IN THE SUPREME COURT OF NEW ZEALAND SC CIV 2/2004

IN THE MATTER of an Application for Leave to Appeal

BETWEEN **PETER FRANCIS URBANI**

Appellant

AND **GILLIONS AND SONS LIMITED**

Respondent

Hearing 13 July 2004

Coram Keith J
Tipping J

Counsel I G Hunt and A Isac for the Appellant
C S Withnall QC for the Respondent

APPLICATION FOR LEAVE TO APPEAL

Hunt In my submissions today Your Honours I wish to address principally the question of whether the issue raised by this appeal is one of general and public importance. In my submission that issue in this case concerns the principles to be applied by the Court of Appeal in determining appeals against factual findings and conclusions in the High Court. I accept that I must show that the question that is raised is one of general and public importance and that it's capable of bona fide and serious argument. I accept also that the significance of this matter for these particular litigants and indeed litigants generally is not or will not normally be sufficient to justify the grant of leave in any particular case. However in my submission the issue raised by this notice of appeal or application for leave does satisfy those important requirements and it also satisfies in my submission the underlying and broader requirement that it be in the interests of justice that the Court hear this appeal.

Tipping J Necessary in the interests of justice.

Hunt Necessary, yes sir. As I say I contend that the issue of what is the correct approach to be taken by the Court of Appeal in dealing with appeals against factual findings in the High Court is a matter of general and public importance. Indeed I would go so far as to say it is a matter of fundamental importance. Any principle or any set of principles that might be said to affect, restrict, or concern the ambit of a rehearing that's provided for by the Rules is in my submission a matter of general and public importance. The opportunity at this very early stage in the life of this Court to deal with this question is perhaps not surprising. Perhaps also it's the case that the timing is good. The Court of Appeal, Your Honours, is now, as it always has in theory been, but is now in practice more realistically regarded as an intermediate appellate Court. Previously in practice I would suggest that it has not been. So, hence, some of the comments made by Justice Thomas in the separate Judgment in the Decision of **Rae**. Now it is truly an intermediate Court. This Court is the final Court of Appeal for litigants in New Zealand. It is however, the only Court in which litigants have the opportunity as of right to challenge factual findings and conclusions reached in the High Court. Undoubtedly this Court is not going to lightly consider any attempts made to overturn factual findings which have already been considered at length in the Court of Appeal and applications are likely to fail at the stage that I'm at right now.

Keith J In that event Mr Hunt, if you were to get leave and the Court on the merits was persuaded by you, what would be the relief you would be seeking in this Court.

Hunt In this case, sirs, the relief I would be seeking would be the quashing of the Decision of the Court of Appeal and in this case, because of what I say the errors in the Court of Appeal were, the findings that I contended for in that Court.

Keith J But a simple quashing of a Court of Appeal Decision doesn't get you anywhere, does it?

Hunt No it doesn't and I would not be seeking to have the Court of Appeal, this case remitted to the Court of Appeal to hear the argument again on any different test that this Court might say should be applied. I'd be asking the Court to deal with that case, that situation on the full hearing of the appeal.

Keith J So this Court would, notwithstanding what you've said about three minutes ago, would actually go into the full facts.

Hunt Yes, for a number of reasons, including the practical reasons in terms of the number of stages at which otherwise the case will have to proceed to and I believe that that course –

Keith J Well you added to those number of stages by the way you argued the appeal in the Court of Appeal didn't you potentially.

Hunt Well I think yes I did and I accept that I did but I didn't do that without some consideration for the convenience to the parties or without agreement for that matter as to the course that was adopted.

Keith J Yes.

Hunt I was saying sirs that error correction is not going to be the stuff of this Court or the work of this Court.

Keith J Well, you've just said it is in this case if it comes to that.

Hunt It will be in this case and it has been in other cases such as the Australian cases to which I've made reference, the **SRA** cases, because of the peculiar circumstances that have arisen. So in general terms I would say though that that will not be the work that this Court will be inclined to encourage if I can put it that way.

Tipping J Is it the essence of your argument that the Court of Appeal instead of assessing the matter for itself, simply resorted to the expressions "open to" and "entitled to". Is that the essence of it?

Hunt That in a nutshell could be said to be it sir.

Tipping J Well now, let's assume that was right just for the moment but what if we were of the view that on any application of the correct test, the result must have been the same or was extremely likely to have been the same.

Hunt If Your Honours applied what I say on that test, the test the Court of Appeal applied?

Tipping J No, no, on the correct test.

Hunt The correct test. If Your Honours concluded that, applying the correct test, the appeal would nonetheless fail, then it would fail, totally.

Keith J So what do you say is the correct test?

Hunt What I say is the correct test is that on any appeal against findings of fact in the High Court, it is for the Court of Appeal to rehear the case and to give the Judgment that it considers ought to have been given in the first instance.

Keith J Without any deference to the Court of Appeal Judgment?

Hunt Well, there are a number of issues –

Keith J Sorry to the first instance.

Hunt There are a number of considerations that apply to the way in which the Court of Appeal should approach that task even on the test that I have outlined, including the question of the deference to be shown to findings which are grounded in credibility assessments.

Tipping J Surely the correct test is whether the appellant has shown that the findings below were wrong.

Hunt That is the test that I would, that is exactly the test that I am proposing should be applied.

Tipping J Well now, "open to" is sometimes loosely used and you may have a semantic point here Mr Hunt, but "open to" and "entitled to" and so on usually carries the connotation that the Appeal Court agrees with it. Now, I don't think there's a great deal of doubt about what the correct test is. We don't need a second appeal, do we, to establish that. It's just that semantically the Court of Appeal hasn't precisely articulated it. And there may be a miscarriage of justice, let us assume there is a miscarriage of justice on that basis, but is it a point of general and public importance? I would have thought your argument demonstrates quite clearly that the correct test is self-evident and has been for 100 years. It's put in slightly different ways, "plainly wrong" sometimes, but essentially it's been established for a very long time.

