

# Supreme Court of New South Wales - Court of Appeal

## NEAL v AMBULANCE SERVICE OF NEW SOUTH WALES [2008] NSWCA 346 (10 December 2008)

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NEW SOUTH WALES COURT OF APPEAL

CITATION:

NEAL v AMBULANCE SERVICE OF NEW SOUTH WALES [\[2008\] NSWCA 346](#)

FILE NUMBER(S):

40820/07

HEARING DATE(S):

24 November 2008

JUDGMENT DATE:

10 December 2008

PARTIES:

Michael Shane Neal (Appellant/Cross-Respondent)

Ambulance Service of New South Wales (First Respondent/Cross-Appellant)

State of New South Wales (Second Respondent)

JUDGMENT OF:

Tobias JA Basten JA Handley AJA

LOWER COURT JURISDICTION:

District Court

LOWER COURT FILE NUMBER(S):

DC 3250/04

LOWER COURT JUDICIAL OFFICER:

Balla DCJ

LOWER COURT DATE OF DECISION:

6 June 2007

LOWER COURT MEDIUM NEUTRAL CITATION:

[*Neal v Ambulance Service of NSW*] [\[2007\] NSWDC 123](#)

COUNSEL:

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G. Craddock SC (First Respondent/Cross-Appellant)  
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I V Knight, Crown Solicitor (First Respondent/Cross-Appellant and Second Respondent)

**CATCHWORDS:**

EVIDENCE – admissibility – evidence of what plaintiff would or would not have done – subjective approach – Civil Liability Act 2002 (NSW), s 5D(3)  
INTOXICATED PERSONS – police powers to detain intoxicated persons – whether hospital “responsible person” – Intoxicated Persons Act 1979 (NSW) ss 3, 5  
POLICE – powers to detain intoxicated persons – purpose of detention powers – whether power to require intoxicated person to undergo medical treatment – status of police protocol – Intoxicated Persons Act 1979 (NSW) ss 3, 5  
TORTS – negligence – duty of care – causation – duty of care owed by Ambulance Service and police to plaintiff – plaintiff intoxicated and resisted assistance from ambulance officers – plaintiff taken into custody – whether ambulance officers required to advise police that plaintiff needed to be conveyed to hospital – whether breach of duty on part of police through custody manager failing to comply with police protocol – whether police should have taken plaintiff to hospital when he arrived at police station – whether plaintiff would have accepted medical assessment and treatment from hospital  
WORDS & PHRASES – “responsible person”

**LEGISLATION CITED:**

Ambulance Services Act 1990 (NSW), ss 4, 13, 15, 26  
Civil Liability Act 2002 (NSW), s 5D  
Health Administration Act 1982 (NSW), s 9  
[Interpretation Act](#) 1987 (NSW), [s 34](#)  
Intoxicated Persons Act 1979 (NSW), ss 3, 5  
Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 129, Pts 9, 16  
Law Reform (Vicarious Liability) Act 1983 (NSW), s 10

**CATEGORY:**

Principal judgment

**CASES CITED:**

Amaca Pty Ltd v AB & P Constructions Pty Ltd [\[2007\] NSWCA 220](#); [\(2007\) Aust Torts Rep 81-910](#)  
Cole v South Tweed Heads Rugby League Football Club Limited [\[2004\] HCA 29](#); [217 CLR 469](#)  
Kirkham v Chief Constable of the Greater Manchester Police [1990] 2 QB 283  
Modbury Triangle Shopping Centre Pty Ltd v Anzil [\[2000\] HCA 61](#); [205 CLR 254](#)  
New South Wales v Bujdoso [\[2005\] HCA 76](#); [227 CLR 1](#)  
Smith v Barking, Havering and Brentwood Health Authority [\[1994\] 5 Med LR 285](#)  
State of New South Wales v Bujdoso [\[2007\] NSWCA 44](#); 69 NSWLR 302  
State of New South Wales v Napier [\[2002\] NSWCA 402](#)  
Rosenberg v Percival [\[2001\] HCA 18](#); [205 CLR 434](#)

TEXTS CITED:

Madden and Cockburn, "What the Plaintiff Would Have Done: s 5D(3) of the Civil Liability Act 2002 (NSW)" (2006) 3 Aust Civil Liability 47

Phipson on the Law of Evidence (9th ed, 1952) p 469

Trindade, Cane and Lunney, The Law of Torts in Australia (4th ed, OUP, 2007) p 542

DECISION:

(1) Dismiss the appeal.

(2) Order the appellant to pay the respondents' costs of the appeal.

(3) Allow the cross-appeal and set aside orders 1 and 2 made in the District Court on 15 June 2007.

(4) In lieu thereof, (a) give judgment for the Ambulance Service of New South Wales (the first defendant) against the plaintiff; (b) order the plaintiff to pay the first defendant's costs of the trial, insofar as the costs relate solely to the case as against the first defendant.

(5) Grant Michael Neal a certificate under the Suitors' Fund Act 1951 (NSW) in respect of the costs of the cross-appeal.

JUDGMENT:

**IN THE SUPREME COURT**

**OF NEW SOUTH WALES**

**COURT OF APPEAL**

**CA 40820/07**

**DC 3250/04**

**TOBIAS JA**

**BASTEN JA**

**HANDLEY AJA**

**10 December 2008**

**Michael Shane NEAL v AMBULANCE SERVICE OF NEW SOUTH WALES**

**Headnote**

On the night of 27 July 2001, Mr Neal (the plaintiff) suffered a serious blow to the head whilst walking alone in Newcastle. Police discovered him and called an ambulance. He rejected assistance from the ambulance officers. Since he was clearly inebriated, the police

took him into custody under the [Intoxicated Persons Act 1979](#) (NSW). The following morning, his condition was observed to deteriorate and, being unable to rouse him easily, the police had him taken to the Mater Hospital. A CT scan done at the Mater Hospital showed an extradural haematoma with a fracture to the skull. The plaintiff was transferred to the John Hunter Hospital for surgery to drain the extradural haematoma.

The plaintiff suffered different ongoing disabilities following the assault. Some, particularly his right-sided weakness (hemiparesis), were allegedly caused from the failure to take him to hospital when the police found him in the street.

He brought proceedings in the District Court for negligence against the State (as responsible for the police's alleged negligence) and the Ambulance Service of New South Wales. He was only successful against the Ambulance Service, recovering damages assessed on the basis of a "loss of a chance" of a better outcome. He appealed against the trial judge's findings with respect to the State's liability and damages. The Ambulance Service cross-appealed in relation to its liability.

