevant personnel, in order to discharge their duty of reasonable care, should have erected an appropriate sign. In considering whether reasonable care had been exercised, the question whether a sign would have been efficacious in a general sense was an element which itself involved questions of degree and judgement. However, there was material before the Magistrate on which the Magistrate as a reasonable person might have been satisfied that there had been a departure from the duty of reasonable care.

CAVANOUGH J:

1. This is an appeal by the State of Victoria from a decision of the Magistrates' Court by which the State was found liable in negligence in relation to a physical injury suffered by a pupil at a State school. I have determined that errors of law were made by the Magistrates' Court and that the case should be remitted for rehearing on certain issues.

The incident

2. In 1994 the respondent, Arjune Subramanian, was a 15 year old boy attending a State metropolitan high school, Highvale Secondary College, in Year 9. During a morning recess Arjune and some of his friends saw something shiny that looked like money in a long drain in the school yard. The drain was covered by a series of grilles or grates. Two of Arjune's friends tried to lift one of the grilles. They found it was very heavy. Arjune came to their assistance. Between them

they raised the grille and Arjune put his hand down to retrieve the shiny item. At this, the other two lost control of the grille and it came down on Arjune's hand. It crushed and sliced off the top third of his left index finger. Arjune was taken to hospital suffering a great deal of pain. He was left with an unsightly stump on the finger. Although he is right hand dominant, the loss of the top part of the finger has caused him inconvenience and embarrassment over the subsequent years.

The proceedings below

3. In 2006 Mr Subramanian brought a claim against the State of Victoria in the Magistrates' Court claiming damages for the injury to his finger on the basis of alleged negligence on the part of the principal, Mr Robins, and a certain teacher, Mr Dooley. As the case was presented to the magistrate, Mr Subramanian's main allegation was that there had been a lack of proper supervision in the school yard, but he also claimed that there had been a failure to warn him about the dangers of the grilles. The magistrate was not satisfied that there had been a lack of proper supervision. However she was satisfied that there had been a negligent failure to warn – in particular, by failure to erect a warning sign.[1] She awarded Mr Subramanian $15,000 damages.

The appeal

4. The State of Victoria now appeals to this Court against the magistrate's decision. It brings the appeal under s109 of the *Magistrates' Court Act* 1989 which provides for an appeal on a question of law, only. The appellant argues that the Magistrates' Court failed to consider certain relevant matters and that it thereby made errors of law. As indicated below, I accept that there were failures of that kind. The appropriate remedy would normally be an order that the decision be set aside and that the case be remitted for rehearing and re-determination on the outstanding issues. However the appellant seeks to go further. It says that there was no evidence to support the magistrate's finding that "some sign" was required in order to discharge the duty to take reasonable care for the safety of the pupils. It also says that there was no evidence upon which any inference could be drawn to the effect that the respondent (and the other boys) would have taken notice of any sign or other warning. On one or other or both of those grounds, the appellant submits that this Court should order that the proceeding in the Magistrates' Court be dismissed. It is true that the question whether there was any evidence on which the magistrate could come to her conclusion is a question of law; and it is also true that the respondent's case was very thin. However, as I will explain in due course, in view of the strictness of the "no evidence" test, and the nature of the matters allegedly not proven, I am not satisfied that this Court should order that the claim be dismissed on a "no evidence" basis.

Concessions by the parties

5. The notice of appeal sets out numerous questions said to be questions of law together with numerous grounds of appeal. However, because of concessions made on both sides at the hearing of the appeal, it has become necessary to deal with only a limited number of the questions and grounds.

6. The notice of appeal included a complaint that the magistrate had wrongly rejected a "no case" submission made by the State of Victoria at the conclusion of the plaintiff's case. However the grounds comprising this complaint were withdrawn at the hearing of the appeal, albeit not on the basis that the no-case submission had been ill-founded, but rather on the basis that events had overtaken it.

7. For his part, the respondent conceded that the magistrate had erred in law in one respect, namely by denying the appellant natural justice by holding that there was negligence in the fact that the grille had not been bolted down or otherwise secured, in circumstances where the plaintiff had not pleaded or argued any such case before the magistrate.

8. On the other hand, the appellant acknowledged that the finding of negligence based on failure to warn was an independent basis for the decision; and that, therefore, in order to succeed, the appellant would need to show error of law insofar as the decision was based on failure to warn.

Common ground: Duty of care

9. A primary or personal duty of care may attach to several parties within a school system:

individual teachers, the school principal, and the school authority itself.[2] Highvale Secondary College was conducted by the appellant, the State of Victoria. Ordinarily, the duty of a school authority to the pupils is a "non-delegable" duty.[3] However, under the law of Victoria, the relevant liability of the appellant could only be a vicarious liability for the torts of its servants and agents, because the State of Victoria is generally immune from direct liability in tort.[4] The State of Victoria can be liable directly as an occupier of premises[5], but in the present case it was not sued on that basis. Nevertheless, the relevant duty of care extends to the state or condition of the school premises. In *Commonwealth v Introvigne*[6], Murphy J said that there was a duty:

> "To take all reasonable care to provide suitable and safe premises. The standard of care must take into account the well-known mischievous propensities of children, especially in relation to attractions and lures with obvious or latent hazards."

10. The parties were and are agreed that the principal and the teacher owed to the respondent a duty to take reasonable care for his safety – not a duty of insurance against harm but a duty to take reasonable care to avoid harm being suffered.[7] In *Beaumont v Surrey County Council*[8], Geoffrey Lane J said:

> "In the context of the present action it appears to me to be easier and preferable to use the ordinary language of the law of negligence. That is, it is a headmaster's duty, bearing in mind the known propensities of boys and indeed girls between the ages of 11 and 17 or 18, to take all reasonable and proper steps to prevent any of the pupils under his care from suffering injury from inanimate objects, from the actions of their fellow pupils, or from a combination of the two. That is a high standard."

The magistrate's reasons

11. The evidence in this matter was heard over two days (with interruptions) and the magistrate reserved her decision for three weeks. The decision was delivered orally on 25 August 2006. The transcript occupies 12 pages. After summarising the evidence and referring to some cases, the magistrate turned to the claim of lack of supervision. She rejected it. She then turned to the failure to warn issue. She dealt with it relatively briefly, saying:

> "In relation to failure to warn I am however satisfied that the defendant has failed to warn the children of the dangers of lifting the grill of the drain. In permitting the children to lift the lid they have exposed the child to a risk. It is a foreseeable risk that a child such as the plaintiff will attempt to retrieve something of value such as money or something shiny from a drain and the likelihood of that occurring in my view is probable and not far fetched or fanciful. If the risk of injury is foreseeable then it is then for the tribunal of fact, that being this court, to determine what a reasonable man would do by way of response to the risk and it is my view within the bounds of reasonableness for the grill to be either bolted down or there to be some sign erected to warn the children against the dangers of lifting the grill, and by not doing so the children are exposed to risk of injury. There is no evidence of any warnings to the children to prohibit them from removing the grill and while Mr Dooley said he would have cautioned and in fact told the children not to do so if he had observed them to do so. That was as far as he could go with that.[9] The area was not a prohibited zone and the children regularly gathered there. The grill on the drain was such that it was heavy and moveable and a child could look through it and see items beneath it. In this case the child thought he could see something shiny, money or something."

The remaining questions of law and grounds of appeal

12. Of the stated "questions of law" set out in the notice of appeal the following four remain in issue:

> "8. Whether the Court failed to consider whether a sign would have avoided the Respondent's injury.
>
> 9. Whether there was any evidence upon which the Court could find that a sign would have avoided the Respondent's injury.
>
> 10. Whether it was reasonably open to the Court to infer that the Respondent's injury would have been avoided by the existence of a sign.
>
> 11. Whether the Court failed to take into account relevant evidence and failed to consider relevant matters in assessing whether a sign was a reasonable response of the Appellant to the risk."

13. The extant grounds of appeal are as follows:

"(iv) That the Court failed to consider evidence:

(a) that between 1991 and 2005 the Principal was not aware of any similar incident at the school involving the use of a lid of a drain in the same or similar manner;

(b) that in his 40 years of teaching the Principal had not known of such an incident;

(c) since 1984 at the relevant school the teacher on yard duty was not aware of any other incident involving the use by school children of the lids or grates of a drain.

Such evidence was relevant to the magnitude of the risk and the reasonableness of the Appellant's response to it.

(v) That the Court failed to consider relevant issues, namely the appropriate location, size and content of the sign to warn the Respondent of the dangers of lifting the grill.

(vi) That the Court did not consider a critical matter, namely whether the proposed sign would have avoided the Respondent's injury. Had the Court considered this issue the inevitable conclusion was that the Respondent had not discharged his burden of proof. It was not reasonably open to infer that a sign would have avoided the Respondent's injury.