Hunt Well, um –

Tipping J Semantically I'd be, subject to what Mr Withnall says, I'd be inclined to agree with you that it's been put more like an appeal for ministration than an appeal from a proper rehearing appeal but frankly what troubles me is I can't see the answer as being any different on the correct test. Once the primary evidence was found to be, the employer's evidence was preferred, you'll have to concentrate with me on showing me what the difference would be, could be, not would be, could be.

Hunt Yes, that effectively was the way in which I sought to address the argument to the Court of Appeal because there was no challenge made to the Trial Judge's conclusions as to the credibility of the appellant and indeed of his witnesses and so that every discreet point at which there was a conflict between the evidence of the appellant and that of the respondent, in every point at which that arose the Trial Judge's assessment was deferred to because of the approach that this Court has taken in relation to assessments which are founded on credibility. The approach that was taken in the Court of Appeal was to draw the Court's attention to the fact that, even allowing for the issues, and they were specific issues in the main, in which the Judge was entitled to reject the appellant's evidence and prefer that of the respondent's evidence, there was nonetheless an underlying significant substratum, if I can put it that way, of evidence that simply wasn't in dispute as to exposure to the particular tasks involved in, and indeed the involvement in, the actual involvement

in embalming, which was said to have been the cause of some recognisable psychological difficulty.

Tipping J Even on the employer's case there was an entitlement to some relief on your client's part subject to all the other points in the case, that's really what it amounts to isn't it?

Hunt Correct, my opening and closing, or particularly my closing submission, to His Honour in the High Court, was that leaving aside anything that was in dispute, the appellant was entitled to succeed on these issues based on what the respondent has said. If I might deal with that sort of issue a little further sirs, since it's obviously cutting to the quick so to speak –

Tipping J Yes.

Hunt The approach, there were and Your Honours don't have the benefit of this, but in the evidence Mr Urbani asserted that he had been an observer of embalming essentially for a period of around about four months at the outset of his employment. He then asserted that over the last two or so months of his employment he was not only an observer but he was involved in undertaking various aspects of the embalming process. He didn't assert that he undertook those kind of things when he was in the first four preliminary months of his employment. Within his evidence, while speaking to the general exposure, if I can put it that way, and involvement, he also identified various specific incidents. They number about four in fact in the course of this 30 week period of employment which he gave prominence to as examples of the sort of thing that he said occurred. Now, when he was cross-examined by my learned friend, those particular incidents were given a good deal of attention and the conclusion reached by the Judge was that he didn't accept the appellant's contentions in relation to those particular incidents. You will have seen reference to the Australia Skier for example and so on. There were a number of reasons given by the Judge for concluding that what the appellant said in those respects was not to be accepted. And also he concluded that there were aspects of exaggeration, embellishment and indeed invention. But what that left, and it wasn't in dispute, particularly so as even the respondents acknowledged that their stance prior to trial could not be sustained in light of the evidence, was exposure to the sights, tasks, smells and so on of embalming for the first four or so months, and then in the last few months an increasing degree of participation in the actual business of embalming. That comes through quite clearly from the summary, and it is only of course a summary, of evidence that I've addressed to Your Honours attached to my synopsis and you can get some flavour of essentially what was agreed by reading that. For example, if Your Honours were to look, if you wish me to take you to it now I'm happy to do so.

Keith J Well, one or two instances.

Hunt Yes. Attached to my synopsis sir is a summary of evidence.

Tipping J Where is this, Mr Hunt, I'm sorry?

Hunt You should have -

Tipping J Oh, I've got it I think.

Hunt Summary of evidence of appellant and respondent's witnesses.

Tipping J Attached to which document?

Keith I've got it attached to the letter. Attached to the letter of 11 June.

Hunt I'm sorry, attached to the letter of 11 June you may find it.

Tipping J I'm sorry Mr Hunt, I'm just trying to pick it out. We'll look at it together, I don't think it's on my file. Anyway, we'll look at it together.

Hunt Thank you sir. Well I won't try and take Your Honours –

Tipping The Registrar's got another copy, that would be more convenient. Thank you.

Hunt If I might just take Your Honours to the respondent's evidence rather than the appellant's evidence because that, as His Honour said in the High Court, was the evidence he accepted of the extent of exposure that there had been. If Your Honours turn to page 3 of this summary, you can see the evidence, the evidence in chief that is, of Mr Wright. He was, as Justice Hanson said, one of the key witnesses for the respondent. The underlined passages indicate the points to which I wish to draw the Court's attention but you will see in paragraph 7 in the first instance the acknowledgement.

Keith J Well, that's very general though isn't it?

Hunt Yes, indeed, yes. At the top of page 4 you will see reference to the later stages of the period during which the appellant or the plaintiff was present and what he was called in to do.

Keith J Now, on the basis of those, you are really saying that the Court of Appeal should have reached a different conclusion in paragraph 41 for instance of their Decision, of their Judgment. Your attack is on paragraphs 40 to 46 isn't it.

Hunt Sorry sir. 41 to 46?

Keith J 40 to 46 is your attack.

Hunt Yes it is sir, yes it is.

Keith J And the one that's relevant to that passage at the top of page four is paragraph 41 I take it.

Hunt That's right.

Keith J Well, the involvement was limited wasn't it. I mean quite apart from the test that's been applied, there was a disagreement and the Judge found that, and you accept, that Mr Urbani's exaggerated account went beyond the common ground.