The issues for determination on appeal were:

(i) whether the ambulance officers were liable to the plaintiff for breaching their duty of care by failing to advise the police that the plaintiff needed to be conveyed to hospital;

(ii) whether the police were liable to the plaintiff for breaching their duty of care by failing to take the plaintiff to hospital, either immediately he arrived at the police station or at 3:45am; and

(iii) whether damages were assessed correctly on a "loss of a chance" basis.

The Court held, dismissing the appeal and allowing the cross-appeal (per Basten JA, Tobias JA and Handley AJA agreeing):

In relation to (i)

1. Ambulance officers have a duty to take reasonable care in treating a person to whose assistance they have been called, whether the cause of the need for treatment is accidental injury, illness or the result of a criminal attack: [23].

*Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; 205 CLR 254; *New South Wales v Bujdoso* [2005] HCA 76; 227 CLR 1; *State of New South Wales v Bujdoso* [2007] NSWCA 44; 69 NSWLR 302; *State of New South Wales v Napier* [2002] NSWCA 402, distinguished.

2. The ambulance officers should have passed on information about the plaintiff's injury to the police because they were unable to provide relevant medical assistance and they knew that the plaintiff was about to be taken into police custody: [26].

*Kirkham v Chief Constable of the Greater Manchester Police* [1990] 2 QB 283, applied.

3. The trial judge did not determine whether the plaintiff established on the balance of probabilities that he would have agreed to go to the hospital, or, if taken unwillingly, he would have submitted to the medical assessment and treatment: [34]–[35].

4. The only available inference is that the plaintiff would not willingly have gone to hospital and submitted to medical assessment, whether taken by the police (which was itself improbable) or in an ambulance. Therefore, the plaintiff failed to establish affirmatively that he would have accepted medical assessment and treatment. **He did not show that any breach of duty on the part of the ambulance officers caused the delay in treatment; hence, the ambulance officers' liability was not established:** [49].

**In relation to (ii)**

5. The police protocol may inform the content of the general law duty of care with respect to detainees in police custody: [60].

6. While the custody manager had a general law obligation to provide medical treatment as required by the plaintiff, there was no breach of that duty in the circumstances of the case: [62].

7. Whether or not the police had power to detain the plaintiff for the purpose of taking him to hospital, under [s 5](#) of the *Intoxicated Persons Act 1979* (NSW), they had no power to require him to remain in hospital: [32].

8. The custody manager at Newcastle Police Station, where the plaintiff was detained, did not envisage taking a detainee to hospital in a police vehicle. If an ambulance had been called immediately after arrival at the police station, the probabilities were that the plaintiff would have refused to go to hospital and the ambulance officers would not have been able to take him: [32], [48], [56], [62].

**In relation to (iii)**

9. In light of the findings in (i) and (ii), this issue did not need to be resolved: [63]–[64].

**IN THE SUPREME COURT**

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**TOBIAS JA**

**BASTEN JA**

**HANDLEY AJA**

**10 December 2008**

**Michael Shane NEAL v AMBULANCE SERVICE OF NEW SOUTH WALES**

**Judgment**

1 **TOBIAS JA:** I agree with Basten JA.

2 **BASTEN JA:** On the night of 27 July 2001 Mr Neal (the plaintiff) suffered a serious blow to the head whilst walking alone on the streets of Hamilton, near Newcastle. He was discovered by police, who called an ambulance. He rejected assistance from the ambulance officers and, being clearly inebriated, was taken into custody by the police under the [Intoxicated Persons Act 1979](#) (NSW). He declined to tell them where he was living and to identify any person who might be able to look after him. He was taken to Newcastle Police Station. The following morning his condition was observed to deteriorate and, being unable to rouse him easily, the police had him taken to hospital by ambulance.

3 At the Mater Hospital the plaintiff underwent a CT scan, which revealed an extradural haematoma, with an overlying linear fracture of his skull. The plaintiff was transferred to the John Hunter Hospital in Newcastle for surgery to drain the haematoma.

4 The plaintiff suffered a variety of ongoing disabilities following the assault. Some, he accepted, were caused solely by the blow to the head. However others, particularly a right-sided weakness (hemiparesis), were said to have flowed from the failure to take him to hospital when he was discovered in the street by the police. He brought proceedings in the District Court for negligence against the State (as responsible for the negligence of the police) and the Ambulance Service of New South Wales (“the Ambulance Service”). He was successful against the Ambulance Service only, and recovered damages assessed on a “loss of a chance” basis: *Neal v Ambulance Service of NSW* [2007] NSWDC 123; 5 DCLR (NSW) 210. On 15 June 2007 Balla DCJ ordered the Ambulance Service to pay him a sum of \$99,336.52. The plaintiff also obtained an order for costs against the Ambulance Service, but was ordered to pay the costs of the State in respect of the claim against it.

5 The plaintiff appealed against three aspects of her Honour’s judgment, namely:

- (a) the failure to find liability on the part of the State;
- (b) the findings with respect to a “loss of a chance for a better outcome”, and
- (c) an inadequate allowance for loss of earning capacity.

6 The Ambulance Service cross-appealed with respect to three matters, namely findings that:

- (a) it owed a duty of care to the plaintiff;
- (b) any breach of duty was causative of loss, and
- (c) the plaintiff had lost a chance of securing a better outcome.

7 It is convenient to note immediately the nature of her Honour's finding with respect to the breach of duty on the part of the ambulance officers. It was limited in its form and was expressed in the judgment at [40] in the following terms:

“I am satisfied that the ambulance officers breached their duty of care to the plaintiff in failing to inform the police officers:

1. Of the possible consequences of their inability to fully examine the plaintiff
2. That the plaintiff should be taken to a hospital to be medically assessed.”

8 A finding in this limited form requires consideration of the powers, obligations and likely actions of the police officers, if the ambulance officers had taken the steps identified, and the likely response of the plaintiff. It is convenient, therefore, to consider the various questions of liability raised by the appeal and cross-appeal together, before turning to the challenge to the assessment of damages.

### **Facts and findings: liability of Ambulance Service**

9 The plaintiff's case against the Ambulance Service was based on the failure of the two ambulance officers to take the steps noted above. The precise basis upon which the Ambulance Service was said to be liable was not articulated in the pleadings. The Ambulance Service is a statutory corporation and represents the Crown: [Ambulance Services Act 1990](#) (NSW), [s 4](#). Although the Ambulance Service has power to “appoint and employ” employees (see [s 13\(1\)](#)), the employer is the Health Administration Corporation: [s 15\(2\)](#). The Health Administration Corporation is also a statutory body representing the Crown: see [Health Administration Act 1982](#) (NSW), [s 9\(2\)\(f\)](#).