(vii) That in determining that a reasonable response of the Appellant to the risk was 'some sign erected to warn the children against the dangers of lifting the grill', the Court –

(a) failed to take into account relevant evidence, namely that referred to in paragraph (iv) hereof;

(b) failed to consider the Appellant's competing priorities."

14. There is obvious overlap between and within some of the questions and grounds as pleaded. On the other hand, despite the brevity of the magistrate's reasons on what has now emerged as the critical part of the claim, and notwithstanding that the pleading accuses the magistrate of failing to "consider" various things, it is not a ground of appeal, nor was it argued, that the magistrate's reasons were so inadequately stated as to give rise to error of law on that account alone.[10] Reasons of the detailed kind which may be required to enable a right of appeal on questions of fact to be exercised might not be required where an appeal is limited to questions of law.[11] However it ought to be possible from a lower court's reasons to ascertain the basis for its findings.[12] In the present case, in certain critical respects, it is not possible to do so. Certain submissions on behalf of the State that were worthy of serious consideration, especially in relation to the question whether a warning would have been effective, were not addressed. Accordingly, had the point been raised, I would have found error of law in that regard alone.[13] Ironically, the point not having been raised, the inadequacy of the reasons makes it more difficult for the appellant to demonstrate that the magistrate committed some other error of law. It is not enough to show a mere possibility that the magistrate did so.[14] On the other hand, as will appear, I am prepared to infer that the magistrate simply failed to consider or deal with certain critical issues, such that her decision should be set aside for error of law.

Failure to consider relevant matters

15. On this part of the appeal, the State needs to show two things: first, that the magistrate did in truth fail to consider some particular matter; and, second, that that matter was something that the magistrate was bound to consider.[15]

16. As to the first thing, the leading Victorian statement of the test is that of Sholl J in *Harrison v Mansfield*[16]:

> "The true principle ... must be, not that everything relevant which a magistrate does not refer to is to be taken to have been overlooked, or on the other hand, that it is to be taken to have been considered, but that, if something which should have been considered is not referred to, and the nature of the decision suggests some error, which may have been due to that matter not having been considered as it should have been, or if the magistrate's observations indicate, on a comparison of what he said with what he did not say, that the matter in question has not been considered as it should have been, the appellate tribunal may properly draw such an inference, and the magistrate will have no cause to complain if it does so."

17. As to the second thing, it is helpful to recall some basic principles of the tort of negligence. The elements of a negligence claim are duty, breach and consequent damage. The legal or ultimate[17]

burden of proof lies on the plaintiff in relation to each element. As already indicated, the existence of a duty of care was common ground before the magistrate. There was a dispute about breach. The classic exposition of the principles relating to breach is that of Mason J in *Wyong Shire Council v Shirt*[18], as follows:

> "In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

There was a dispute as to whether the injury was causally related to any negligence of the principal or the teacher. Quantum was in issue, but is no longer so.

18. At the hearing before me, senior counsel for the appellant put most emphasis on the proposition that the magistrate did not turn her mind to the question of how likely it was that a warning sign would have been effective in deterring the respondent or other pupils from lifting a drain cover. I accept that this was a matter that the magistrate was bound to consider, certainly in connection with the issue of causation (in relation to the respondent himself) and probably also in connection with the issue of the reasonableness of the response (or non-response) of the relevant school personnel to the risk of injury identified by the magistrate.[19] In *Secretary, Department of Natural Resources v Harper*[20], Batt JA (with whom Tadgell and Callaway JJA agreed) said:

> "The topic of efficacy overlaps with the issue of causation, but it may be said in general that the duty of care does not require occupiers to take precautions that are unlikely to be efficacious: cf *Waverley Council v Bloom*[21]."

Senior counsel for the respondent did not argue to the contrary.

19. There is next to nothing in the magistrate's reasons to indicate that she gave consideration to efficacy in either connection. The nearest is her statement that "by not [bolting down the grille or erecting 'some sign'] the children are exposed to the risk of injury". The respondent submits that I should infer from the mere fact that the magistrate found the State liable that she considered these matters. I do not think that that would be appropriate. Before the magistrate, counsel for the State had lain heavy stress on the alleged absence of any evidence that the erection of a sign would have avoided the plaintiff's injury.[22] Had the magistrate been conscious of the issue of efficacy when, three weeks later, she came to give her decision, she would surely have recalled those submissions and she would surely have dealt with the matter explicitly and in some detail. The likelihood that the magistrate simply forgot or overlooked the matter is strengthened by the fact that she made other mistakes indicative of lack of attention or recollection. Among other things[23], she made a reasoned determination[24] on a claim which, as she had been told by both counsel repeatedly[25], had been abandoned. She also made a finding that bolting down the grille would have been a reasonable response to the hazard when no allegation to that effect had been made. The hearing of the case had been interrupted by other cases several times. When she reserved her decision the magistrate said that she had heavy commitments ahead of her in the following weeks. I find that the issue of efficacy was not given any or any proper consideration[26].

20. That finding makes it unnecessary for me to determine whether there were other imperatively relevant considerations that the magistrate failed to take into account as alleged.

21. For completeness, however, I would indicate that I am not satisfied that the magistrate failed to consider the evidence of the principal, Mr Robins, or that of the teacher, Mr Dooley, to the effect that neither could recall any similar incident in any school ground during their respective lengthy careers[27]. Indeed the magistrate referred expressly to the evidence of the principal in this regard, albeit towards the beginning of her reasons and as part of a general summary of the evidence rather than in the course of dealing specifically with the failure to warn claim: She said[28]: "Furthermore, Mr Robins said that there were no similar instances in his 40 years." In any event,

it is "well established that the absence of any prior injuries or complaints, while relevant to that part of the *Shirt* calculus relating to the degree of probability of the occurrence of the risk, is not determinative of the reasonable response of the party sought to be made liable."[29] Hence it is at least doubtful whether an omission to consider this evidence would have amounted, by itself, to an error of law[30].

22. As to paragraph (v) of the grounds of appeal, it is true that the magistrate did not say anything in particular about the "appropriate location, size and content" of the proposed sign. It cannot be laid down as an inflexible rule that specificity in any or all of those respects is essential in all warning sign cases.[31] However, it may be very difficult to give proper consideration to the issue of efficacy without being specific about the size, location, form and content (ie wording and/or symbols) of the proposed sign or notice. The omission of the magistrate in this regard further confirms my view that she gave no or no proper consideration to efficacy.

23. As to the complaint in paragraph (vii) of the grounds of appeal to the effect that the magistrate did not consider the appellant's "competing priorities", I would only say that it adds little or nothing to the appellant's case in circumstances where the appellant did not produce any evidence or make any submissions before the magistrate about any competing priorities or (to use the language of the *Shirt* calculus) "conflicting responsibilities".

The "no evidence" grounds

24. The appellant submitted that there was "no evidence to support a finding that 'some sign' was a reasonable response to the risk of injury".[32] As a further or alternative ground, it submitted that there was "no evidence upon which any inference could be drawn that the boys would have taken notice of any warning (whatever it may have been)".[33] The latter point was expressed a little differently in paragraph (vi) of the grounds of appeal, as follows: "It was not reasonably open to infer that a sign would have avoided the Respondent's injury".

25. Sub-section 109(1) of the *Magistrates' Court Act* 1989 provides:

> "A party to a civil proceeding in the Court may appeal to the Supreme Court, on a question of law, from a final order of the Court in that proceeding."