Hunt It's absolutely correct to say the Judge was right in finding that the exposure was limited compared to the extent which Mr Urbani set out to establish.

Keith J Right.

Hunt But one needs to be careful in that because one is talking about the disposal by the Trial Judge of the allegations in relation to four particular matters, specific matters on which he was taxed heavily and which was found to be unacceptable.

Tipping J Once the specific matters had gone, what was the employer supposed to have done wrong vis-a-vis the intending appellant? Just in a nutshell.

Hunt Nutshell. The evidence that I can take Your Honour to at the moment, because it's in the summary, is that the employer was aware that this man was suffering or finding it difficult to cope with what he'd seen. One of the specific reasons is, as Your Honour would see in the very last page of the synopsis, as to why continuing employment was not offered. Page 15 sir. This is Mr Gillions, the principal of the defendant, the respondent.

Tipping J He hadn't handled what he had seen well.

Hunt Sir, that is why no full time employment was offered, one of the reasons.

Keith J One of the reasons. I mean the, because the other reason was that that was the period covered by the Labour Department programme wasn't it.

Hunt Well, Mr Gillions' position was that Mr Urbani had simply run out of the six month period as opposed to having resigned although I'm not sure that that was something that he adhered to as closely as he –

Tipping J Well, he couldn't handle it, putting it bluntly. What fault was there in the employer?

Hunt The employer was aware, the employer was aware that this was a person who was immature. The employer said, and indeed it's in Mr Gillions' evidence in chief, the previous couple of pages, the days were being counted down until he left. This is the principal who acknowledged that

he had to undergo an initial interview to see whether he was cut out for the job. Acknowledging that –

Keith J Well, that's fair enough isn't it?

Hunt Yes, but particularly acknowledging that this is the kind of employment in which some people may react and others may not.

Keith J Yes.

Tipping J But he wasn't cut out for the job. What could the employer do or not do that is, for which he is blamed as a result of that. Just, should he have said to him earlier, "You're not cut out for the job, you'd better leave," I mean what –

Hunt He should have said to him having been aware that he was not handling what he was seeing well, that he should have taken steps to protect him from the consequences of the fact that he wasn't handling what he was –

Tipping J He couldn't have been given a proper test of the job, he'd either have to go wouldn't he or, he just wasn't handling the, and one feels very sympathetic towards him, don't please misunderstand me, but the simple fact is he, for whatever reason, he wasn't handling it well. But to keep him at it wasn't going to be very helpful so the only answer is that he should have been invited to leave earlier isn't it? I mean I know I'm getting a bit into the. But I just want to feel the weight of this, whether it's necessary in the interests of justice to let him have a second appeal.

Hunt Well, I'm happy to try and deal with that head on because I think it is critical. If Your Honour, you would have to read, and no doubt you will have the chance to do so later, but if one looks for example, to talk about Mr Gillions who's the principal, the principal of the business at the time, and I've set out key passages in his evidence in pages 13 to 15. And if Your Honour doesn't mind my taking you through that as quickly a I can, it may be helpful to do so.

Tipping J Yes, surely we should. We have little flexibility as to time as you know, but I think it would be helpful to me at least. I haven't seen this before. Whether it's my fault or someone else's I don't know but it doesn't matter.

Hunt Well, I will then take you sir briefly through Mr Gillions' evidence.

Tipping J This is the summary.

Hunt Yes, this is the summary of the points that I regard as significant in terms of the argument which is being addressed. And the reason why I take you to Mr Gillions first is because he was the first point of contact, he was the principal.

Tipping J Yes, sure.

Hunt The key person on the ground so to speak who dealt with the appellant was Mr Wright and we can come back to him if need be. You see from the brief of evidence what Mr Gillions was saying prior to the commencement of employment, the tasks or the job itself would entail. You see, for example, paragraph 17, what it was indicated he would be undertaking, what he would be doing. The warning that it would be impossible to shield him from seeing deceased persons. Care in paragraph 19 to inform him of what he would be involved in in terms of lifting and made it clear that it would be impossible to prevent seeing parts of some procedures.

Keith J So he knows that at the outset and that's, I mean, that's integral to the business isn't it.

Hunt Yes. It was significant in a number of ways in my submission to the argument at trial because it indicates a recognition by the company that this is the kind of position that may in some cases have an effect on some people.

Keith J Absolutely.

Hunt So some care needs to be taken.

Tipping J What about 38 as to the plaintiff being an observer of embalming procedures, it was impossible to keep the plaintiff away. He seems to have been, with great respect, a bit of a tiger for punishment on that evidence.

Hunt Well, that ties in with some of the other evidence in which the respondent sought to say, well I suppose in a colloquial way, whether he was his own worst enemy. A pejorative way of putting it, I would suggest, but the question of whether or not this was a person who was –

Tipping J Well the Judge accepted this evidence, didn't he?

Hunt He did accept the respondent's evidence. Which of course you should remember, sir, he said was at odds with what the plaintiff was saying. Well part of the point of the appeal and the reason why the issue was -

Tipping J If there are no credibility issues then we must approach it on the basis that it was impossible to keep the plaintiff away surely. The man said so and there are no credibility issues and the Judge accepted his evidence.

Hunt I don't believe that the Judge –

Tipping J Well he didn't expressly make a finding on that point but the tenor of the Judge's conclusions was that Mr Gillions was a reliable witness and your client wasn't.

Hunt Well, the tenor, the Judge certainly, he didn't deal with every aspect obviously of either parties' witnesses. I don't believe that he gave any prominence to that particular –

Tipping J No of course not.

Keith J But you're highlighting it aren't you.

Tipping J You're inviting me to have a good hard look at it. And I am.

Hunt Well there is an argument that a person who one is aware is not coping should have steps, taken in an employment context, to be removed from the situation.