10 The individual ambulance officers were not sued, presumably because they had immunity from liability for conduct carried out in execution of their duties, in good faith: [Ambulance Services Act, s 26](#). Such a statutory immunity is to be disregarded in considering the vicarious liability of another person: see [Law Reform \(Vicarious Liability\) Act 1983](#) (NSW), [s 10\(2\)](#). Whether either of the Ambulance Service or the Health Administration Corporation was vicariously liable for the acts or omissions of the ambulance officers appears not to have been the subject of debate in the proceedings, perhaps because of an apparent lacuna in the pleadings. In any event, the Ambulance Service did not, on the appeal, oppose a judgment against it if the officers were liable, on the basis that it was the wrong defendant.

11 Although the plaintiff was able to give limited evidence as to his consumption of alcohol on the afternoon of 27 July 2001, it is clear that he had been drinking heavily. On the basis of a blood sample taken at 12.30pm on the following afternoon, a pharmacologist expressed the view (which was not challenged) that his blood alcohol concentration at the time of the incident would have been about 0.4g%. There was also no challenge to the conclusion that he was an intoxicated person for the purposes of the [Intoxicated Persons Act](#), being “a person who appears to be seriously affected by alcohol ...”: [s 3](#).

12 At about 2am on the morning of 28 July 2001, the plaintiff was found by Police Constables Cosgayon and Fuhrer. He was lying prone across a driveway. The officers noticed a few droplets of blood on the driveway and a small cut to the plaintiff's head: Tcpt, 06/12/06, p 135 (Fuhrer) and p 169 (Cosgayon). The senior officer, Constable Cosgayon,

gave evidence that they spoke to him and tried to find out what had happened. He described his speech as “a little bit slurred” and said he had formed the view that the plaintiff was “well affected by alcohol”. He recalled asking him about the injury to his head, but recalled no clear response. The police called an ambulance. The ambulance records indicate that the call was received at 2.05am and that the ambulance had arrived by 2.19am. The senior ambulance officer was Mr Butt, who drove the vehicle, the treating officer being Ms Chapman. Ms Chapman was a probationary ambulance officer who had been with the Service for about 10 months at the time of the incident. Prior to commencing work with the Ambulance Service, she had completed a degree in nursing and had worked as a registered nurse for about 20 months. She described her service as a “third career”, having previously worked for 12 years as a research officer with BHP, before taking time out from the workforce to raise a family, following which she obtained her qualifications in nursing.

13 As a result of the medical consequences of the plaintiff’s injury, the New South Wales Police conducted inquiries into the events of the evening and obtained statements from those who were witnesses at the trial. The initial statements were taken within weeks of the incident: Ms Chapman’s statement being dated 28 July 2001. The statements were thus taken quite shortly after the events and predated the trial by some five years.

14 Ms Chapman said that she approached the police and was told that the plaintiff “appeared to have a laceration to his head” about which they were concerned. She approached the plaintiff and asked if she could look at his head. She described him as sitting on the ground and rubbing the top of his head with his hand and saying things like, “[t]here’s no blood on my head see”. In her statement she said:

“I saw some dried blood on the left side of his head, towards the top area. The male continually kept moving and I had trouble seeing the injury. I could see dried blood on his head however I could see a small amount of swelling in front of the abrasion area. I was touching the area of the wound, examining it, and I didn’t seem to elicit any painful response from the male. I was unable to visualise a wound due to dried blood. The area of dried blood was about 4 [centimetres approximately] in diameter. I couldn’t see an open wound and the dried blood was very dry.

The male knocked my hand away a couple of times when I tried to help him. Adam my partner came over and as he came up the male said words to the effect, ‘I haven’t given you permission to examine me’. Adam said something like, ‘Can we have a look at your head’. I made another attempt at examining the male and he started to push my hand away and moving his head about. The male was becoming [combative] towards me and wouldn’t let us help him.”

15 In her evidence in chief she said she had touched his head a couple of times (Tcpt, 07/12/06, p 191):

“Q. What was your purpose in doing that?

A. Just to assess the wound, if you’ve got a significant injury you get like a boggy mass associated with a lot of bleeding or a depressed skull fracture or something like that. Just to assess the quality of the skin there and that, to assess if there was any pain felt by the person when I touched it. ...

Q. What did you [do] in terms of those intended investigations ... what did you discover, was there a boggy mass?

A. No, no, there was – it was perfectly normal in that respect, he had just an egg on his head like when a child hits their head on the bench, like just a little half egg on [his] head, that was the only thing I could feel when I felt it. ...”

16 The ambulance officers gave evidence that, in the circumstances, they could not examine or treat the plaintiff or take him to hospital, without his consent. They clearly did not have his consent. Although there was a case run at trial that greater efforts should have been taken to obtain his consent and carry out a more complete investigation, her Honour rejected that complaint and it was not reagitated on appeal. Indeed, the thrust of the plaintiff’s case was not that the ambulance officers would have been able to make any definitive assessment of his condition, but rather that, as they should have appreciated, he needed to be taken to hospital for an adequate medical assessment of his condition. The plaintiff contended that the ambulance officers should have been alert to the need for a medical assessment at hospital, something the police officers would not have appreciated. If properly advised, however, the police should have taken him to hospital themselves.

17 Because they were not so advised, the police did not breach their duties by taking him to the police station, pursuant to powers under the [\*Intoxicated Persons Act\*](#). However, the custody manager at the police station, Senior Constable Keeping, acting in accordance with the police protocol, should, the plaintiff argued, have arranged for immediate medical treatment.

18 Critical to the plaintiff’s claim against the ambulance officers was their understanding of the circumstances at the time they left the plaintiff with the police. Her Honour summarised the evidence given by them in that respect in the following terms:

“11 Ms Chapman said that if the plaintiff had been willing to go to hospital they probably would have taken him because he had a laceration and a bump on his head. She was aware that there was a risk of a haematoma and that any head injury could be a significant head injury.

12 Mr Butt said that if the plaintiff had not refused help he would have taken the plaintiff to the hospital. He believed that the plaintiff required medical assessment because there could have been a significant head injury. The ambulance protocol required a person with a head injury to be taken to a hospital where he or she could be examined and tested by medical practitioners who had the capacity and the equipment to detect whether it was a significant injury.

13 The police officers saw that the plaintiff would not let the ambulance officers examine his head. They heard the ambulance officers ask the plaintiff several times whether he wanted to go with them to the hospital. The plaintiff was brushing their hands away and was not co-operating.

14 The ambulance officers decided to leave and told Constable Fuhrer that they could not treat the plaintiff if he did not want to be treated.”

19 In assessing the complaints against the Ambulance Service, her Honour appears to have accepted the substance of this evidence and continued:

“38 Mr Butt said that he did not tell the police that the plaintiff may have a head injury and should be medically assessed. He said that in hindsight he should have done so.