There is a need to consider the import of the expression "on a question of law" in s109. In connection with the hearing before me, the solicitors for the appellant filed a folder containing a list and copies of relevant legislation and authorities. Of the authorities listed, three were included as pertaining to the principles applicable in appeals under s109, namely, *S v Crimes Compensation Tribunal*[34]; *Transport Accident Commission v Hoffman*[35] and *Victorian WorkCover Authority v Game*[36]. Of these, senior counsel for the appellant took me to *Game*[37] and in particular to the references therein to *Hoffman*. *Game* was an appeal under s52 of the *Accident Compensation Act* 1985 from the County Court. There is a reference in *Game*[38] to s109 of the *Magistrates' Court Act* 1989 in terms which seem to indicate that the Court of Appeal considered that what had been said in *Hoffman* was applicable to s109 of the *Magistrates' Court Act* 1989, although *Hoffman* itself was an appeal under s52(1) of the *Administrative Appeals Tribunal Act* 1984 from the Victorian AAT. In effect, senior counsel for the State submitted that for present purposes s109(1) of the *Magistrates' Court Act* should be construed in the same way as s52(1) of the *Administrative Appeals Tribunal Act* 1984 had been construed in *Hoffman*. In *Hoffman*, Young CJ and McGarvie J said[39]:

> "How then is it to be construed? It is not to be construed as limited to an appeal from a decision of the Tribunal on a question of law. Nor is it to be construed as granting an appeal from any decision which involves a question of law. The *via media* we think is to construe the section as granting a right of appeal from any decision of a Tribunal on a question of law which is involved in the Tribunal's decision. See per Deane J in *Director-General of Social Services v Chaney* [1980] FCA 87; (1980) 31 ALR 571; (1980) 47 FLR 80; (1980) 3 ALD 161, at p181. This construction would exclude an appeal upon such questions as whether a particular decision was against the evidence and the weight of evidence: see *Collins v Minister for Immigration and Ethnic Affairs* [1981] FCA 147; 36 ALR 598; (1981) 58 FLR 407; (1981) 4 ALD 198. It would, however, allow an appeal upon the question whether there was any evidence upon which the Tribunal could have reached the decision which it did reach. In *Blackwood Hodge (Australia) Pty Ltd v Collector of Customs (NSW) (No. 2)* [1980] FCA 96; (1980) 47 FLR 131; (1980) 3 ALD 38 the Full Court of the Federal Court held that in order to succeed, an appellant would have to show that there was no basis on which the Tribunal could reach the conclusion which it came to: see especially per Fisher J."

26. The principles stated in *Hoffman* concerning the extent to which a finding or inference of fact might be impugned in an appeal confined to a question of law were further considered by Phillips JA in a detailed and influential[40] (albeit *obiter*) discussion in the abovementioned case of *S v Crimes Compensation Tribunal*. His Honour said that the true question was whether the particular finding or inference was "open" to the tribunal.[41] He deprecated the use of the modifier "reasonably" before the word "open". He said that his suggestion in this regard was assisted by what Mason CJ had said in *Australian Broadcasting Tribunal v Bond*[42] in specifically refraining from accepting a "no sufficient evidence" test as distinct from a "no evidence" test in Australia.

27. Phillips JA proceeded[43]:

> "The word 'reasonably' is used in this context, I suggest, just to emphasise that, when judging what was open and what was not open below, we are speaking of rational tribunals acting according to law, not irrational ones acting arbitrarily. The danger of using the word 'reasonably' lies in its being taken to suggest that a finding of fact may be overturned, on an appeal which is limited to a question of law, simply because that finding is regarded as "unreasonable". That is not the law as I understand it, at least in Australia. A finding of fact will be overturned on an appeal as to a question of law only if that finding was not open."

Having included *S v Crimes Compensation Tribunal* in the folder, the appellant would presumably invite me to regard it, also, as being applicable to appeals under s109 of the *Magistrates' Court Act* 1989.

28. The respondent made no distinct submission about the principles applicable under s109 in relation to challenges to determinations of fact. However, in apparent harmony with the appellant's approach, Mr Tobin SC, who appeared with Ms Forbes for the respondent, submitted from time to time that the question was whether the relevant inferences were "open".[44]

29. There is another line of cases, to which I was not referred, relating specifically to appeals under s109 of the *Magistrates' Court Act* 1989. In *Cehner v Borg*[45] the Court of Appeal held that the proper approach under s109 was the same as had been stated by Stephen J, in relation to the old procedure of orders to review, in *Spurling v Development Underwriting (Vic) Pty Ltd*[46]:

> "... in the case of any question of fact the Court should treat the matter as an appeal from the verdict of a jury and should not make up its own mind upon the evidence but rather confine itself to seeing whether there was evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which he did."

This passage from Spurling was also treated as governing appeals under s109 of the *Magistrates' Court Act* 1989 in *Myer Stores Ltd v Jovanovic*[47] and in *Insurance Manufacturers of Australia Pty Ltd v Heron*[48], both decisions of single judges of this Court.

30. Strangely, there is no reference in the *Hoffman* line of cases to the *Cehner* line, and the reverse is true also. If there were any significant difference, for present purposes, between the two lines of authority such that I needed to choose between them, the choice would not be easy. *Cehner* is a decision of the Court of Appeal dealing directly with s109. However there appears to have been no argument in *Cehner* directed to the present question. As already mentioned the very recent decision of the Court of Appeal in *Game* seems to indicate an assumption that the Hoffman approach applies under s109. Much the same could be said about the reference to s109 by Tadgell JA (with whom Charles JA agreed) in *Green v Victorian Workcover Authority*[49], a case referred to in *Game*. Moreover in *Wong v Carter*[50], a case arising directly under s109, Tadgell JA, having noted that the section conferred a right of appeal "on a question of law" only, said that the "[t]he nature of an appeal of that character was considered in [*Hoffman*]." Winneke P associated himself with the observations of Tadgell JA concerning the nature of an appeal under s109. However the main concern of Tadgell JA was not about the proper limits of a "no evidence" challenge under s109 but about the impermissibility of complaining about alleged errors of practice and procedure. Chernov JA, who gave the leading judgment, considered and rejected the appellant's submission that the magistrate's decision had not been "open" to him. Chernov JA commented[51] that there was no indication that the magistrate's finding was "inconsistent with other facts found by him or with the weight of the evidence". However, as indicated below, I think that the weight of authority is against admitting grounds such as inconsistency of findings or that a finding was "against

the weight of the evidence" in an appeal confined to a question of law. It is true that the detailed discussion in *S v Crimes Compensation Tribunal* about the distinction between a question of fact and a question of law was framed by reference to the issue in that case, namely whether the claimant came within a statutory description. By contrast, the present case involves an allegation of common law negligence. And it is true that many, if not all, of the cases in the Hoffman line, including all of the ones to which I have so far referred, have arisen under statutory provisions rather than at common law. However in *Fidgeon v William Abbott & Associates*[52] the Court of Appeal treated *Hoffman* and *S v Crimes Compensation Tribunal* as being applicable in the context of an appeal from the Legal Profession Tribunal in relation to a complaint against a solicitor of common law negligence. Moreover, the distinction between questions of fact and questions of law, as difficult as it may sometimes appear, is of central importance in many areas of the law, including "the detection of reviewable jury error under the old appellate processes of the courts of common law".[53] In *S v Crimes Compensation Tribunal*, although the context was statutory, Phillips JA appeared to be addressing this subject in general terms.

31. To digress for a moment, the adoption in *Cehner* of the language used in *Spurling* seems, with respect, a little odd insofar as the Supreme Court is thereby enjoined, in appeals from magistrates, to "treat the matter as an appeal from the verdict of a jury". Juries do not give reasons whereas, these days at least, magistrates are required to give reasons and usually do.[54] Is the Supreme Court to disregard the magistrate's reasons in considering a "no evidence" challenge?[55] Ironically, in the present case, as I have already observed, the magistrate's reasons do not deal with the "efficacy" issue in either of its two aspects. In that sense the present case happens to involve something akin to appellate review (on a "no evidence" basis) of an inscrutable jury verdict.

32. In any event it seems to me that there is no significant difference between the *Cehner/Spurling* approach and the *Hoffman/S* approach for the purposes of the present case. On the *Cehner/Spurling* approach, the question is whether there was any "any evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which he did" (my emphasis). I would understand this as referring not to ordinary appeals from juries (or from trial judges) in which a new trial is sought[56], but rather to cases where the question is whether, as a matter of law, there is or was any evidence or other material upon which a verdict in favour of the relevant party could be given.[57] In cases of the latter kind (like the present) grounds such as that evidence was wrongly admitted or rejected, misdirection by the trial judge or that the verdict was unreasonable or perverse or against the evidence or the weight of the evidence have no place.[58] In *S v Crimes Compensation Tribunal*, Phillips JA said that ordinarily a determination of fact will not give rise to an error of law "unless it is shown that the fact-finding tribunal arrived at a finding that was simply not open to it".[59] Phillips JA extended this language to cover not only a finding of fact derived from the acceptance of direct evidence to that effect but also "an inference of fact drawn by the tribunal from other facts found by it"[60]. Phillips JA went on to say[61]:

> "In what I have said I have spoken of whether a particular finding (including an inference) was open to the fact-finding tribunal. Sometimes the question is posed as whether there was any evidence to support the finding which is under challenge, but that expression is perhaps ambiguous when it comes to inferences. It may question whether there were the primary facts from which an inference might be drawn or, there being no doubt about the primary facts, it may question whether the inference could be drawn from those facts. In this area the relevant question in relation to a fact is always whether the finding (including an inference) was open, and so I think that that is the better formulation."