Keith J But you're not challenging findings on that issue are you. That's –

Hunt I'm not, no I'm not sir.

Keith J That comes from your confining of the appeal.

Hunt Yes. The primary findings that I'm challenging are those relating to the question of causation. Was there any psychological injury sustained as a result of exposure to things that are not in dispute as having occurred.

Keith J Well, do you want to pick up any particular points. We've been in a sense looking at paragraph 41, haven't we, of the Court of Appeal Judgment and the causation questions are dealt with by the Court of Appeal from 44 to 46.

Hunt Yes, and probably in paragraph 46 sir is the main, the main conclusion that I'm challenging, the causation conclusion, is one that was open to Their Honours. Might I sirs -

Keith J Well, I mean in terms of the test they stated, if you took that as a low test then, and if it was correct, which you reject, then it might have been pretty hard to disagree but you're saying the test should have been that the Court of Appeal should have been saying, "was that finding wrong, have we been persuaded by Mr Hunt that that finding was wrong", and you're saying they should have been by reference to which items in your schedule of evidence?

Hunt Yes.

Keith J Which bits?

Hunt Oh, what I am, this evidence is there to show the substantial body of evidence that was not in dispute.

Keith J Yes, sure, I understand that but what particular bits of the substantial body of evidence that was not in dispute about causation would you like to take us to?

Hunt Well, to come back if I would then to Mr Selwyn Wright because he's the key factual witness for the respondent. And we'd already touched on pages 3 and 4 of the synopsis. You can see by reading through the underlined passages the kind of tasks the appellant was involved in according to Mr Wright through paragraph 41, 43, 44, all through page 5 of that synopsis and indeed the identified portions of page 6 as well. As much as anything sirs, Your Honours, I would want Your Honours to look at what was said in terms of cross-examination which is from page about 7 onward. If you like, more detail about the level and extent of involvement in the embalming tasks that Mr Urbani undertook and to put it in the –

Keith J But this really goes back does it, Mr Hunt, to paragraph 41 rather than the causation?

Hunt Well it certainly goes directly back to 41 but it must go back to 46 as well because the Judges –

Keith J Well you've got to have 41 as a basis for 46, that's plain.

Hunt You do, yes. But if I don't have an underlay of, in my submission, undisputed factual evidence I've got nothing to point to causation as resting on. Your Honours can get some flavour if you will of just what was in agreement and what was not by looking at the bottom of page 9 and here there is reference to some questions asked of Mr Wright concerning the formal position taken by the respondent in interrogatories, or in answer to interrogatories. You will see just about three or four questions above the bottom of that page reference to the particular passage in the Court of Appeal bundle and an answer given by Mr Alan Gillions, the brother indeed of Russell Gillions, and the underlined question or statement, "However I am informed and believe that the plaintiff was forbidden to undertake any actual … work either supervised or unsupervised. That is not true either is it?" The second sentence is what I asked about. " No, not by a long chalk is it? No." And as I say, in many respects, what Mr Wright was saying about the involvement of Mr Urbani at a hands on level is not really in dispute. Mr Wright acknowledges what was being done.

Tipping J But what was being done was not abnormal was it for someone who wants to know whether they have a future in the funeral directing field. There wasn't any suggestion was there that he was exposed to sort of abnormally unpleasant experiences or tasks?

Hunt Well, I suppose it depends on, to a certain degree, on one's point of view. But we're not talking about for example, Mr Brookell kind of case, and Your Honours are familiar with that kind of situation. We are talking

about things that might be regarded as routine perhaps within the context of an embalming practise but the question is whether or not those kind of tasks are capable of causing a kind of psychological reaction and my submission being that they are even if they are quite within the bounds of what ordinarily occurs.

Tipping J Before we get to causation, on the assumption that your client's case is focused solely on what the respondent accepted, wherein lies the breach of duty, what is the essence of the breach of duty which is said to have caused the damage?

Hunt The breach of duty is in being aware that this is the kind of work that might in certain individuals cause an adverse psychological reaction and that, with respect, is acknowledged by the opening comments made by Russell Gillions and it is too, and Your Honours haven't seen this of course, it is something that is quite apparent from the evidence that was given by the respondent's other –

Tipping J Being aware of the risk of adverse psychiatric or psychological reaction and then what, not –

Hunt And then being aware also that the particular individual is vulnerable and is not handling what he is being exposed to well or adequately and not taking steps to guard against the consequences of that exposure which are seen.

Keith J But these issues weren't before the Court of Appeal were they?

Hunt The issue, no they weren't, the issue –

Keith J So how can we, how can you being saying that the Court of Appeal was wrong –

Hunt Well I'm answering a question as to the stage that follows the conclusion that there has been established a link between what was seen and undertaken.

Tipping J But aren't you really putting up by this method, and skilfully if I may say so, a somewhat different case? No?

Hunt No sir, no.

Tipping J Did the pleading encompass this did it? That even if everything that we say is not accepted, there was still a breach of duty along these lines.

Hunt Absolutely, and as I said before, the proof of the underlying factual allegations which were necessary to even get into the arena of saying there has been a breach of a duty were supplied in this case, unusually, by the respondent.

Tipping J I understand that point but you say it was fairly within the compass of your case that even if some of your higher level allegations failed, there was still a breach of duty on what the respondent accepted.

Hunt Absolutely, indeed I would even go even further sir. One of the questions that was asked, and you'll see it in the Trial Judge's Decision, where is the evidence if you like of the standard that should have been applied by a funeral director at this time, in this place, in this environment? Where is, if you like, some expert corroboration of what I say or what the appellant says the standard that the Gillions failed to achieve was? And the answer in part was, look at what the respondent says it did.

