IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY
BETWEEN

No. B61 of 2018

LIEN-YANG LEE
Appellant

And

CHIN-FU LEE
First Respondent
CHAO-LING HSU
Second Respondent
RACQ INSURANCE LIMITED
Third Respondent

SUBMISSIONS OF THIRD RESPONDENT

Part I:

1. I certify that these submissions are in a form suitable for publication on the internet.

Part II:

2. The issues raised by the appeal are those referred to in the appellant's submissions.

Part III:

3. I certify that the third respondent has considered a notice in compliance with section 78B of the *Judiciary Act* 1903 (Cth), and concluded same is not required.

Filed on behalf of the Third Respondent
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Part IV:

4. In these submissions the respondents are referred to as "Mr Lee", "Ms Hsu" and "the respondent" respectively. References to reasons in the joint core appeal book ("CAB") carry additional references to the relevant paragraph of the Trial Division reasons ("QSC") and Appeal Division reasons ("QCA") respectively. The respondent's book of further materials is referred to as "BFMR".

5. Subject to the following matters the appellant's narrative of facts is accurate. Further factual detail is addressed in the argument below.

6. As to [11] of the appellant's submissions, Dr Lee's proposed evidence was excluded. This was affirmed on appeal.[1]

7. The accident was violent in character, being a head on collision. The photographic evidence depicts the driver's seat post-accident positioned well forward in the driving well, and angled up.[2]

Part V:

Ground One – Adequacy of reasons

8. The principles are uncontroversial. They are adverted to at [55] to [59] of the appellant's submissions. In *DL v R*,[3] three members of this court[4] essayed what was required of a trial judge – and by parity of reasoning, with appropriate adjustments, an appellate court on rehearing – in exposure of reasoning. The requirement lies on a "spectrum", depending on the issue involved; inadequacy is not grounded on account of a failure to undertake "a minute explanation of every step in the reasoning process that leads to the judge's conclusion".

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[1] CAB 80, QCA [87].
[2] BFM (Appellant) 49.
[3] *DL v R* (2018) 356 ALR 197; [2018] HCA 26.
[4] Kiefel CJ, Keane and Edelmann JJ at [33].

9. The evidence of the appellant and Ms Hsu, together with the written statement of Mr Lee, were to the effect that Mr Lee was the vehicle driver. The trial judge rejected their evidence as not reliable or credible.[5]

10. The finding that the appellant's blood was present on the driver's airbag raised a serious issue as to whether the appellant was the driver of the Toyota. That evidence obliged the appellant address how this ensued if in truth he was a rear seat passenger. No such evidence or explanation was afforded by the appellant. In particular, no oral evidence was adduced from the alleged driver, Mr Lee.

11. The trial judge found the appellant was the driver. His Honour made two factual errors in his reasoning. One was that the appellant gave evidence through an interpreter. The other was that the driver was not restrained by a seatbelt.

12. The appellate court, upon rehearing, although recognising these errors, found the trial judge's driver identity finding remained apt.

13. The appellant's complaint is that the appellate court, in its reasons, failed to properly address and explain the effect of the evidence of Dr Grigg as to the function of seatbelt pretensioners and airbag deployment, upon collision. That is incorrect.

14. The mechanism of the pretensioner function was canvassed at QCA [64].[6] McMurdo JA noted at QCA [136] that Dr Grigg's evidence provided support for the appellant's case in relation to the "mechanics of the airbag and the driver's seatbelt and the likelihood of particular injuries if both were activated".[7] However, McMurdo JA identified two reasons for concluding that this evidence was not decisive, namely:

    (a) Dr Grigg's evidence was limited by his engineering (as opposed to medical) expertise, [8] and thus did not traverse the question of how the

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[5] CAB 36, QSC [194]; CAB 37, QSC [198].
[6] CAB 76.
[7] CAB 90, QCA [136].
[8] Ibid.

appellant's particular injuries related to the blood staining on the airbag; and

(b) The evidence of Dr Robertson provided sound explanation for how the appellant's blood came to be on the airbag at the relevant locations, after deflation commenced, and militated against an indirect mode of blood deposition.[9]

15. In his reasoning, McMurdo JA specifically considered the "particular location on the airbag of the bloodstains"[10], but having regard to the evidence of Dr Robertson, in the context of the competing hypotheses as to manner of deposition, rejected that as determinative.[11]

16. Contrary to [45] of the appellant's submissions, the engineering evidence of Dr Grigg went further than the inflation and deflation over approximately half a second. The airbag bore the character of a bag, not a balloon. Dr Grigg's final report refers to, and depicts, a like airbag remaining partially but still substantially inflated in the aftermath of activation.[12]

17. Dr Grigg did not go on to address how, and to what degree, the coarse airbag fabric may adhere or attach to the driver's person after deployment. Nor did he address the consequence of any movement of a driver (including the driver's head) and airbag after such deflation commenced, or how in the context of such movement blood could have been deposited on the deflated airbag.