It seems to me that there is substantial equivalence between that formulation and the *Cehner/Spurling* formulation notwithstanding that the latter does not expressly differentiate between findings and inferences. The proposition that the two formulations should be regarded as equivalent, and that therefore the observations in *S v Crimes Compensation Tribunal* should be seen as applicable to appeals under s109 of the *Magistrates' Court Act* 1989, gains additional support from *Ericsson Pty Ltd v Popovski*[62], a case that arose directly under s109. In that case, Brooking JA (with whom Ormiston and Charles JJA agreed) indicated clearly[63] that a series of cases, mainly from New South Wales, culminating in *Azzopardi v Tasman UEB Industries Ltd*[64], being cases some of which can be seen to have strongly influenced the reasoning of Phillips JA in *S v Crimes Compensation Tribunal*, would be in point in any consideration of what amounted to a question of law for the purposes of s109 of the *Magistrates' Court Act* 1989.

33. Mr Ruskin QC, who appeared with Mr Moulds for the appellant, stressed that the respondent, as the plaintiff below, had had the burden of proof. And of course the proceeding below was conducted in a court, not in an administrative tribunal. The rules of evidence applied accordingly. In such a situation, the task facing the appellant is usually not quite as formidable as that which faces an appellant who had carried the burden of proof below and failed.[65]

34. On the other hand, it is rarely easy to establish that the decision of the lower court was "not open".

35. In the present case, because of the paucity of the relevant part of the magistrate's reasons, the appellant does not have the benefit of any findings by the magistrate excluding from consideration any particular items of putatively relevant material.

36. Moreover, the difficulty for the appellant is increased by the nature of the two presently relevant issues that were before the Magistrates' Court. The first such issue was as to what "reasonable" care required. This was, of course, an issue of fact for the magistrate. In *Swain v Waverley Municipal Council*[66], Gleeson CJ said:

> "When a trial judge, or an appeal court, asks *as a matter of law* whether a judgment adverse to the defendant is reasonably open to a jury, the enquiry may be affected by the nature of the judgment required of the jury. A judgment about whether the evidence could support a certain finding of primary fact might require nothing more than attention to the detail of the evidence, and a consideration of its probative potential. *A judgment about whether behaviour is reasonable might involve the application of a measure that is to be found, not in the evidence, but in the wisdom and experience of those who make the decision.*"

The other relevant issue was causation. The causation issue arose on a hypothetical basis. No warning sign had in fact been erected. It was a matter for the magistrate to infer what might have occurred if a warning sign had been erected. That issue in turn only arose on the theory that reasonable care did call for the erection of a warning sign. Mr Ruskin stressed that the plaintiff had been required to prove his case on causation on the balance of probabilities. But, once again, causation is a question of fact. In *Swain*[67], though he dissented in the result (in that he would have allowed the Council's appeal), McHugh J referred with approval to what Isaacs J had said about appeals from jury verdicts on issues of causation in *Cofield v Waterloo Case Co Ltd*[68]:

> "A Court has always the function of saying whether a given result is consistent with two or more suggested causes. But whether it is equally consistent is dependent on complex considerations of human life and experience, and in all but the clearest cases — that is, where the Court can see that no jury applying their knowledge and experience as citizens reasonably could think otherwise — the question must be one for the determination of the jury."

The position is *a fortiori* in an appeal limited to a question of law.

The course of the proceedings below

37. It is true that, below, counsel for the plaintiff said very little in her opening about the failure to warn case; that the plaintiff called no witness to give evidence specifically and directly pertaining to it; and that his counsel said little about it in her closing address, save to invoke "common sense". In submissions and in evidence, she concentrated mainly on the "failure to supervise" case.

38. On the other hand, the plaintiff's "failure to warn" allegations were the subject of at least three, and arguably five, of the six paragraphs of alleged negligence set out in the statement of claim.

39. The only witnesses called on behalf of the respondent were the respondent himself and two of his friends who had been involved in or present at the time of the incident. Neither the respondent nor either of the other two boys was asked, either in chief, in cross-examination or in re-examination, even whether a warning as to the dangers of the grilles had been given to them. None was asked, or said, anything about any difference to their behaviour that might have been made by a sign or any other notice conveying a warning or a prohibition in relation to the grilles. Nor did the respondent call any evidence as to common or usual practice in relation to drains or

signs in schools nor any expert opinion evidence as to good practice in that regard[69]. Counsel for the State pointed all this out during his unsuccessful no case submission. He then called the former principal, Mr Robins; a teacher, Ms Bates, who had worked at Highvale as a year co-ordinator at the relevant time; and another teacher, Mr Dooley, who had worked there at all times since 1984 and who had had a total of 40 years teaching experience in the Victorian system. The appellant's counsel led very little evidence from his witnesses on matters of present relevance. Ms Bates' evidence is of no present relevance. Mr Robins did say that grilles of the kind used at Highvale were commonplace in schools and that he was unaware of any prior like instance during his 43 years of experience in the Victorian education system. Mr Dooley could not say whether other schools had similar drain covers, but in his 40 years of experience he had not heard of a like incident. However, as mentioned above, the absence of prior incidents is not determinative.

40. Counsel for the respondent chanced her arm only a little in presently relevant respects in cross-examination. She asked the headmaster whether he had taken any ameliorative action after the incident. He said that he had decided that there was no need to do so because he discovered that the grate was "very heavy", "surprisingly heavy", and that it sat flush with the drain and was very difficult to move.[70] She asked him whether it had occurred to him that the grille's very weight might present a danger if other boys were to attempt the same thing. He responded that it hadn't happened to his knowledge in 40 years and that there was no reason for anyone to try. He then agreed that the grates were such that small objects could easily fall between them. He acknowledged that one might surmise that students might attempt to retrieve things that fall into the grate, but commented:

> "... students are told that they have to respect each other's property. They have to respect school property. If they put a ball up on the roof they have to report it, and a staff member will go and get it. The same thing applies with the sort of thing you are talking about."

Finally, he was asked:

> "This incident having occurred you saw no need to take any action to prevent it occurring at another time?"
>
> He answered:
> "Apart from – apart from reminding students that you don't interfere with things like that, no, there was no need."[71]

41. Mr Dooley had been on yard duty at the relevant time. He gave evidence that when a teacher was on yard duty he or she was expected to take action against inappropriate behaviour and that if he had come across students lifting or trying to lift the grate he would "certainly say something"[72] and that he "would react".[73]

42. Various photographs and diagrams of the school grounds were tendered and received in evidence.

Reasonable response

43. In my view there was some evidence to support a finding that the relevant personnel, in order to discharge their duty of reasonable care, should have erected an appropriate sign. As the magistrate herself said, there was evidence[74] to the effect that the area in question was not a prohibited zone and that the children regularly gathered there; that the grille was moveable but "surprisingly" heavy[75]; and that a child could look through it and see items beneath it.[76] Before the magistrate, counsel for the defendant conceded that it would be open to the magistrate to find that an injury of the kind suffered was foreseeable.[77] He said "...we all know that children become inquisitive and they do try and sometimes put their hands where they ought not be."[78] The magistrate went further and found that it was "probable". That particular finding cannot be impugned on a "no evidence" basis. Hence, it might perhaps be said that there were elements of both allurement and hidden trap.[79] So one is left with evidence on which it was open to the magistrate to find, as in substance she did, that the material to be weighed on the plaintiff's side of the *Shirt* calculus was considerable.

44. Turning to the defendant's side of the *Shirt* calculus, ie. "what a reasonable man would do by way of response to the risk", it is true, as the appellant submits, that the matter must be

viewed as at a time prior to the accident, ie not retrospectively but prospectively.[80] Further, the law accepts that "the response of prudent and reasonable people to many of life's hazards is to do nothing".[81]

45. In its terms the *Shirt* calculus calls for a "balancing out" between, on the one hand, the magnitude of the foreseeable risk and the degree of probability of its occurrence and, on the other, "the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have".

46. But the words of Mason J in *Shirt* are not to be read as one would read a statute. As Gleeson CJ and Kirby J said in *Mulligan v Coffs Harbour County Council*[82], although reference is often made to the "*Wyong Shire Council v Shirt* calculus", the use of the word "calculus" is unfortunate. They continued[83]:

> "A calculus is a method of calculation. What is involved in the process to which Mason J was referring is not a calculation, it is a judgment. In *Ridge v Baldwin* [1963] UKHL 2; (1963) 1 QB 539; [1964] AC 40; [1963] 2 All ER 66; [1963] 2 WLR 935 Lord Reid observed that '[t]he idea of negligence is ... insusceptible of exact definition'."