39 I find that the ambulance officers should have articulated the possible consequences of their inability to complete their examination to the attending police officers. Those police officers did not have any formal medical or paramedic training. While they knew the plaintiff had a head injury they did not appreciate the possible consequences of the head injury. There was no reason for the ambulance officers to believe that the police officers had any appreciation of the possibility that the small laceration they could see at the back of the plaintiff's head could lead to a loss of consciousness and brain damage."

20 The evidence given by Mr Butt in that respect appeared at Tcpt, 07/12/06, p 259 in the following terms:

"Q. I want to put it to you that firstly, you did not tell the police that this man may have a head injury and should be medically assessed?

A. Correct.

Q. You did not do that is that right?

A. That's right.

Q. I want to put it to you that that is something that you should have done?

A. In hindsight I should have done it."

21 As her Honour recognised, there was a further step to be taken, namely to determine what would have happened if the ambulance officers had advised the police that the plaintiff needed to be taken to hospital, but that they, without the plaintiff's consent, could not do so. Her Honour made the following factual findings in that respect:

55 Constable Fuhrer said that if he had been told by the ambulance officers that the plaintiff should be taken to the hospital it was more than likely that he would have done so. He believed that he had the power to detain the plaintiff and take him to a responsible person such as a hospital in certain circumstances. Constable Cosgayon said that they would have taken the plaintiff if the ambulance officers had said '*This man should be taken to a hospital*'.

56 I am accordingly also satisfied that the police officers would have taken the plaintiff to hospital if they had been asked to do so by the ambulance officers.

57 The consequence of my findings is that the plaintiff should have been taken to hospital from the scene and I find that he would have arrived at around 2.30 a.m. I find that there was a delay in the plaintiff arriving at hospital of about 8 hours."

### **Challenge to finding of liability: Ambulance Service**

22 By way of cross-appeal, the Ambulance Service challenged the initial finding that it owed a duty of care to the plaintiff. In support of that ground, it referred to the general principle that a person is not responsible for the criminal behaviour of strangers, referring to the judgments in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; 205 CLR 254. It also sought support from the decision of this Court in *State of New South Wales v Napier* [2002] NSWCA 402, a case upholding the liability of the State for harm suffered by a prisoner caused by the conduct of fellow prisoners.

23 This contention was misconceived. The plaintiff did not suggest that the Ambulance Service had a duty to prevent injury inflicted by strangers: he merely argued that the Ambulance Service had a duty to take reasonable care in treating injuries received in a criminal assault. **That ambulance officers have a duty to take reasonable care in treating a person to whose assistance they have been called, should be uncontentious, whether the cause of the need for treatment is accidental injury, illness or the result of a criminal attack.**

*Modbury Triangle* is not authority to the contrary. Nor is any assistance obtained from cases such as *Napier*, addressing the circumstances in which prison authorities may be responsible for attacks by one inmate on another: see *New South Wales v Bujdosó* [2005] HCA 76; 227 CLR 1; *State of New South Wales v Bujdosó* [2007] NSWCA 44; 69 NSWLR 302.

24 An alternative argument was that no duty of care arose, or, if it arose did not continue, in circumstances where the person sought to be assisted rejected offers of help. This more restrained argument raised a different issue. Although it is commonly said that the existence of a duty of care is a question of law, it is not to be viewed as such, abstracted from a factual context: *Cole v South Tweed Heads Rugby League Football Club Limited* [2004] HCA 29; 217 CLR 469 at [56] and [81] (Gummow and Hayne JJ); *Amaca Pty Ltd v AB & P Constructions Pty Ltd* [2007] NSWCA 220; (2007) Aust Torts Rep ¶81-910 at [46]- [47] (Giles JA), [93] (Ipp JA) and [137]-[140]. Nor is there any bright line separating the existence of a duty from its scope and content in particular circumstances. Finally, the question as to whether a duty exists is not helpfully answered without consideration of the particular respects in which breach is alleged. For present purposes, nothing is gained by asking, in the abstract, whether ambulance officers owed the plaintiff a duty of care: the only relevant question is whether the ambulance officers owed the plaintiff a duty which required them to advise the police that the plaintiff needed to be conveyed to hospital.

25 To formulate the question at that level of particularity may be said to preclude the separate consideration of breach. In the present case that is so, but only because there is no dispute that the relevant advice was not given. Nor does it preclude a proper consideration of both the factual and legal elements of the question. Once the question is formulated with some precision, it will be apparent that the answer is not to be found in the willingness of the police to take the plaintiff to hospital or the views of the ambulance officers as to what, with hindsight, should have been done. The willingness of the police to take the plaintiff to hospital would undoubtedly be relevant to questions of causation which might arise once a breach of duty had been established; it does not assist in identifying whether the law imposes a duty of that kind in those circumstances. The fact that help would have been provided if sought, is not directly relevant to determining whether there is a duty to seek help.

26 The powers of the police with respect to intoxicated persons, now found in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (“the 2002 Act”), Part 16, were, at the time of the incident, contained in the *Intoxicated Persons Act*. With respect to people detained for questioning under Part 9 of the 2002 Act, the officer having responsibility for the detained person (the custody manager) “must arrange immediately for the person to receive medical attention if it appears to the custody manager that the person requires medical attention or the person requests it on grounds that appear reasonable to the custody manager”: s 129. Although no such provision was found in the *Intoxicated Persons Act* (nor now in Part 16 of the 2002 Act) it may be accepted that a duty in similar terms would arise under the general law. **Further, if one public authority having custody of a person with knowledge of a particular disability or susceptibility requiring care or medical attention, transfers the person to another public authority having similar responsibilities, the duty of care on the first will**

**extend to passing on relevant information of that kind:** see *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 2 QB 283. By analogy, a similar duty would arise in the case of ambulance officers unable to provide relevant medical assistance, in circumstances where they know, or should know, that the person is about to be taken into custody by the police.

27 The argument below focused on the question whether the police had power to take the plaintiff to hospital. The trial judge found that they did by the combined operation of [ss 3](#) and [5](#) of the *Intoxicated Persons Act*. The relevant operative provisions, found in [s 5](#), were as follows:

#### **“5 Detention of intoxicated persons**

(1) A police officer may detain an intoxicated person found in a public place who is:

(a) behaving in a disorderly manner or in a manner likely to cause injury to the person or another person or damage to property, or

(b) in need of physical protection because the person is intoxicated.

...

(3) An intoxicated person detained by a police officer under this section is to be taken to, and released into the care of, a responsible person willing immediately to undertake the care of the intoxicated person.