Keith J Well, all that was rejected in the end by the Judge in the later part in the High Court wasn't it, in paragraph 215 I think of the High Court Decision. As I was indicating before Mr Hunt, I have real difficulty in taking these points on board at this stage because they just weren't before the Court of Appeal and I take your point that you were answering my brother's question but like him, I have difficulty in seeing where we get to going back actually to an earlier question I asked. I mean if we were to give leave and we were to decide that the matter had been wrongly handled by the Court of Appeal and we were to enter into an examination of the facts and we were to find in your favour there would be still be unresolved wouldn't there, the appeal against all the other issues including the conclusions reached in the High Court in paragraph 215.

Hunt Well that of course was one of the very first things that arose in front of the Court of Appeal was you're here on a very limited basis. Why is that? There was a digression while the reason for that in the correspondence that Your Honours have seen was found and –

Keith J Well the then President gave what I thought was a very sensible direction that the case shouldn't be confined.

Hunt Well I think Their Honours accepted that the direction that was given was in the context of the points of appeal which were by then before His Honour and which did not expand into these other issues which have been identified. Anyway, that's why it proceeded in that –

Keith J But just in terms of the practical question I've just raised, I mean making all those assumptions in your favour that you would get leave, you would persuade us that the standard was wrong, you would persuade us that the findings were wrong when the correct standard was applied. What then?

Hunt Well, the way it was dealt with in the Court of Appeal and I think it would have to be the same in this case, was, firstly the Court said, Well notwithstanding these, what I would have said, these findings were not determinative of the decision because the case was lost on the causation point, the Court said well we will consider in the event that we are with you on your primary grounds, whether leave should be granted to you to pursue argument on the other outstanding issues identified, if you like, in

the correspondence. Now clearly I can't ask for anything better or different than that.

Keith J So there would have to be a second stage, I mean, assuming all those things were in your favour in this Court, there would still then be the question of pursuing, because that wouldn't give you a Judgment, there would still be a question of pursuing all those other matters that were held against you in the Court –

Hunt The High Court, just as it was in the Court of Appeal, exactly.

Tipping J I'm not entirely clear. Would you be asking us, if leave is granted to apply the correct test to these facts and come to a conclusion on that circumscribed issue, rather than remit it to the Court of Appeal to determine on the correct facts. Which of those two, the former?

Hunt The former.

Keith J But if there's going to have to be a Court of Appeal hearing anyway if you're going to succeed on that circumscribed issue, why shouldn't they deal with the –

Hunt Well, I'm asked the question and I've tried to give an answer which I think is consistent with a number of reasons including expediency.

Keith J Well, except the expediency is defeated by the fact that, assuming all this goes your way or your client's way, you still have to go back to the Court of Appeal.

Hunt Well, Your Honours raise a point that is equally valid in terms of an approach that Your Honour Justice Tipping has just suggested the difficulty would be. I'm asked to suggest what I believe should occur if the Court were to accept my argument on appeal and then remit this issue back to the Court of Appeal for this issue to be considered against whatever this Court says the correct test is. That too, that would certainly be an appropriate juncture at which in addition to deal with the outstanding issues that there are. And having it discussed like that, I can certainly see the expediency if you like of doing it that way as well. One of the things I've been concerned about in this case, because unusually there are a number of quite complicated issues, ACC and so on, has been to avoid putting both parties to the trouble of arguing points that, if I fail on this primary aspect, need never be reached or won't ever be reached. That's the very reason for example why in the High Court damages were left at large because the forensic task and the cost of that exercise is very significant and so for better or worse that was the choice that was made.

Keith J Well, is there anything more you want to tell us? We will, of course, take the opportunity to go through that evidence again.

Hunt Well I did want to, if I might sir, notwithstanding Your Honour just –

Keith J We have been fairly indulgent really. We're getting used to this new regime.

Hunt Well what, if I, if I might briefly just finish a point with these couple of comments, and I'm back to the footing of which I started with in terms of whether this is a matter of general importance. Your Honour raises the question of whether the test is any different whether you describe it as "wrong" or "plainly wrong" or whatever. Now, the Decisions that I have referred to, four of them including one of Your Honour's own, and so on.

Keith J Well, that does go to the point that it's pretty familiar country Mr Hunt.

Hunt Yes, what I was going to say just briefly sir, was is it a semantic point when the Court said in **Hutton v Palmer** that the Judge had to have misused his advantage or culpably misused his advantage. That sets one test. Another test is apparently, has there been a plainly demonstrated error and I am referring here to Your Honour Justice Tipping's non-exhaustive analysis in **Rae** of the conventional circumstances.

Tipping J Where it's primary evidence. It's a bit different when you've got inferential.

Keith J Yes, primary oral. I mean you're setting yourself too difficult a standard aren't you by –

Hunt What I meant to say was –

Keith J I mean it's easier for a respondent to get through the no palpable error test but they're disputed oral evidence cases aren't they?

Hunt We're also talking here about conclusions that flow from –

Keith J Yes, but at that stage you go to the "wrong" or "plainly wrong" don't you? Which is better for you?

Hunt Well, "wrong" is better for me. "Plainly wrong" is more difficult for me.

Keith J Is not quite as good. But –

Hunt "Reasonably open" is very difficult for me.

Keith J Well, assuming that there is a semantic difference, there is a gradation isn't there. "Open on the evidence" is the kind of formula that's quite often used about criminal jury trials isn't it, and then you move up to, you've got to show it to be wrong or if you've got a really de novo thing there's no deference you might say to the original decision. Well that's not your argument. You've got to persuade the Court of Appeal that the decision was wrong. That's the –

Hunt All I was saying was those other formulae, they might be regarded, as has been suggested, as semantic differences. In my submission they are not and that deserves some examination as to what the right, if you like, formula would be.

