*please note that you will need to change the information highlighted in yellow to suit each of the rounds, and of course, the content of the submissions itself*

IN THE HIGH COURT OF AUSTRALIA

BETWEEN:

**WAGSTAFF**

Appellant

AND

**ZHANG**

Respondent

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**APPELLANT'S SUBMISSIONS**

(Senior Counsel – Joie Ng)

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## I Summary of Submissions

The wrong test for assessing the standard of care owed by a child was applied in the original trial.

1. The correct test is the care reasonably to be expected of a "child of similar age, intelligence and experience".
2. The trial judge erred in stating that the test for the standard of care owed by a child is "the care reasonably to be expected of an ordinary child of the same age".

## II Submissions

**1. The correct test is the care reasonably to be expected of a "child of similar age, intelligence and experience"**

1.1. It may be more accurate to regard *McHale v Watson*[1] as having adopted a standard of care which is partly objective and partly subjective in its nature

1.1.1. Kitty J exemplified the view that would deny to children as it would to adults the right to plead that the harm caused was due to being abnormally slow-witted, quick-tempered, absent-minded or inexperienced.[2]

1.1.2. Owen J holds that the capacity of a particular child to appreciate the risk must be taken into account so that more will be expected of a child of superior intelligence and experience for its age than of one who is less well developed.[3]

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[1] *McHale v Watson* (1966) 115 CLR 199.
[2] Ibid 213-14 (Kitty J).
[3] Ibid 231 (Owen J).

1.1.2.1. It becomes apparent that age, but also intelligence and development, are necessary in determining the standard of care owed by a child.

1.1.2.2. In a like manner, the capacity of a particular child to appreciate the risk must be taken into account so that less will be expected of a child of less intelligence and experience for its age than of one who is more well developed.

1.1.3. In *Mullins v Richards*,[4] the views of Kitty and Owen JJ were regarded as essentially the same.[5]

1.1.4. This approach was followed in *H v Pennell*[6] and *Kain v Mobbs*.[7]

1.2. In practical terms, this would entail asking whether the defendant had exercised the care reasonably to be expected of an ordinary child of the same age, intelligence, and experience.[8]

**2. The trial judge erred in stating that the test for the standard of care owed by a child is "the care reasonably to be expected of an ordinary child of the same age"**

2.1. There are cases in which it is said that the care required of children is that care which is ordinarily exercised under similar circumstances by children of the same age.[9]

2.2. Ever since *Lynch v Nurdin*, common law courts have accepted that in determining whether a child is guilty of contributory negligence, the relevant standard of care is that to be expected of an ordinary child of the same age.[10]

2.2.1. This is an English case, there has since been High Court of Australia authority on the matter of the standard of care for contributory negligence of children.

2.3. McHugh J in *Joslyn v Berryman* referenced the decision made in *McHale v Watson*, though neglecting to include the subjective aspect of the test.[11]

2.4. Moreover, the material facts of the case *McHale v Watson*[12] is more similar to the case at hand, compared to the material facts of *Joselyn v Berryman.*[13]

2.4.1. Judge McHugh's comment on the test of standard of care owed by a child is made applying broadly to contributory negligence. The parties to this case are adults, not children, and the incidence regards intoxicated driving.

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[4] *Mullins v Richards* [1998] 1 WLR 1304.
[5] Ibid 1308 (Hutchison LJ).
[6] *H v Pennell* (1987) 46 SASR 158, 177 (Olsson J).
[7] *Kain v Mobbs* [2008] NSWSC 383, [150] (Harrison J).
[8] *McHale v Watson* (1966) 115 CLR 199, 229 (Owen J); *Ryan v State Rail Authority of NSW* [1999] NSWCA 1236, [20] (Dunford J).
[9] *Joslyn v Berryman* (2003) 214 CLR 552, [35] (McHugh J).
[10] *Lynch v Nurdin* (1841) 1 QB 29.
[11] *Joslyn v Berryman* (2003) 214 CLR 552, [32] (McHugh J).
[12] *McHale v Watson (*1966) 115 CLR 199.
[13] *Joslyn v Berryman* (2003) 214 CLR 552.

2.4.2. On the other hand, the case of *McHale v Watson*[14] involved children as both the plaintiff and the defendant.

2.5. The trial judge's test for the standard of care does not account for the expectation of children who are more or less developed, experienced and intelligent, than the ordinary child of like age.

## III CONCLUSION

The trial judge applied the wrong test for assessing the standard of care owed by a child, that "the care reasonably to be expected of an ordinary child of the same age". Instead, the correct test was the care reasonably to be expected of "a child of similar age, intelligence and experience". Thus, in applying this test, the appellant's cerebral palsy needs to be considered in regards to the objective and subjective aspects of the tests. Thus, the standard of care should be lowered on the basis of the appellant's cerebral palsy and the appeal should be allowed.

Joie Ng
Senior Counsel for the Appellant
Dated: 07 June 2023

[14] *McHale v Watson* (1966) 115 CLR 199.

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**APPELLANT'S MEMORANDUM OF AUTHORITIES**

(Senior Counsel – Joie Ng)

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A *Cases*

1. *Allen v Chadwick* (2014) 120 SARS 350
2. *Carrier v Bonham* [2002] 1 Qd R 474
3. *Chan v Fong* (1973) 5 SARS 1
4. *H v Pennell* (1987) 46 SASR 158
5. *Imbree v McNeilly* (2008) 236 CLR 510
6. *Joslyn v Berryman* (2003) 214 CLR 552
7. *Kain v Mobbs* [2008] NSWSC 383
8. *Lynch v Nurdin* (1841) 1 QB 29
9. *McHale v Watson* (1966) 115 CLR 199
10. *Mullins v Richards* [1998] 1 WLR 1304
11. *Ryan v State Rail Authority of NSW* [1999] NSWCA 1236
12. *Town of Portland Hedland v Reece William Hodder by Next Friend Elaine Georgina Hodder* [No 2] [2012] WASCA 212
13. *Wyong Shire Council v Shirt* (1980) 146 CLR 40