(4) An intoxicated person detained by a police officer under this section may be taken to and detained in an authorised place of detention if:

(a) it is necessary to do so temporarily for the purpose of finding a responsible person willing to undertake the care of the intoxicated person, or

(b) a responsible person cannot be found to take care of the intoxicated person or the intoxicated person is not willing to be released into the care of a responsible person and it is impracticable to take the intoxicated person home, or

(c) the intoxicated person is behaving or is likely to behave so violently that a responsible person would not be capable of taking care of and controlling the intoxicated person.”

28 One purpose of the power to detain is to provide “physical protection” because, whether through incapacity or otherwise, due to intoxication, the person is unable to care for himself or herself. Such a situation can clearly arise in circumstances where the person is suffering an injury which requires medical attention. The fact that the person may decline medical assistance does not vitiate the power of detention. Nor does the fact that the person is presently refusing medical assistance necessarily vitiate the obligation to pass on to the custodian information relevant to the person’s medical needs. Apart from other considerations, it may be reasonable to expect that a person who is significantly intoxicated may change his mind when the effects of the alcohol or drugs diminish.

29 Although the power to detain may arise in circumstances where a person is in need of medical treatment, there is no power to require the intoxicated person to undergo medical treatment. If the plaintiff had been willing to go to hospital, it is unlikely that he would have been detained. Similarly, if, whilst in detention, he had asked to be taken to hospital, it seems likely that, in acceding to that request, he would simply be released from detention, rather than being “released into the care of a responsible person”. The question whether the hospital constitutes a “responsible person” for the purposes of the *Intoxicated Persons Act*, although agitated both at trial and on appeal, was a distraction. The arguments may, however, be shortly addressed

30 [Section 3](#) of the *Intoxicated Persons Act* contained the following definition:

“**responsible person** includes any person who is capable of taking care of an intoxicated person, including:

(a) a friend or family member, or

(b) an official or member of staff of a government or non-government organisation or facility providing welfare or alcohol or other drug rehabilitation services.”

31 Noting that the definition was merely inclusive, her Honour concluded that a hospital would be a “responsible person” for the purposes of the Act. Although it is not necessary to determine whether that view is correct or not, there are reasons to doubt its correctness. First, the purpose of the care envisaged is to limit or avoid the potential consequences of intoxication, rather than to provide treatment for an injury, illness or other disability unrelated to the effect of drugs or alcohol. Secondly, although the examples may well be non-exclusive, each suggests that the person providing the care is an individual, rather than an institution. Even where institutions are envisaged, it is the official or member of staff to whom the intoxicated person is to be released.

32 Even if a hospital were a responsible person, and was prepared to take the plaintiff (as seems likely considering his physical condition), it is clear that there is no power to release a person into such care if he or she is “not willing”: [s 5\(4\)\(b\)](#), second limb. The plaintiff did not go to hospital in the ambulance at 2.30am because he refused assistance. Whether or not the police had power to detain him for the purpose of taking him to a hospital, it is beyond doubt that they had no power to require him to remain in a hospital. If he had maintained the view expressed to the ambulance officers, it is probable that he would have left the hospital, unless the police intervened to take him back to the police station.

33 With respect to the liability of the ambulance officers, accepting that they should have informed the police of the plaintiff’s need for medical assessment and accepting that the police would have taken him to hospital, the plaintiff would still have failed to establish liability on the part of the Ambulance Service unless he satisfied the Court that he would have accepted medical assessment and treatment from a hospital. That question was not addressed in terms by the trial judge. Without an affirmative finding on that issue, the claim against the ambulance officers should have failed.

34 This issue was not entirely disregarded in her Honour’s reasons. Thus, in considering the assessment of damages by reference to the loss of a chance of a better outcome, her Honour took into account that “even if the plaintiff had been conveyed to hospital there was a chance

that his behaviour may or may not have permitted discovery of haematoma at an earlier time”: at [109]. That assessment did not, however, purport to address the issue of causation: what needed to be established on the balance of probabilities was that –

- (a) the plaintiff would have agreed to go to the hospital, or
- (b) if taken unwillingly, he would have submitted to medical assessment and treatment.

35 This matter not having been determined by her Honour, it is necessary for this Court on a rehearing to consider the issue for itself. In some circumstances such a matter may give rise to difficulty because it depends upon an assessment of what the plaintiff would or would not have done, and this Court has had no opportunity to evaluate his evidence. That difficulty is ameliorated in the present circumstances to the extent that no direct evidence from the plaintiff as to what he might or might not have done would have been admissible. That is because the proceedings were governed by the [Civil Liability Act 2002](#) (NSW), [s 5D](#) of which relevantly provides as follows:

**“5D General principles**

(1) A determination that negligence caused particular harm comprises the following elements:

(a) that the negligence was a necessary condition of the occurrence of the harm (*factual causation*), ....

...

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.”

36 The real purpose of paragraph (a) is not easy to discern, without reference to extrinsic material: such reference may be justified under [s 34\(1\)\(a\)](#) of the [Interpretation Act 1987](#) (NSW). Section 5D was introduced in response to the *Review of the Law of Negligence, Final Report* (2002) (“the Negligence Review”) which noted that, in order to answer the question of what the plaintiff would have done if the defendant had not behaved negligently, Australian courts adopted a “subjective approach”. The Negligence Review affirmed that approach at par 7.40, having described the approach in the following terms at 7.38:

“The subjective approach depends on asking what the plaintiff would actually have done if the defendant had not been negligent, whereas the objective approach depends on asking what the reasonable person in the plaintiff’s position would have done if the defendant had not been negligent.”

37 The Negligence Review also noted (without explicit reference) that Canadian law asked “what the reasonable person *in the plaintiff’s position and with the plaintiff’s beliefs and fears* would have done”: at par 7.39 (emphasis in original). That approach was rejected on the basis that it required “an answer to the nonsensical question of what a reasonable person with unreasonable views would have done”. Whether the statute has excluded that approach is less clear and depends on the operation of both paragraphs (a) and (b) of s 5D(3).

38 Paragraph (b) excludes the plaintiff’s evidence as to what he or she would have done. The Negligence Review stated at par 7.40:

“[T]he Panel is also of the view that the question of what the plaintiff would have done if the defendant had not been negligent should be decided on the basis of the circumstances of the case and without regard to the plaintiff’s own testimony about what they would have done. The enormous difficulty of counteracting hindsight bias in this context undermines the value of such testimony. In practice, the judge’s view of the plaintiff’s credibility is likely to be determinative, regardless of relevant circumstantial evidence. As a result, such decisions tend to be very difficult to challenge successfully on appeal. We therefore recommend that in determining causation, any statement by the plaintiff about what they would have done if the negligence had not occurred should be inadmissible.”