Keith J Well I read all that material in that case that was kindly put in the materials which I'd forgotten about until I was looking at it yesterday, and I read those long interesting Judgments in the High Court when I just put in that one sentence saying that the basic approach is well enough understood and I wasn't sure that it was helpful to continue to find new ways of saying it and so the rule is, I mean the approach is plain enough. Your complaint is that the approach of the Court of Appeal here wasn't that approach, number one, and number two, if they'd adopted the correct approach, there's a pretty fair chance you would have got home.

Hunt Yes, I can put it in one of either of two ways. I can say the approach is plain and if it is the Court of Appeal didn't apply it. If it's not plain then it needs a little discussion because it hasn't really been ventilated as thoroughly as it has in other jurisdictions, then that's a matter of importance that the Court should –

Keith J Yes.

Hunt And then I'd refer to the other cases including the House of Lords Decision, **Barber v Somerset**. Now, as well as the Canadian cases, and I don't want to trespass on Your Honours' patience -

Keith J Well the Canadian cases are against you in a way aren't they.

Hunt They are, they are.

Keith J I mean it's quite interesting that stuff about rationing of time, it sounds like a Chief Justice who's got her eye on treasury or something, with respect.

Hunt Well, the point of putting those -

Tipping J Well, the first paragraph in the Majority Judgment in the Canadian, number 14 on your list, page 7 of 52, equates what you say are completely different tests into the same formula. If you look at paragraph 1 of the Majority Judgment, given by Justice Major and Justice Iacobucci, "the proposition … could have relied to reach that conclusion. And the same in the Minority at 104.

Keith J So you don't want us to do that?

Tipping J You don't want us to go with the Canadians do you?

Hunt I don't. But the reason for putting it there is to show that there has been consideration, this is a five-four Decision, even though both Decisions –

Tipping J They're not different on the test, they're just different on the particular case.

Hunt Yes, the point being sir to show that, well Mr Withnall says this is a matter of settled authority throughout the Commonwealth in the highest Courts.

Tipping J I see, that's why it's there.

Hunt Well, what it shows you.

Keith J Alright. Well, let's forget the Canadians.

Hunt It's just there to show that at the level as it is in the High Court and in the House of Lords as well, and I'll just finish if I might by reference to the **Barber v Somerset** case which is interesting and perhaps relevant because firstly because it's the House of Lords' consideration of the **Hatton v Southerland** Court of Appeal Decision which is probably the most significant English authority on mental injury in the workplace and this is an appeal arising from that Judgment. It's there not just because of that fact but because of the strong dissent of Lord Scott, if Your Honours are looking at it, it's at Tab 9 sir, page 390 paragraph 10 where Lord Scott explains the reasons for his disagreement with his fellow members of the house, with the Decision, the Majority Decision of the House to restore the Judge's findings against the conclusions reached by the Court of Appeal and at paragraph 11 would be a specific passage I would refer Your Honours to.

Keith J So you would prefer us, you would prefer the Minority view in the House of Lords.

Hunt I would indeed.

Keith J Where does this get you? Are you suggesting that there's a matter of great importance here because we're going to sort out the Commonwealth? It's not very likely.

Hunt Beg your pardon sir.

Keith J We're going to sort out the Commonwealth, that we will produce a ringing Judgment and the Canadians and the Brits will follow.

Hunt We have in this country a couple of paragraphs in **Hutton v Palmer** but which deal with old authority, the palpable misuse issue. That's been dealt with in a way that I would suggest is appropriate in the High Court in Australia. We then have **Rae** which even Justice Tipping, with respect, acknowledges is not intended to be an exhaustive case.

Keith J No, no.

Hunt And this is not a **Rae** case. It's not a **Rae** case at all. We then have the **Nomoi** case which, with respect to both Your Honour and Justice Gault, grapples with the right kind of test, and Your Honour in your conclusions different from the ones in this Court of Appeal Judgment, doesn't just review against the approach taken by the Court of Appeal but concludes by saying, I've reviewed all the evidence, it's correct, it's my view. As did Justice Gault -

Keith J Well it was the whole of Easter I took to read it. So, I don't know quite why I did that but anyway, but at a certain point you do just keep going on and on.

Hunt That is a true example of a concurrent finding.

Keith J Yes, yes, but I went further than I needed to didn't I?

Hunt Well I'm obviously arguing sir that you did exactly what you should have done.

Keith J Well you're not are you, because you're saying the Court has to answer the question, was the High Court wrong? Have you, Mr Hunt, shown us that the High Court was wrong? Whereas I was saying not only had Mr Farmer failed to show us that the High Court was wrong but having read all this stuff we came to the conclusion that we would have reached the same conclusion, which is a further step isn't it?

Hunt That is the further step that I would suggest is equivalent to a concurrent finding.

Keith J Yes, but it's not the law is it, I mean it's not required that appeal courts do that. I mean that is at that top level I said before, if the appeal is completely de novo and you completely ignore what's happened before, that's what you do. I wasn't, we weren't doing that.

Hunt Well, that case also in Justice Gault's Decision makes some reference to the **SRA** case seemingly with approval, and Your Honour's Decision in **Fowler v Wills**, again briefly, but making what in my submission is, if you like, approving reference to that summary or that examination of the issue without needing to get into it in any great detail. The only reason for drawing Your Honour's attention to those issues is to say well, here we are, we now have a Court which has the job, I would suggest, of putting some clear guidelines in place. Those sir would be my submissions.

Keith J Yes, Mr Withnall.