Gleeson CJ and Kirby J went on to point out how the rigid application of the well known passage from *Shirt* could operate unrealistically and produce unreasonable results for defendants. Equally, in my view, an insistence that *in every case* the plaintiff identify and strictly prove all facts necessary to enable the court to carry out an exhaustive cost – benefit analysis, from the defendant's standpoint, of the proposed precautions would be unrealistic and would tend to produce injustice for plaintiffs. In my view, the law does not require it.[84]

47. The present case may be distinguished from *Harper*, *Vairy* and the numerous other cases in which the defendant has been in occupation of vast areas of land open to the public for recreational or other purposes, being cases in which it could justifiably be said that, because the hazard in question was replicated many times over within those areas and because numerous other kinds of hazards existed therein as well, reasonableness did not require the singling out of the particular location and the particular hazard associated with the claim in question. In the present case, there was no evidence nor any suggestion before the magistrate that the same kind of hazard (drain covers) existed in other parts of the school grounds. Nor was it expressly put to the magistrate, by way of evidence or submission, that different kinds of hazards existed in the school grounds and might compete for attention by way of a warning sign. It seems to me that it would have been open to the magistrate to proceed on the basis that the absence of any such evidence or of any such suggestion or submission from the defendant was a matter that she could take into account in favour of the plaintiff. In *Swain v Waverley Municipal Council*[85], Gleeson CJ and Kirby J said:

> "More than 200 years ago, Lord Mansfield said that 'all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.' This basic principle of adversarial litigation is not a matter of esoteric legal knowledge; it accords with common sense and ordinary human experience. When the jurors in this case were asked to consider whether the flags should have been placed elsewhere, they may have thought that it was up to the respondent, rather than the appellant, to tell them what difficulty there would have been about moving the flags to avoid the sand bank, or to explain why nothing would have been gained by putting the flags in a different location. That is something they might reasonably have taken into account in making a judgment about the reasonableness of the conduct of the respondent."

48. Although the question of general efficacy should usually be considered by the trial court in warning cases, it is not necessarily essential for there to be evidence on the matter in conventional form. Indeed in *Council of Municipality of Waverley v Lodge*, Bryson J (with whom Meagher JA and Heydon JA agreed) said[86]:

> "Another important subject, *potentially the subject of evidence but rarely addressed in forensic contests*, is the actual impact of signs on human behaviour, their utility and the extent to which they are read and if read complied with."

49. It is true that in *Harper*, Batt JA (with whom Tadgell and Callaway JJA agreed) held that the plaintiff below had not established a breach of the duty owed to her and that his Honour so

held partly because there was no evidence of the efficacy of a warning sign of the type which the judge below found to be required.[87] However, consonantly with the above-quoted passage from *Lodge*, Batt JA did not hold that direct evidence on the point was always essential. Quite the contrary. His Honour said that questions of the need for and efficacy of a sign were peculiarly for the judge as the tribunal of fact and that it was "extremely doubtful" whether the opinions or comments of witnesses on those issues were "admissible or helpful".[88] On the other hand, Batt JA apparently thought it significant that there was no evidence of the erection of similar signs in reserves elsewhere; and no doubt a corresponding comment might be made in relation to the present case.

50. It is important to remember that *Harper* involved an ordinary appeal under s74 of the *County Court Act* 1958. It was not an appeal confined to questions of law. As Batt JA himself said[89]:

> "This being an appeal on fact and law, the question for this court is whether either finding [of the County Court judge] is shown to be wrong."

The scope of the present appeal is far more limited. I am not at liberty to examine the material that was before the magistrate by reference to what I would consider a reasonable response on the part of the relevant school personnel. Far from it. Even if I thought that a finding of breach would be 'unreasonable' or 'perverse', that would not be sufficient to warrant the order sought by the appellant. As McHugh J said in *Swain*[90]:

> "Consequently, a plaintiff may tender evidence that, if accepted, is sufficient as a matter of law to constitute negligence but insufficient as a matter of fact to be regarded as reasonable by an appellate court. The evidence of the defendant may be so overwhelming or the quality of the plaintiff's evidence may be so weak that the verdict for the plaintiff cannot be regarded as reasonable, even though, as a matter of law, the evidence could justify a verdict for the plaintiff."

Nor am I confined to the consideration of "evidence" strictly so called. In *Kerr v Ayr Steam Shipping Company Ltd*, a case described by Isaacs J in *Cofield v Waterloo Case Co Ltd*[91] as a case "that brings into conspicuous relief the true principle of law regarding sufficient proof of causation to go to the jury", Lord Parmoor adopted the following statement by Lord Dunedin in *Mackinnon v Miller*[92]:

> "It seems to me that each case must be dealt with and decided upon its own circumstances and that inferences may be drawn from circumstances just as much as results may be arrived at from direct testimony".

Further, in considering whether reasonable care had been exercised in the present case, the question whether a sign would have been efficacious (in a general sense) was but one element of the overall *Shirt* calculus and, moreover, an element which itself involved questions of degree and judgment.

51. In my view there was material before the magistrate on which the magistrate might, as a reasonable (ie rational[93]) person, have been satisfied that there had been a departure from the duty of reasonable care.

52. This case related to the environment of a state secondary school, not a national park[94], a public beach[95], a public swimming area[96], a public theatre[97]; or a sporting or recreational facility[98]. In *Woods v Multi-Sport Holdings Pty Ltd*[99], Gleeson CJ said:

> "Where it is claimed that reasonableness requires one person to provide protection, or warning, to another, the relationship between the parties, and the context in which they entered into that relationship, may be significant. The relationship of control that exists between an employer and an employee, *or of wardship that exists between a school authority and a pupil*, may have practical consequences, as to what it is reasonable to expect by way of protection or warning, different from those which flow from the relationship between the proprietor of a sporting facility and an adult who voluntarily uses the facility for recreational purposes. I say "may", because it is ultimately a question of factual judgment, to be made in the light of all the circumstances of a particular case."

53. In relation to the element of general efficacy in particular, Mr Tobin submitted that there

were circumstances in this case from which a magistrate might have inferred that a warning sign would have had efficacy. He pointed out that authority figures in schools can readily discipline students for infractions of school rules or requirements. In the present case, the school could not only have warned against the dangers of lifting the grilles but also prohibited it. A warning sign could have been worded accordingly, ie so as to convey not only the danger but also the prohibition. A photograph of the area near the drain which was in evidence before the magistrate shows that there was a large blank wall running next to the drain along its entire length. Presumably a sign could have been put on the wall, if not elsewhere. Mr Tobin further pointed out that the defendant below had successfully resisted the plaintiff's claim that the school had had an inadequate system of supervision. Indeed it had called evidence to show that it had a fully adequate system. Further, there was oral evidence from Mr Dooley that he would have intervened had he seen children trying to lift the grate. Hence, Mr Tobin submitted, a permanent sign conveying an explicit warning and prohibition would have been backed up by the twin elements of enforceability and detectability within the school environment. Further again, the evidence showed that each drain cover was so heavy that it required not just one boy but three to lift it. It could be inferred, Mr Tobin said, that it was even less likely that three boys, together, would disobey a warning sign as compared with one boy.

54. I agree with Mr Tobin that, at least in combination, the evidence and the circumstances to which he referred were such that a rational magistrate might, without erring in law, have concluded that the erection of a warning/prohibition sign would have been an efficacious measure and accordingly that, in all the circumstances, the omission to erect such a sign amounted to a breach of the duty to take reasonable care for the safety of the students. Even if it be said that, despite (or even because of) the "surprising" heaviness of the drain cover, the respondent must have been aware of the danger, "a notice might have transformed the plaintiff's knowledge of the existence of [a danger] into a more lively appreciation of the danger".[100]

55. I stress that this does not necessarily mean that I would regard a finding of negligence on the material that was before the magistrate as a reasonable finding, much less that, had I been sitting as the magistrate, I would have decided that the omission to erect a sign was a breach of duty. Because the matter will need to be reheard and re-determined, it is preferable that I say no more in this regard.

Causation

56. On the question of causation, Mr Tobin made essentially the same points. That is to say, in summary, he referred to detectability and enforceability in the school environment and to the need for at least three students to combine to defy the proposed warning/prohibition. He submitted that in the absence of any evidence that the respondent (or any of the other boys involved in the incident) was a particularly unruly student, this was also enough to provide some basis for an inference of causation, on the balance of probabilities, in the particular case. I agree.

57. I do not accept Mr Ruskin's submission that it was essential that the respondent himself give evidence to the effect that he would have heeded and obeyed an appropriate sign. It is true that evidence of that kind is frequently given in "warning" cases. It is also true that courts in Australia have adopted a "subjective" approach which has regard to what the plaintiff's own response would have been had the warning been given, as distinct from an "objective" approach which would have regard to a reasonable person in the plaintiff's position.[101] However, as far as I am aware, it has not been laid down in any case that evidence on this point from the injured person himself or herself is essential, even in cases where that person is physically capable of giving it. Quite the contrary. In *Harper* Batt JA acknowledged that evidence of this kind may amount to "a reconstruction of doubtful utility"[102], although he noted "that the question is often asked".[103] In *Hoyts Pty Limited v Burns*[104], Kirby J, citing other similar judicial observations, said:

> "... the evidence of what a claimant would have done if a non-existent warning had been given by a hypothetical sign is so hypothetical, self-serving and speculative as to deserve little (if any) weight, at least in most circumstances."