39 In the distant past, English courts developed detailed rules of evidence, one purpose of which was to exclude from consideration by a jury evidence which the judges considered not capable of being properly assessed by lay people. Prior to 1833 in the UK, “every person having an *interest*, however minute, in the result of the proceedings, was absolutely barred from being a witness”: see *Phipson on the Law of Evidence* (9th ed, 1952) p 469. At common law, the accused in a criminal trial could not give evidence on oath. The modern approach, reflected in the [Evidence Act 1995](#) (NSW), is to abandon inadmissibility in favour of allowing the jury (or judge) to assess weight and reliability. Prior to the [Civil Liability Act](#), the lack of weight likely to attend self-interested assertions was well understood: see, eg, *Smith v Barking, Havering and Brentwood Health Authority* [1994] 5 Med LR 285 at 289 (Hutchinson J) quoted by Gummow J in *Rosenberg v Percival* [2001] HCA 18; 205 CLR 434 at [89]; see also Madden and Cockburn, “What the Plaintiff Would Have Done: [s 5D\(3\)](#) of the [Civil Liability Act 2002](#) (NSW)” (2006) 3 *Aust Civil Liability* 47. On one view, the difficulty of “counteracting hindsight bias” might have been thought to lie with the plaintiff. It seems unlikely that the provision was introduced to prevent the trivial waste of time which might attend the adducing and challenging of such evidence. Rather, the purpose of the provision appears to be to prevent a trial judge placing any weight on such evidence, in circumstances where it could not be said to be an abuse of his or her advantage as a trial judge. (Were it otherwise, an appellate court could intervene.)

40 Whatever the real purpose of the provision, the issue for determination is how a court is now to identify what course the plaintiff would have taken, absent negligence. That assessment might include evidence of the following:

- (a) conduct of the plaintiff at or about the relevant time;
- (b) evidence of the plaintiff as to how he or she might have felt about particular matters;
- (c) evidence of others in a position to assess the conduct of the plaintiff and his or her apparent feelings or motivations, and

(d) other matters which might have influenced the plaintiff.

41 Properly understood, the prohibition on evidence from the plaintiff about what he or she would have done is of quite limited scope. Thus, the plaintiff cannot say, “If I had been taken to hospital I would have agreed to medical assessment and treatment”. Indeed, as the Negligence Review recognised, such evidence would be largely worthless. However, the plaintiff might have explained such evidence along the following lines:

“I recall on the trip to the police station that I began to feel less well; my state of inebriation was also diminishing; I began to worry about the pain in my head ....”

42 That evidence (entirely hypothetical in the present case) would not be inadmissible. If accepted, it might provide a powerful reason for discounting any inference as to future conduct drawn from the past refusal of treatment. It would constitute evidence as to the plaintiff’s position, beliefs and fears. Because an inference would need to be drawn from that evidence, no doubt the court would take into account the likely response of a reasonable person in such circumstances. That is consistent with the Act requiring that the matter be determined “subjectively in the light of all relevant circumstances”. Whether this is consistent with the Canadian approach need not be considered further: see Trindade, Cane and Lunney, *The Law of Torts in Australia* (4th ed, OUP, 2007) p 542.

43 In respect of each aspect of evidence in the present case, it is clear that the plaintiff’s conduct at the time at which he was supposed to have been taken to hospital, constituted an unequivocal rejection of any such proposal. There was evidence that his attitude remained combative at 3.45am, whilst in the police station. There was also evidence that he resisted being touched and having his clothing removed, when finally taken to the hospital, after his condition had deteriorated significantly, at about 12pm the following day.

44 So far as the conduct of others observing him was concerned, the ambulance officers had formed a clear view that he would not accept treatment or transport to hospital for assessment. The police officers witnessed the events and agreed with that assessment. Despite her Honour’s finding, it must have remained doubtful that, in those circumstances, they would have agreed to take the plaintiff to hospital themselves. Constable Cosgayon was asked if the ambulance officers had suggested that Constable Fuhrer and he should have taken the plaintiff to hospital. He had no recollection of such a statement being made but thought that if it had been, they would have taken him: Tcpt, 06/12/06, p 178 (15). He also agreed that, the plaintiff not having been taken by police to a hospital “may have been an indicator” that such a statement was not made to them. No doubt the inference was that, if asked, they would have taken him to a hospital, but the evidence was somewhat obliquely elicited.

45 Constable Cosgayon was asked what he thought appropriate in the circumstances and gave the following evidence (p 186):

“Q. I’m suggesting to you that once you saw that the ambulance officers had been unable to carry out an assessment of Mr Neal that you ought to have conveyed him to a hospital.

A. No.

Q. You don’t agree?

A. No.

Q. Can you just tell us, shortly, why.

A. I believed at the time – I presume I believed at the time that they made an adequate assessment of him and at that stage we believed it was a minor injury and for his welfare that we took him back to Newcastle Police Station.”

46 Constable Fuhrer was also asked whether, if it had been suggested by the ambulance officers that the plaintiff needed to be taken to hospital, that would have been done (Tcpt, 06/12/06, p 157-161):

“Q. Did they say to you, ‘Look, he’s had an injury to the head, but he won’t let us examine him. It could be serious. We can’t deal with him. You’ll have to take him to the hospital.’ They didn’t say that to you, did they?

A. I can’t recall what was said.

Q. If two ambulance officers had said that to you, you’d have taken him to the hospital, wouldn’t you?

A. More than likely.”

47 There was then an attempt to elicit from him that he understood that the police had power under the [Intoxicated Persons Act](#) to take someone to a hospital. Having elicited that belief, the cross-examiner returned to the issue which had been the subject of a concession as set out above:

“Q. Is one of those circumstances your understanding at the time where an ambulance officer says, ‘This person may be injured, but he won’t let us treat him. He needs to be taken to a hospital. You should take him.’ You would then do it, would you not?

A. That’s not a circumstance that would occur. We don’t convey in the place of ambulance. That wouldn’t happen, that conversation.

Q. Have you never taken an injured person in your police car to a hospital?

A. Not an injured person, no.

...

Q. Let me put it another way. If you had to convey an intoxicated person somewhere in your paddy wagon as a result of your detaining that person, would you take them to the police station or to a hospital, as at July 2001?

A. I mean, obviously it depends on the injury. But if they’re not prepared to go with an ambulance, then certainly police don’t replace an ambulance and take them to hospital. ...

Q. Would I be right in saying, constable, that the ambulance officers did not warn you or provide you with advice that that man needed to be given medical treatment or assessment?

A. I can’t recall them saying that, no.

Q. If they had said it, how would you have responded to it as at July 2001?

A. To me, that's a hypothetical question. They wouldn't have said that. Had they said that, he would have --

Q. Let me assist you, constable. You saw them unable to assess the man. Correct?

A. Correct.

Q. And they were complaining about it to you. They were telling you. Correct?

A. More than likely.

Q. If they'd said to you, 'This man needs medical assessment, but he won't let us do it. He needs to be taken to a hospital', how would you have reacted to that at the time?

