IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY No. B61 of 2018

BETWEEN: **LIEN-YANG LEE**

Appellant

and

CHIN-FU LEE

First Respondent

CHAO-LING HSU

Second Respondent

RACQ INSURANCE LIMITED

Third Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I:

I certify that this outline is in a form suitable for publication on the internet.

Part II:

Ground One – Adequacy of Reasons

1. The Appellant made relevant submissions about the operation of the seatbelt pre-tensioner and the operation of the airbag and certain inferences that arose from it. [46] and [47]
2. Informing those submissions was evidence as to:
   - the relative location of the blood stains on the airbag.
   - the operation of the airbag and the seatbelt pre-tensioner.
   - evidence of Dr Robertson as to the means by which the blood came onto the airbag. [46], [47], [91], [92], [95] – [97], [100], [104], [105], [106]

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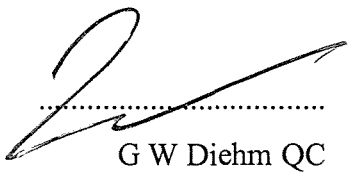
3. Dr Grigg's evidence was that seatbelt pre-tensioners operate to mechanically pull the person back tight into the seat, synchronously with the detonation of the airbag. [45], [87]
4. Dr Robertson's evidence was that the blood staining did not occur by drip or splatter. [52]
5. Dr Robertson's evidence contemplated two means by which the blood could have come on to the airbag. The first was by direct contact with the bleeding object. The second was by transfer from a hand or other bloodied object coming in contact with the airbag. She considered the first most likely. [104]
6. Dr Robertson could not exclude the second possibility but would have expected to see certain signs present. She accepted a number of limitations though in the interpretation of the evidence. [104], [105]
7. An examination of the photographs shows considerable staining of the airbag in places on the windscreen side of the inflated airbag. [46]
8. The Court of Appeal found that whoever was the driver was wearing the seatbelt. [49] – [51]
9. It followed that it was impossible for the Appellant's bleeding face to be in contact with the parts of the airbag on the windscreen side of it, either when it was inflated or deflated or in between. [46]
10. The reasons the Court of Appeal gave did not meaningfully address this argument. [53], [54], [64]
11. The reasons were therefore, as a matter of law, inadequate. [64], [65]

Ground Two – Misuse of Advantage and a Finding Contrary to Compelling Inferences

1. In relevant respects a recognized advantage of a trial judge is seeing and hearing witnesses as they give their evidence, including to enable an assessment from their appearance, as opposed to the content of their evidence, as to their credibility. [71]
2. The advantage might be thought to be a tenuous one, even though with a long history of recognition. [71]
3. The trial judge wrongly recalled the Appellant giving evidence through an interpreter. It was said all due weight had been given to disadvantage both he and his mother had for that. The allowance was not specified. [68]
4. It was a plain misuse of that advantage in making that credit finding. [77-8]

5. The truthfulness of the evidence of each of the Appellant's that Mr Lee Senior was the driver properly stood to be assessed by reference to the surrounding evidence and circumstances. [82], [85]
6. The Court of Appeal differed from the trial judge on issues such as the difficulty in transporting the paralyzed Appellant to the rear seat and whether the injuries suffered by the Appellant were evidence that he was the driver. [86], [87]
7. On the first of those points, the hypothetical difficulty in the available time was substantial. [86]
8. The Court of Appeal also considered that the observations of Mr Hannan, on his arrival 60 seconds or so after the collision, of the Appellant in the rear seat was in the Appellant's favor. [86]
9. A particularly important new finding though was that whoever was the driver was wearing the seatbelt. [87]
10. Once that finding was made, the Court was bound to then assess the probabilities having regard to the evidence canvassed in ground one above. [89] – [100]
11. The Court of Appeal did not do that. [88]
12. Had it done so, it would not have come to the conclusions as in [145] and [149] that it was probable that as the driver the Appellant's blood would be on the airbag. [89] – [100]
13. The conclusion then in [151] that the Appellant's case was, because of the DNA evidence, "substantially weaker" would not have been reached. [101] – [106]

Dated: 10 April 2019



G W Diehm QC