58. In my view, the following observations of Nettle JA in *Berrigan Shire Council v Ballerini*[105] supply a further convincing and complete answer to Mr Ruskin's submission:

> "As Lord Halsbury once said, it is an old expedient but seldom successful to ask a witness what

> he would have done if the facts had been as they should have been. In truth it is all but impossible for a witness to say several years after an event what his mental condition might have been if the circumstances had been different at the time of the event. Consequently, if a witness is honest his hesitation to assert what might have been is ordinarily to be expected. It is also necessary to remember that the judge saw Mr Ballerini in the witness box and his Honour's perception of Mr Ballerini was of a reasonably responsible, careful, sensible, law-abiding young man whose hesitation in testimony reflected a responsible approach to his obligations as a witness. Granted that this appeal is in the nature of a rehearing, we are at a distinct disadvantage relative to the judge in attempting to evaluate Mr Ballerini's credit, and quite unable to achieve the sort of perception of the case that his Honour was able to derive from hearing the evidence as a whole. Faced with the limitations which that entails, I am not prepared to disagree with the judge about the significance of Mr Ballerini's hesitation in the witness box."

In the present case there was available to the magistrate the benefit of seeing and hearing the respondent in the witness box, albeit that the respondent was not asked what his reaction to a sign would have been. The opportunity to form an impression of the respondent was part of the presently relevant material before the magistrate, but is not available to this Court.

59. In passing, I note that, save to the very limited extent to which I have already referred, Mr Tobin did not seek to rely on any presumption of causation or on any proposition that an evidential onus in relation to causation had shifted to the defendant below.[106]

60. Once again, I would emphasise that my conclusion on this aspect of the case does not necessarily mean that I would regard as reasonable a finding that the absence of a warning sign was a cause of, or materially contributed to, the respondent's injury; nor, of course, that, had I been sitting as the magistrate, I would have made such a finding. Again, I should elaborate no further.

Conclusion

61. In my view, the magistrate erred in law in failing to consider, properly or at all, the issues of reasonable care and causation in connection with the respondent's claim insofar as the claim was based on an allegedly negligent failure to warn of the dangers of lifting the grille above the drain. The magistrate's decision must be set aside accordingly.

62. However, on the strict test applicable to an appeal under s109 of the *Magistrates' Court Act* 1989, I am not satisfied that it would not have been open to the magistrate to have found a breach of duty and a causal relationship with the respondent's injury. Therefore, I am not prepared to order that the proceeding before the Magistrates' Court should be dismissed. Rather, I consider that the case should be remitted to the Magistrates' Court to be re-heard and re-determined on the outstanding issues. The Magistrates' Court should be reconstituted for that purpose.[107]

Orders

63. Subject to any submissions counsel may make as to form, I would make orders to the effect that:

(a) The appeal be allowed;

(b) The decision of the Magistrates' Court be set aside;

(c) The case be remitted to the Magistrates' Court to be re-heard and re-determined on the issues of breach of duty and causation in respect of the respondent's claim of negligence constituted by the alleged failure to warn.

I will hear counsel as to the appropriate form of order and as to costs.

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[1] The magistrate also referred to the absence of any mechanism to lock down or secure the grille, but it is common ground that this basis for her decision cannot stand.

[2] P. Heffey, "The Duty of Schools and Teachers to Protect Pupils from Injury" (1985) 11 Mon LR 1 at 47.

[3] *Ramsay v Larsen* [1964] HCA 40; (1964) 111 CLR 16 at 28-29; [1964] ALR 1121; 38 ALJR 106; *Commonwealth v Introvigne* [1982] HCA 40; (1982) 150 CLR 258 at 264, 269-271, 280-281; (1982) 41 ALR 577; (1982) 56 ALJR 749; *New South Wales v Lepore* [2003] HCA 4; (2003) 212 CLR 511; (2003) 195 ALR 412; (2003) 77 ALJR 558; (2003) 24 Leg Rep 2; *Leichhardt Municipal Council v Montgomery* [2007] HCA 6; (2007) 230 CLR 22; (2007) 233 ALR 200 at [110]; (2007) 81 ALJR 686; (2007) 153 LGERA 55; (2007) 46 MVR 289; [2007] Aust Torts Reports 81-873 (2007) 233 ALR 200.

[4] *Crown Proceedings Act* 1958 s23(1)(b); *Richards v State of Victoria* [1969] VicRp 16; [1969] VR 136 at 138; Hogg and Monahan, *Liability of the Crown*, 3rd edition, 2000, p133. This was apparently common ground below (transcript, 150) and was not disputed before me. Compare *Commonwealth v Introvigne* [1982] HCA

40; (1982) 150 CLR 258 at 264, 269-271, 280-281; (1982) 41 ALR 577; (1982) 56 ALJR 749; Heffey, op. cit. p55 footnote 293.

[5] *Occupiers' Liability Act* 1983 (Vic); Heffey, op. cit. p 36-37.

[6] [1982] HCA 40; (1982) 150 CLR 258 at 274; (1982) 41 ALR 577; (1982) 56 ALJR 749. See further Ramsay and Shorten, *Education and the Law*, 1996 at 192-194 and cases there cited; CCH, Australian Professional Liability: Education at [20-700] and cases there cited; Butler and Matthew: *Schools and the Law, 2007* at 42-44 and cases there cited.

[7] See *Richards v State of Victoria* [1969] VicRp 16; [1969] VR 136 at 136 at 138, 141; *Trustees of the Roman Catholic Church, Archdiocese of Sydney v Kondrajian* [2001] NSWCA 308 at [53]- [67].

[8] (1968) 66 LGR 580 at 585.

[9] A transcription error has occurred here. The words of this sentence should have been recorded as a continuation of the previous sentence.

[10] Cf *Sun Alliance Insurance Ltd v Massoud* [1989] VicRp 2; [1989] VR 8 at 18-20; *Westpac Banking Corporation v Tyler* [1998] VSC 179 (Smith J) at [16]; *Ambulance Service of New South Wales v Daniel* [2000] NSWCA 116 at [75]- [81]; (2000) 19 NSWCCR 697; *Oil Basins Limited v BHP Billiton Ltd* [2007] VSCA 255 at [55].

[11] *Perkins v County Court of Victoria* [2000] VSCA 171; (2000) 2 VR 246 at 273 (per Buchanan JA with whom Phillips and Charles JJA relevantly agreed; (2000) 115 A Crim R 528); cf *Day v Electronik Fabric Makers (Vic) Pty Ltd* [2004] VSC 24 (Nettle J) at [24]-[26].

[12] *Ambulance Service of New South Wales v Daniel* [2000] NSWCA 116 at [75]; (2000) 19 NSWCCR 697.

[13] See *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation* (1988) 79 ALR 267 at 276-7; (1988) 19 ATR 1122; 14 ACLR 156; *Oil Basins Limited v BHP Billiton Ltd* [2007] VSCA 255 at [77]; cf *Secretary, Department of Employment and Workplace Relations v Barrington* [2006] FCA 527 at [24]- [34]; (2006) 43 AAR 68.

[14] See *Kymar Nominees Pty Ltd v Sinclair* [2006] VSC 488 at [9] and cases there cited.

[15] See *Rumpf v Mornington Peninsula Shire Council* [2000] VSC 311; (2000) 2 VR 69 at 76-77 [7]- [14].

[16] [1953] VicLawRp 60; [1953] VLR 399 at 404. See also *McConkey v McConkey* [1960] VicRp 47; [1960] VR 295 at 300; *620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 1)* [2006] VSC 490 at [24].

[17] In some circumstances an "evidential" burden of proof may fall on the defendant: see further below.

[18] [1980] HCA 12; (1980) 146 CLR 40 at 47-48; (1980) 29 ALR 217; (1980) 54 ALJR 283; (1980) 60 LGRA 106; 47 Aust Torts Reports 80-278. Compare *Mulligan v Coffs Harbour City* [2005] HCA 63; (2005) 223 CLR 486 at 490 [2] per Gleeson CJ and Kirby J; (2005) 221 ALR 764; (2005) 80 ALJR 43; [2005] Aust Torts Reports 81-811.

[19] Compare ground of appeal (vi). There was no objection by senior counsel for the respondent to the reliance by the appellant on this matter not only in connection with causation but also in connection with reasonableness, notwithstanding that, arguably, the notice of appeal did not cover the latter.