A. If that was the case and they pressed that a person had to go to hospital, they would have went to hospital in the ambulance."

[Counsel having misheard the answer and being corrected by the trial judge continued.]

"Q. I'm sorry? What, have I missed the answer?

A. I said if that was the case that they said that, that person would have went to hospital in the ambulance.

Q. I see.

A. They would not go to hospital in a police vehicle.

Q. So your understanding is that if the man had needed assessment one way or another he'd have been got into the back of the ambulance.

A. More than likely.

Q. Would you have assisted them to do it?

A. If they'd needed assistance, but not, I don't think, in the manner that you -- he wouldn't have been forced into an ambulance, no.

Q. If he'd been putting up some kind of a struggle, what would you have done? You're there on the spot with this problem. What would you have done?

A. It depends on the kind of struggle. If he wants to be violent, we deal with it.

Q. You'd have arrested him and put him in the back of the paddy wagon. Correct?

A. More than likely, yes.

Q. And you would have taken him somewhere that you thought appropriate at the time. Correct?

A. Correct.

Q. And if you understood it was a significant injury, you may have taken him straight to the hospital. Correct? You may have.

A. I doubt it. We don't take people to the hospital in the police car."

48 The somewhat equivocal assertion by Constable Fuhrer in the question and answer set out in the extract at [46] above that he would "[m]ore than likely" have taken the plaintiff to

hospital cannot properly be viewed in isolation. The remainder of his evidence made explicit his view that such an event would not have happened. Although Constable Cosgayon agreed that the failure to take the plaintiff to hospital suggested that they had not been asked to do so, this evidence provided a flimsy basis for her Honour's finding that it would have happened. More importantly for present purposes, at no stage did counsel for the plaintiff suggest to either of the police officers that they might have made any assessment at all as to what the plaintiff's response would have been if they had taken him to hospital. There was no evidence to assist the plaintiff on this point, either from the ambulance officers or the police officers. The plaintiff himself gave no relevant evidence. He recalled receiving a "big thump to the side of my head" but had no recollection thereafter until his time in John Hunter Hospital: Tcpt, 05/12/06, pp 45-46. He was not in a position to have given evidence of the kind referred to above as legally permissible; nor did he attempt to do so.

49 The objective circumstances therefore provide no assistance to the plaintiff. Whether his resistance to medical treatment was fuelled by alcohol or drugs, by the injury to his head or by other considerations is unknown. **The only available inference is that he would not willingly have gone to hospital and submitted to medical assessment, whether taken by the police (which was itself improbable) or in an ambulance. It follows that he failed to establish, affirmatively, that he would have accepted medical assessment and treatment. Any breach of duty on the part of the ambulance officers was therefore not shown to have caused the delay in obtaining treatment and hence liability was not established. The cross-appeal should be upheld and the judgment in favour of the plaintiff set aside.**

### **Liability of police**

50 The claim against the Police Service was run at trial upon two bases, namely:

- (a) being aware that the plaintiff had a head injury and that the ambulance officers had not been able to examine him fully, they should have taken him to hospital, rather than to the police station, and
- (b) when brought to the police station, the custody manager, knowing that the ambulance officers had not been able to complete their examination and knowing that the plaintiff had a head injury, should have arranged for the plaintiff to be taken to hospital.

51 Her Honour rejected these claims on the basis that neither the police officers who found the plaintiff, nor the custody manager at the police station, appreciated (nor reasonably should have appreciated) the potential seriousness of the plaintiff's injury: at [50]-[52]. Her Honour accepted Constable Cosgayon's evidence that he believed at the time that the ambulance officers "had made an adequate assessment of a minor injury" and that it was appropriate to take him to Newcastle Police Station.

52 That conclusion was not directly challenged on appeal; rather, the plaintiff argued that there had been a breach of duty on the part of the police, through the custody manager at the police station, in failing to comply with a relevant police protocol.

53 The protocol relied upon was in the following terms:

### **"Medical treatment**

The custody manager must immediately call for medi[c]al assistance (in urgent cases send the person to hospital) if someone in custody at a police station:

- appears to be ill
- is injured
- does not show signs of sensibility and awareness
- fails to respond normally to questions or conversation
- is grossly affected by alcohol or other drugs (eg incapable of standing from a sitting position unassisted, seen to be lapsing in and out of consciousness)
- requests medical attention and the grounds on which the request is made appear reasonable
- otherwise appears to be in need of attention

This applies even if they do not request medical attention and whether it has recently been received elsewhere (unless brought to the police station directly from hospital, psychiatric centre etc). In all other cases if a detained person asks for a medical examination, comply. Tell them it is at their own expense.

...

### **Notes for guidance**

Remember someone who appears to be drunk or is behaving abnormally might be suffering from illness, the effects of drugs or an injury (particularly head injury) which is not otherwise apparent. Someone needing or addicted to drugs might experience harmful effects within a short time. Always call a doctor when in doubt.

Medical assessments of grossly intoxicated people are to be conducted by doctors or a registered nurse at a public hospital. Do not seek assessments from ambulance officers.”

54 The plaintiff emphasised that his case clearly fell within the terms of the protocol (he was injured), was highlighted by the “Notes for guidance” (referring to head injury), which was in mandatory terms and should be interpreted in favour of the individual who is under the complete control of the police whilst in custody. The custody manager at Newcastle Police Station on the night in question, Senior Constable Keeping, gave evidence. He was taken to the protocol and invited to accept that the plaintiff fell within its terms, because he had a head injury. He agreed that he was injured, but that he considered the injury “very minor”: Tcpt, 08/12/06, p 319-320. He also agreed that he was not himself able to make medical assessments, having no medical training and that he had not attempted to do so. He did not know that the ambulance officers had been unable to complete a full assessment or that they wanted to take him to hospital: Tcpt, p 320. He also agreed that police records suggested that he had seen the plaintiff vomiting at 3.45am, but he was not aware that vomiting could be the sign of a head injury: Tcpt, p 325.

55 The standard procedure for persons held under the *Intoxicated Persons Act* was that they should be woken and spoken to every half hour. The plaintiff had at all stages refused to give an address to the police or tell them of any place to which he could be taken. The entry in the police records for 3.45am stated “seen, spoken to still would not give address”. After having his attention drawn to this entry, he was asked the following questions (pp 326-327):

“Q. If you had been told that ambulance officers had said this man might have a head injury, if he vomits medical assistance should be obtained, would you then have got medical assistance?”