10.51 am

Mr Withnall May it please Your Honours. The essential issue which was before the Court of Appeal was whether the Judge's finding that the plaintiff had not discharged the onus of showing that his psychological difficulties were caused by the conditions of his employment was wrong. It was at that basic factual stage before any issues of duty, breach of duty and causal breach of duty arose. What I want to do is to briefly outline the process firstly by which the Trial Judge arrived at that conclusion and then outline the process by which the Court of Appeal reviewed that conclusion in light of the submissions which were put to the Court of Appeal by my learned friends. In essence, and I cover this in my written submissions, I just want to try and encapsulate it, in essence the appellant, who was plaintiff in the Court below, said, "during the course of my employment, I was exposed to this". The Judge said, "I do not accept your evidence, you exaggerate, you invent, you are an unreliable witness", and in fact in paragraph 183 of his Judgment, he said, "I really cannot place any reliance on anything that the plaintiff says. I find that what you were exposed to was this. I then have to consider whether, in light of what I have found as a fact, you were exposed to that resulted in the injuries or psychological difficulties which you complain of to the extent that I have found as a fact that you do suffer from such psychological problems". And I say that because the Judge expressly rejected as a fact the claim that the plaintiff suffered from post traumatic stress disorder. The conclusion that the Judge then reached was that the extent of involvement that he accepted as a question of primary fact was not shown to have caused the psychological difficulties. In reaching that conclusion His Honour took into account, and I summarise this at paragraph 12 of my written submissions, firstly the evidence of psychological problems predating the employment and that is at paragraphs 217 to 218 of the High Court Judgment under the heading "Causation" although at this point His Honour is dealing with causation in the second stage, breach of duty. He says, "I have dealt extensively with the evidence pointing to many other problems and stressors in this man's life. These included the break-up of a relationship, the crashing of cars, the truancy from school, the serious fights, financial problems and the death of friends. There is also an indication of difficulties with his father". One is a comment related to credibility issues. There are also the pre-existing medical conditions which Mr Prosser seems to have chosen to ignore, no doubt because he never bothered to get the necessary notes. In particular, those problems led to sleep apnoea etc. So there were the psychological problems, the existence of other stressors, then his acceptance of the defendant's expert evidence, Dr Earthroll, and at paragraph 138 of the Judgment in relation to the experts he said, "The difficulty confronting Mr Prosser's diagnosis based on the exaggerated self-reporting of the plaintiff is that it contains no checks and balances. It was done without foreknowledge of the plaintiff's history. I find it surprising an expert would be so bold as to make a diagnosis in such a difficult area without reference to previous medical records. It is for that and a number of other reasons that I preferred the evidence of Dr Earthroll quite emphatically." And then at paragraph 142, "I found Mr

Prosser a somewhat obtuse witness who rigidly adhered to his views under cross-examination despite contradiction by other evidence. Many of his answers were long and confusing as to be difficult to understand."

Tipping J This is quite a long way, Mr Withnall, from whether the Court of Appeal applied the correct test.

Withnall What I want to do, what I'm simply doing is saying, this is the process which the learned Judge applied.

Tipping J Well it's all in your written submission with respect.

Withnall The process which the Court of Appeal then considered –

Tipping J It's para 46, which is, if there is a problem it's really there or thereabouts isn't it.

Withnall Well my submission sir is that we have to read para 46 in light of paragraph 45. The Court of Appeal said the Judge was not obliged to accept the views of the experts, particularly as these experts had based their views etc. With regard to the specific matters raised by Mr Hunt, we consider that there was ample evidence of pre-employment difficulties as set out in paragraph 24 above, some of which was not produced until trial. Significant other stressors in Mr Urbani's life arose after the employment had ceased. We have also found that the Judge was aware of and accepted the level of involvement in embalming as described by Gillions' witnesses. His view as to causation was thus clearly founded on an acceptance of that level of involvement and then paragraph 46. "Taking into account all of these factors we consider that the decision that the Judge came to on the causation was one available to him on the evidence and should not be disturbed." Now, in my submission what the Court was saying there was simply, "We have not been persuaded that the Judge's factual finding on this issue was wrong."

Tipping J If one looks at the way, it's been expressed, it is disjunctive or in a sense it is probably meant to be disjunctive, available on the evidence and not shown to be wrong, should not be disturbed.

Keith J It doesn't say, "and therefore should not be".

Tipping J No, it doesn't say, "and therefore".

Withnall No.

Keith J And you'd say that that reading is supported by the somewhat stronger language in 45 where you get "ample" and "clearly".

Withnall Paragraph 46 is simply –

Keith J So you're saying that the semantic point that my brother was pointing to really isn't a semantic point, that really it's all being said together.

Tipping J Well, in a sense it's a paraphrase of **Rae**. Even assuming that high test was being invoked which of course it should be at a, but they're really saying, I would have thought although perhaps not very elegantly expressed with respect, but open on the evidence and not shown to be wrong. Should not be disturbed.

Withnall That's exactly what the Court of Appeal said.

Keith J What authorities were put to the Court of Appeal on this or was it simply taken for granted that everybody knows the test?

Withnall No, authorities such as **Rae, SRI, SRA v Earthline, Fox v Percy, Whisprun v Dixon** etc. Nearly all the authorities which are before this Court were before the Court of Appeal. The Canadian case wasn't. **Nomoi** of course wasn't. In **Rae** itself, in Justice Thomas's Decision at page 198 of the Judgment, beginning about line 38, His Honour referred to **Clark Boyce** and then **Rangitera Limited v Commissioner of Inland Revenue** in which the Board reiterated that an appellate Court should not reverse the decision of a trial Judge on a question of fact unless that decision is shown to be wrong. Notwithstanding that it may have been a decision which could have gone either way at first instance, it cannot be reversed if it was one which the trial Judge was "entitled to reach". That same language is used by the Court of Appeal in this Judgment, of "entitled to reach", and is part of what my learned friend complains about. For instance at paragraph 27 of his submissions.