[20] [2000] VSCA 36; [2000] 1 VR 133, 151 [51].

[21] [1999] NSWCA 229; (1999) Aust Torts Reports 81-517 at [18].

[22] Both during his "no case" submission (transcript, 56) and during his final submissions (transcript, 142-143).

[23] See the list in the appellant's written outline dated 10 November 2006, pages 5-6.

[24] Transcript, 168.

[25] Transcript, 4, 143-144.

[26] Compare *Amaca Pty Ltd v AB&P Constructions Pty Ltd* [2007] NSWCA 220 at [76]- [77]; [2007] Aust Torts Reports 81-910; (2007) 5 DDCR 543. In that case, causation had not really been in issue at the trial.

[27] See ground (iv).

[28] Transcript, 164.

[29] *Bujnowicz v Trustees of the Roman Catholic Church of the Archdiocese of Sydney* [2005] NSWCA 457 at [42]; [2005] Aust Torts Reports 81-824 per Tobias JA (with whom Santow and Ipp JA agreed), citing earlier NSW authorities. See also *Berrigan Shire Council v Ballerini* [2005] VSCA 159; [2005] 13 VR 111 at [46] per Nettle JA. Compare *Roman Catholic Church Trustees v Hadba* [2005] HCA 31; (2005) 221 CLR 161 at [13]; 216 ALR 415; (2005) 79 ALJR 1195; [2005] Aust Torts Reports 81-805.

[30] See *Li Shi Ping and Liu Xiu Ling v Minister for Immigration, Local Government and Ethnic Affairs* [1994] FCA 1512; (1994) 35 ALD 225 at 236 (distinguishing between relevant considerations and "particular pieces of evidence"); *WAFD v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 257 at [35]; *Woods v Migration Agents Authority* [2004] FCA 1622 at [55]; (2004) 39 AAR 519; cf *WAFP v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 319; *Tralongo v Malios* [2007] VSC 239 at [76]; 27 VAR 74.

[31] See *Nagle v Rottnest Island Authority* [1992] HCA 43; (1993) 177 CLR 423 at 432; 112 ALR 393; 67 ALJR 426; [1993] Aust Torts Reports 81-211; cf at 435 per Brennan J (dissenting). See also *Secretary, Department of Natural Resources v Harper* [2000] VSCA 36; [2000] 1 VR 133 at [45]; *Amaca Pty Ltd v AB&P Constructions Pty Ltd* [2007] NSWCA 220 at [87]- [88], [109]-[112]; [2007] Aust Torts Reports 81-910; (2007) 5 DDCR 543; cf *Council of the Municipality of Waverley v Lodge* (2001) 117 LGERA 447 at 459 [45]; *Vairy v Wyong Shire Council* [2005] HCA 62; (2005) 223 CLR 422 at 427 [7], 447 [76] 479 [208] and [210]; (2005) 221 ALR 711; (2005) 80 ALJR 1; [2005] Aust Torts Reports 81-810; (2005) 142 LGERA 387; *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42 at [31], [75], [78]-[79]; (2007) 234 CLR 330; (2007) 238 ALR 761; (2007) 48 MVR 288; (2007) 81 ALJR 1773; [2007] Aust Torts Reports 81-905; (2007) 155 LGERA 153 per Gummow J.

[32] Written outline, para 12. See also para 11. And see page 12 of the transcript before this Court. This point is not squarely covered by any of the extant questions of law or grounds stated in the notice of appeal. However the appellant's reliance on the point was not objected to by the respondent.

[33] Written outline, para 7. Strictly speaking, this paragraph of the outline was included in respect of the subsequently abandoned "no case" point, but it was in effect adopted at the hearing as foreshadowing the

"no evidence" case.
[34] [1998] 1 VR 83.
[35] [1989] VicRp 18; [1989] VR 197; (1988) 7 MVR 193.
[36] [2007] VSCA 86; (2007) 16 VR 393.
[37] At [13]-[21], esp at [14]-[16].
[38] At [14].
[39] [1989] VicRp 18; [1989] VR 197 at 199; (1988) 7 MVR 193.
[40] See *Transport Accident Commission v O'Reilly* [1998] VSCA 106; [1999] 2 VR 436 at 460 [58]; (1998) 28 MVR 327; (1998) 14 VAR 189 per Callaway JA; *Myers v Medical Practitioners Board of Victoria* [2007] VSCA 163 at [47]- [55]; (2007) 18 VR 48; *Stone v McIntyre* [2007] VSC 406 at [28]- [37]; (2007) 17 VR 280; (2007) 176 A Crim R 540; 48 MVR 549.
[41] [1998] 1 VR 83 at 91.
[42] [1990] HCA 33; (1990) 170 CLR 321 at 356; (1990) 94 ALR 11; (1990) 64 ALJR 462; 21 ALD 1.
[43] [1998] 1 VR 83 at 91.
[44] Appeal transcript 40, 47, 48.
[45] [2003] VSCA 72 at [1], [17], [30].
[46] [1973] VicRp 1; [1973] VR 1 at 11; (1972) 30 LGRA 19.
[47] [2004] VSC 478 at [7].
[48] [2005] VSC 482 at [63]- [64]; (2006) 14 ANZ Insurance Cases 61-669.
[49] [1997] 1 VR 364, 368-369.
[50] [2000] VSC 53 at [43].
[51] At [36].
[52] [2003] VSCA 5 at [14]- [17].
[53] See *Re Minister for Immigration and Multicultural Affairs: Ex parte Applicant S 20/2000* (2003) ALD 1 at [55] per McHugh and Gummow JJ. See also *Swain v Waverley Municipal Council* [2005] HCA 4; (2005) 220 CLR 517 at 529-534 [30]- [39]; (2005) 213 ALR 249; (2005) 79 ALJR 565; (2005) 138 LGERA 50 per McHugh J (dissenting).
[54] Compare *Aldom v Dunn* [1917] VicLawRp 9; [1917] VLR 70; 23 ALR 3; 38 ALT 110, one of the seminal cases through which (according to observations in *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346; (1961) 19 LGRA 232) the Victorian position in relation to orders to review became established. In *Aldom v Dunn* Hood J at 71, observed that the magistrates below had "dismissed the case, giving no reasons – a practice which, I am sorry to say, is not infrequently followed by magistrates...".
[55] Compare *Swain v Waverley Municipal Council* [2005] HCA 4; (2005) 220 CLR 517, 520 [3]; (2005) 213 ALR 249; (2005) 79 ALJR 565; (2005) 138 LGERA 50 per Gleeson CJ.
[56] As to which see *Pujick v Savic* [1971] VicRp 76; [1971] VR 632; *Kanja v Dynamic Engineering Construction Co Pty Ltd* [2007] VSCA 307 at [4].
[57] See *Dearman v Dearman* [1908] HCA 84; (1908) 7 CLR 549 at 553, quoted in *Pujick v Savic* [1971] VicRp 76; [1971] VR 632 at 634; *Swain v Waverley Municipal Council* (29005) [2005] HCA 4; (2005) 220 CLR 517 at 560-562 [124]- [132] per Gummow J and at 529-534 [30]-[39] per McHugh J (dissenting); (2005) 213 ALR 249; (2005) 79 ALJR 565; (2005) 138 LGERA 50.
[58] *Naxakis v Western General Hospital* [1999] HCA 22; (1999) 197 CLR 269 at 282 [40]; (1999) 162 ALR 540; (1999) 9 Leg Rep 2 per McHugh J; *Swain v Waverley Municipal Council* [2005] HCA 4; (2005) 220 CLR 517 at 534 [39]; (2005) 213 ALR 249; (2005) 79 ALJR 565; (2005) 138 LGERA 50 per McHugh J (dissenting). Note the echo of the passages from *Hoffman* quoted above.
[59] [1998] 1 VR 83, 90.
[60] Ibid.
[61] Ibid.
[62] [2000] VSCA 52; [2000] 1 VR 260.
[63] At 265 [14]-[15].
[64] [1985] 4 NSWLR 139. Compare *Roads Corporation v Dakakis* [1995] VicRp 70; [1995] 2 VR 508 at 517.
[65] *Dearman v Dearman* [1908] HCA 84; (1908) 7 CLR 549 at 553; *Pujick v Savic* [1971] VicRp 76; [1971] VR 632; *Ericsson (Australia) Pty Ltd v Popovski* [2000] VSCA 52; [2000] 1 VR 260 at 265 [14]; *Ambulance Service of New South Wales v Daniel* [2000] NSWCA 116 at [56]- [65]; (2000) 19 NSWCCR 697; *Crown Glass and Aluminium Pty Ltd v Ibrahim* [2005] NSWCA 195 at [39]- [40]; *Stone v McIntyre* [2007] VSC 406 at [32]- [33]; (2007) 17 VR 280; (2007) 176 A Crim R 540; 48 MVR 549.
[66] [2005] HCA 4; [2005] 220 CLR 517 at 522 [8]; (2005) 213 ALR 249; (2005) 79 ALJR 565; (2005) 138 LGERA 50. The emphasis on the last sentence in the quote is mine. See also at 532 [36] per McHugh J.
[67] (2005) CLR 517 at 532-533 [36].
[68] [1924] HCA 18; (1924) 34 CLR 363 at 375. See generally at 374-377. See also *Kerr v Ayr Steam Shipping Company Ltd* [1915] AC 217, referred to with approval by Isaacs J in *Cofield* at 377.
[69] Compare *Hadba* [2005] HCA 31; (2005) 221 CLR 161 at [13]- [15]; cf at [49]; 216 ALR 415; (2005) 79 ALJR 1195; [2005] Aust Torts Reports 81- per McHugh J (dissenting).
[70] Transcript, 85.
[71] Transcript 86-87.
[72] Transcript 121.
[73] Transcript 122.
[74] Transcript 29.
[75] Transcript 85.