A. Yeah.

Q. Medical assistance, I take it, is available if police officers need it at the Newcastle Police Station?

A. No, we’d have to call the ambulance who, in turn, would come and make another assessment and then obviously weigh up whether they feel the person – that’s back then. Now there is a nurse in Corrective Services.

Q. Alternatively, you’d comply with the protocol if you didn’t think it was urgent and you could take him up to the hospital, that right?

A. Yes, but that’s generally done by an ambulance by a rule, unless there’s --

Q. I think I’ve put that to you wrongly. Can I just check that? I have put that to you wrongly. I think the protocol reads, ‘The custody manager must immediately call for medical assistance, in urgent cases send the person to hospital if somebody in custody at a police station is injured’ et cetera.

A. Yep.

Q. In some situations might you have the man taken up to the hospital in a police car?

A. If there’s a need that we feel he needs medical assistance there would be some, but it would be extreme, as in relation to the way they are acting, but obviously if it’s somebody with an injury and something’s happening, obviously we are reluctant to carry them in the back of the truck in case something happens and, you know, they are better off to be in an ambulance say with a police officer escorting in case something medically happens, you know, that they need treatment for because obviously we are not, you know, medical officers.”

56 On the basis of this material, it appears that the plaintiff’s case at trial was, in part, that he should have been taken to hospital either immediately he arrived at the police station, or at 3.45am.

57 The possibility that he should have been taken to hospital on arrival at the police station is inconsistent with the inferences drawn from the earlier discussion concerning the liability of the Ambulance Service. Consistently with the evidence of Constable Fuhrer, Senior Constable Keeping did not envisage taking a detainee to hospital in a police vehicle. Had an ambulance been sought immediately after arrival at the police station, for the very person who had refused treatment only a short time earlier, it is improbable that a different result would have eventuated. In other words, the probabilities were that the plaintiff would have refused to go to hospital and the ambulance officers would not have been able to take him.

58 The plaintiff touched but lightly on the possibility that he should have been taken at 3.45am. It had not been suggested to the ambulance officers that their advice to the police should have included some warning as to the significance of vomiting. Further, the medical evidence on which the plaintiff relied did not address the possibility that he might have arrived at hospital at, say, 4am, rather than 2.30am.

59 Other entries in the custody management record included half-hourly inspections followed by “seen sleeping, breathing normally” or “seen sleeping appears fine”. At 6.10am he was woken and spoken to and then went back to sleep. It was not until 11.05am that Senior Constable Payne (who had taken over as custody manager) recorded:

“Entered cell and tried to rouse IP. [Conscious] yet unable to stand. Ambulance contacted to attend. Supervisor and duty officer informed.”

60 The plaintiff was conveyed by ambulance to the Mater Hospital, leaving at 11.22am.

61 Because the plaintiff placed reliance at the appeal on failure to observe the protocol, it was necessary to consider the legal status of the protocol. There was no provision for such protocols in the [Police Act 1990](#) (NSW) or the [Police Regulation 2000](#) (NSW), as then in force. Although the plaintiff insisted that the protocol had the force of law for police officers, that appears to have meant no more than that, as a lawful direction within the police hierarchy, it was required to be obeyed. Although the source of the protocol was not revealed in the evidence, it is appropriate to accept that it may inform the content of the general law duty of care with respect to detainees in police custody. It carried within it the warning that a person who appeared to be drunk might be suffering the effects of an injury, and particularly head injury. Senior Constable Keeping knew that the plaintiff had a head injury and that he was not personally able to assess its significance. Although he considered it “very minor”, it was clearly of sufficient significance to warrant the calling of an ambulance when the constables on duty found the plaintiff earlier in the night. Not to have called an ambulance in such circumstances would have been a breach of duty. Informed by the terms of the protocol, it would equally have been a breach of the custody manager’s duty not to have called an ambulance had the intoxicated person arrived at the police station in such a condition without any form of medical assessment having been undertaken.

62 The duty of Senior Constable Keeping was not, however, to be assessed without reference to the circumstances of the case. As he indicated in evidence, an examination of an intoxicated person for injuries is usually undertaken by the escorting police, as had happened with the plaintiff: Tcpt, 08/12/06, p 317. **Further, he knew that an ambulance had been called, that ambulance officers had seen him, but that he had not gone with the ambulance officers. It appears that he did not know the reason why the plaintiff had not gone with the ambulance officers (Tcpt, p 320) but the reason did not matter. Either the officers had assessed him as having only a minor injury or he had resisted assessment or had refused to go. Any of these circumstances would have been sufficient for Senior Constable Keeping not to consider calling an ambulance. There was no evidence to suggest that the plaintiff had deteriorated to any extent prior to 3.45am. Nor was there medical evidence as to whether the vomiting at that stage indicated a deterioration of his clinical condition as opposed to the results of excessive intake of alcohol, without having had a meal.**

63 **Whilst the custody manager had a general law obligation to provide medical treatment as required by the plaintiff, there was no breach of that duty in the circumstances of the case. If**

there had been a breach, the analysis undertaken above in respect of causation would have precluded a finding of liability against the State, on behalf of the Police Service.

### **Assessment of damages**

64 Because neither the Ambulance Service nor the State was liable to the plaintiff, it is not necessary to consider the challenges by both the Ambulance Service and the plaintiff to the manner in which damages were assessed. The nature of the assessment required with respect to the loss of a chance of a better outcome depends, as her Honour recognised, on what steps should have been taken and at what time. If her Honour had been satisfied that causation was established, she must have found on the balance of probabilities that the plaintiff would have accepted an offer of assistance at the hospital. In that event, it would not have been appropriate to discount the damages by reference to the possibility that the plaintiff would not have accepted treatment. However, it is possible that the discounting arose because of some concern on her Honour's part that the plaintiff would have accepted treatment, but not immediately.

65 In these circumstances, although there may be error in the manner in which damages were assessed, absent a clear basis of liability, against which to assess the relevant harm and loss, it is not helpful to carry out an entirely hypothetical calculation.

### **Orders**

66 I would propose the following orders:

- (1) Dismiss the appeal.
- (2) Order the appellant to pay the respondents' costs of the appeal.
- (3) Allow the cross-appeal and set aside orders 1 and 2 made in the District Court on 15 June 2007.
- (4) In lieu thereof,
  - (a) give judgment for the Ambulance Service of New South Wales (the first defendant) against the plaintiff;
  - (b) order the plaintiff to pay the first defendant's costs of the trial, insofar as the costs relate solely to the case as against the first defendant.
- (5) Grant Michael Neal a certificate under the [Suitors' Fund Act 1951](#) (NSW) in respect of the costs of the cross-appeal.

67 **HANDLEY AJA: I agree with Basten JA.**