Tipping J It is a field though where it is desirable isn't it, not to appear to merge the two concepts. There is a distinct difference between whether there was evidence to support it and whether it was correct on an independent examination. I would have thought it desirable to keep those distinct frankly, if they are different intellectual exercises.

Withnall I agree they are sir. But in my submission what the Court of Appeal did was to consider the evidence and then come to that conclusion in paragraph 46. It really begins at paragraph 40. Mr Hunt's first submission the Judge failed to recognise that there had been extensive observation, this is unable to be sustained. He considered that submission, looked at the evidence and said he accepted the evidence of Gillions' witnesses which must necessarily encompass the evidence he recorded as to observation in the first four months which the Judge held to be minimal to the extent of being almost non-existent. We also reject Mr Hunt's submission that the Judge minimised Mr Urbani's participation in the process during the last two months. With regard to the Judge at 42, the Judge's finding that Mr Urbani does not suffer from PTSD, this was a finding he was entitled to make, he was faced

with conflicting evidence, he was entitled to accept the evidence of one expert over the other, he refers to the difficulties with Mr Prosser's evidence, they were all in our view relevant and validly taken into account. And moving on to the Judge's findings on causation, the Judge considered that given the indications of pre-employment difficulties, the stressors in Mr Urbani's life and his exaggeration, he'd failed to prove that the Gillions' work was a material contributing factor and then paragraph 45 and paragraph 46 simply encapsulates all that by saying it has not been shown that that finding was plainly wrong, culpably wrong.

Tipping J Just wrong.

Withnall Wrong. Whatever expression one chooses to use to describe the test.

Tipping J The word "plainly" wrong I think is used in the **Rae** context because of the advantages of the trial Judge in that context. The word "wrong" without the "plainly" in my view is adequate to demonstrate the level at the conclusory type of fact. That's all in my view and it's a pity in a way that this wasn't expanded on in **Rae**. It was just talking about that context.

Keith J Well in **Fowler v Wills** we just had the documents essentially and it was a matter of working out from the documents what had gone on.

Tipping J You've still got to show the Trial Judge was wrong. You carry the burden of persuasion as an appellant don't you.

Withnall And what the Court of Appeal did was to consider all those issues and come to the conclusion that they were not persuaded.

Tipping J I suppose it's as if in para 46 the Court of Appeal was saying it was available to the Judge on the evidence and the appellant has not persuaded us that it should be disturbed.

Keith J It's wrong.

Withnall It's not wrong so it should not be disturbed. We have not been persuaded.

Keith J Thank you Mr Withnall, anything in reply Mr Hunt.

11.06 am

Hunt I've actually agreed with some of what I've heard from the Bench and I don't have any difference or dispute with that. It's a question of whether or not that's what occurred here. There's only one point that I want to make because it's important in the context of the evidence that Your Honours don't know a great deal about and some reference has been made to what sustained the Trial Judge's findings in the Decision.

I think I noted you saying the extent of involvement was not shown to have caused the psychological difficulties. One matter of importance in this context was the expert evidence and I'm not disagreeing with the Trial's Judge's rejection of Mr Prosser for the reasons that he gave. Acceptance is another thing but I'm not challenging it. But as the Judge himself said, the Trial Judge this is, in paragraph 133 of his Decision, "Both expert witnesses were dependent in their diagnosis on the plaintiff's self-reporting. That self-reporting matched his brief which for the reasons I've set out above I'm satisfied is exaggerated." In paragraph 135, reference is made to the questions that were asked by the Judge of both Mr Prosser and Dr Earthroll as to what his view would be if the evidence fell short of establishing what was alleged by the Plaintiff and Dr Earthroll said, "Well of course I am in part basing my opinion on what is established as a matter of fact occurred. If you conclude that the factual allegations are not established or established to a lesser degree than is contended for then my opinion that there has been a link between whatever psychological difficulties there are, and that that exposure would move along a continuum towards a reducing level and of course the inference being that if the Court accepts that the exposure was significant then it would move up. One bears in mind in saying that that there is a temptation that seems to regard post traumatic stress disorder as the Rolls Royce of psychological injury. Depression is just as potent a problem in my submission. But anyway, the point being made was, depending on the level of factual, the factual level that is established, the opinion will move up and down. Now, the facts that I was drawing to the Court of Appeal's attention were those which the Judge had said he accepted the respondent's evidence. Insofar as Dr Earthroll was saying, "Well my opinion is in part founded on whatever you say you accept, or conclude you accept, I'll move along one way or the other on the continuum". The fact of the matter is that there was sufficient, well sufficient within what was accepted by the respondent's witnesses, to ground the opinion of Dr Earthroll which I relied on to show the connection between what the exposure was and the injury that was put forward. There was another point of argument which was a question of whether or not Dr Earthroll or Mr Prosser's opinions for that matter were entirely founded on what was elicited through the trial, exactly the same point as arose in **Whisprun** where the question was whether or not the opinions of the medical experts fell away altogether if the Trial Judge rejected the plaintiff's account and part of the argument here was the assessment of the experts is not entirely based on what is before the Court, they are independent persons who have made their assessment based on their examination. But the main point, as I say, as far as the experts are concerned, there was a substrata of clearly accepted exposure which gave considerable credence to Dr Earthroll's conclusion that there was a link between that exposure and some injury.

Keith J So Mr Hunt, you're referring us to Mr Wright's evidence on pages 4 and following of that note of yours.

Hunt Yes.

Keith J We're grateful to Counsel for their assistance. We'll take time to give our Decision in this matter and the Court will now adjourn.

11.12 am Hearing adjourned.