[76] Ibid.
[77] Transcript 136.
[78] Ibid.
[79] *Hasaganic v Minister of Education* [1973] 5 SASR 554 at 557; *Commonwealth v Introvigne* [1982] HCA 40; (1982) 150 CLR 258 at 275; (1982) 41 ALR 577; (1982) 56 ALJR 749; Butler and Mathews, *Schools and the Law*, 2007, [241]; cf *Roads and Traffic Authority of New South Wales v Dederer* [2007] HCA 42 ("*Dederer*") at [63]-[64] per Gummow J; (2007) 234 CLR 330; (2007) 238 ALR 761; (2007) 48 MVR 288; (2007) 81 ALJR 1773; [2007] Aust Torts Reports 81-905; (2007) 155 LGERA 153; cf at [152] per Kirby J (dissenting).
[80] *Vairy v Wyong Shire Council* [2005] HCA 62; (2005) 223 CLR 422 at 461 [124]; (2005) 221 ALR 711; (2005) 80 ALJR 1; [2005] Aust Torts Reports 81-810; (2005) 142 LGERA 387 per Hayne J; *New South Wales v Fahy* [2007] HCA 20; (2007) 232 CLR 486; (2007) 236 ALR 406; (2007) 81 ALJR 1021 at [57]- [59].; [2007] Aust Torts Reports 81-889; (2007) 4 DDCR 459.
[81] *New South Wales v Fahy* [2007] HCA 20 at [7]; (2007) 232 CLR 486; (2007) 236 ALR 406; (2007) 81 ALJR 1021 at [57]- [59].; [2007] Aust Torts Reports 81-889; (2007) 4 DDCR 459 per Gleeson CJ. See also *Vairy v Wyong Shire Council* [2005] HCA 62; [2005] 223 CLR 422 at 461 [124]; (2005) 221 ALR 711; (2005) 80 ALJR 1; [2005] Aust Torts Reports 81-810; (2005) 142 LGERA 387 per Hayne J.
[82] [2005] HCA 63; (2005) 223 CLR 486 at 490 [2]; (2005) 221 ALR 764; (2005) 80 ALJR 43; [2005] Aust Torts Reports 81-811. See also at 468 [155] per Hayne J.
[83] [2005] HCA 63; (2005) 223 CLR 486 at 490 [2]; (2005) 221 ALR 764; (2005) 80 ALJR 43; [2005] Aust Torts Reports 81-811.
[84] See *Swain v Waverley Municipal Council* [2005] HCA 4; (2005) 220 CLR 517, 577 [191]-[192]; (2005) 213 ALR 249; (2005) 79 ALJR 565; (2005) 138 LGERA 50 per Kirby J; cf *Hadba* [2005] HCA 31; (2005) 221 CLR 161 at [13]-[15]; cf at [49]; 216 ALR 415; (2005) 79 ALJR 1195; [2005] Aust Torts Reports 81-805 per McHugh J (dissenting).
[85] [2005] HCA 4; (2005) 220 CLR 517 at 525-526 [17]; (2005) 213 ALR 249; (2005) 79 ALJR 565; (2005) 138 LGERA 50 citation omitted; see also at 567-568 [151]-[155] per Gummow J; and at 587 [225] per Kirby J; compare 533-534 [37]-[39] per McHugh J (dissenting).
[86] [2001] NSWCA 439 at [36]; (2001) 117 LGERA 447 (my emphasis).
[87] [2000] VSCA 36; [2000] 1 VR 133 at 151-152 [51]- [54]. Gummow J (with whom Heydon J agreed) took a similar approach in *Dederer*: see esp at [75] and [78].
[88] *Harper* [2000] VSCA 36; [2000] 1 VR 133 at 143 [34].
[89] [2000] VSCA 36; [2000] 1 VR 133 at 144 [37].
[90] [2005] HCA 4; (2005) 220 CLR 517 at 530 [32]; (2005) 213 ALR 249; (2005) 79 ALJR 565; (2005) 138 LGERA 50.
[91] [1924] HCA 18; (1924) 34 CLR 363, 377. As mentioned above, in *Swain* McHugh J referred with approval to related remarks of Isaacs J in *Cofield*.
[92] [1909] SC 373.
[93] See *S v Crimes Compensation Tribunal* [1998] 1 VR 83 at 91 (line 47).
[94] As in *Harper* and *Romeo*.
[95] As in *Mulligan*.
[96] As in *Vairy* and *Dederer*.
[97] As in *Hoyts Pty Ltd v Burns* [2003] HCA 61; (2003) 201 ALR 470; (2003) 77 ALJR 1934.
[98] As in *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9; (2002) 208 CLR 460; (2002) 186 ALR 145; (2002) 76 ALJR 483; (2002) 23 Leg Rep 2.
[99] [2002] HCA 9; (2002) 208 CLR 460 at 473 [41]. (My emphasis). See also the quotations in paragraphs 9 and 10 of the text above.
[100] *Hoyts Pty Limited v Burns* [2003] HCA 61; (2003) 201 ALR 470 at [64]; (2003) 77 ALJR 1934 per Kirby J, who was in turn quoting Brennan J in *Nagle v Rottnest Island Authority* [1992] HCA 43; (1993) 177 CLR 423 at 443; 112 ALR 393; 67 ALJR 426; [1993] Aust Torts Reports 81-211. Brennan J was dissenting, but he would have found for the defendant, not the plaintiff.
[101] See *Chappel v Hart* [1998] HCA 55; (1998) 195 CLR 232 at 272; 156 ALR 517; 72 ALJR 1344 per Kirby J.
[102] *Department of Natural Resources v Harper* [2000] VSCA 36; [2000] 1 VR 133 at 155 [57].
[103] Ibid.
[104] [2003] HCA 61; (2003) 201 ALR 470 at [54]; (2003) 77 ALJR 1934.
[105] (2005) 15 VR 111 at 136 [58] (footnotes omitted).
[106] Compare *Geyer v Downs* [1975] 2 NSWLR 835 at 856 per Mahoney JA; *Chappel v Hart* [1998] HCA 55; (1998) 195 CLR 232 at 247 [34]; 156 ALR 517; 72 ALJR 1344 per McHugh J; *Naxakis v Western General Hospital* [1999] HCA 22; (1999) 197 CLR 269 at 279 [31]; (1999) 162 ALR 540; (1999) 9 Leg Rep 2 per Gaudron J; *Freidin v St. Laurent* [2007] VSCA 16 at [1]- [4], [15]-[30]; (2007) 17 VR 439; [2007] Aust Torts Reports 81-875 (special leave refused 25 May 2007); *Gittani v Stone Pty Limited v Pavkovic* [2007] NSWCA 355 at [38]- [52], [165]; [2007] Aust Torts Reports 81-924; cf *H v Pennell and State of South Australia* BC8700303 at 18; *Shire of Wakool* [2005] VSCA 216 at [43]- [52]; *Secretary, Department of Natural Resources v Harper* [2000] VSCA 36; [2000] 1 VR 133 at 155 [59] footnote 38; *Fitzpatrick v Job* [2007] WASCA 63 at [219]- [227]; (2007) 14 ANZ Insurance Cases 61-731; [2007] Aust Torts Reports 81-891; *Amaca Pty Ltd v Hannell* [2007] WASCA 158.
[107] See *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal* (1990) 26 FCR 39 at 43; *Kapoor v Monash University* [2001] VSCA 247; [2001] 4 VR 483 at 499; [2002] EOC 93-188 and *Flaherty v Director of Public Prosecutions* [2003] VSC 234 at [40].

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