18. The evidence of Dr Robertson explained how the driver's blood came to be on the particular parts of the deployed airbag turned, in part, on the movement of the driver, in relation to the deployed airbag, in the period following the impact. This included movement in the period immediately following the impact itself, [13] and plausibly upon any movement of the seat forward upon activation of the seat backrest recline mechanism.[14]

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[9] CAB 92, QCA [148] – [150].
[10] CAB 91, QCA [146]; CAB 92, QCA [149].
[11] CAB 91, QCA [146]; CAB 92, QCA [149].
[12] BFMR pages 43-50 (exhibit 5).
[13] BFMR pages 12-13 (transcript T5-50 to T5-51).
[14] BFMR pages 14-15 (transcript T5-56 to T5-57).

19. Read in sequence and in context, QCA [64],[15] [110],[16] [112],[17] [136],[18] [146][19] and [149][20] reveal a consideration of the issue raised by the appellant as to the functioning of the seatbelt pretensioners, the timing of contact with the airbag upon a collision, and the location of the blood staining on the airbag being contrary to the expected point of impact between the airbag and the driver's face. QCA [146]-[150] provided the reasoning, founded on the probability identified by Dr Robertson, as to direct contact blood transfer having regard to post-collision movement. The above (exhibit 5) evidence of Dr Grigg as to the airbag post-inflation underscores this conclusion.

20. As the trial judge[21] and the appellate court[22] found, the inference sought by the appellant as to a blood transfer by hand, on the evidence of Dr Robertson as to the nature of the blood stains on the airbag, was most unlikely. The appellant does not suggest, despite heavy deposition of blood on the airbag, any indicia of hand application was discernible.

21. Such inference did not gain support in the statement evidence of Mr Lee.[23] Indeed, his statement evidence contradicted such inference, disavowing that the appellant was bleeding at the relevant time and contending that he (Mr Lee) was bleeding from his hands. Each assertion was untrue.[24]

Ground two – misuse of advantage of the trial judge and drawing an inference contrary to compelling inferences from uncontroverted evidence

22. Again, the principles are not in doubt.

23. The trial judge made credit findings against the appellant and Ms Hsu. The trial judge specifically referred to evasiveness, and in the appellant's case, "guarded" evidence.[25]

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[15] CAB 76.
[16] CAB 85-86.
[17] CAB 86.
[18] CAB 90.
[19] CAB 91.
[20] CAB 92.
[21] CAB 38, QSC [206], [207].
[22] CAB 92, QCA [150].
[23] BFMR at pages 23-27 (Exhibit 27).
[24] CAB 91-92, QCA [148].
[25] CAB 36, QSC [194].

24. At [68] of the appellant's submissions it is contended that the trial judge's adverse finding of credit against the appellant and Ms Hsu were made "with limited analysis". Like criticism is made of the appellate court at [70].

25. First, the finding of evasiveness was a primary observation of the character and demeanour of their evidence, and did not require more. This finding must be viewed in the context of the criticisms made of their evidence by the respondent in its submissions.[26]

26. Secondly, the trial judge merely illustrated by example features of their evidence that were unreliable in nature.[27] Those examples were plainly not intended to be a line-by-line refutation of each aspect of their evidence. There were a number of unexplained features of their evidence.[28]

27. Ms Hsu gave evidence through an interpreter, but had resided in Australia since 2008, sworn an affidavit in 2015 in English without interpreter's jurat and prior to the subject accident made preparation to gain employment in Australia as a tour guide.[29] She gave unequivocal evidence of the Lee vehicle at all times being on its correct side of the road,[30] whereas the accepted evidence of Mr Hannan (the other driver) was that at all times it could not have been further over on his side.[31]

28. The appellant was unable to answer how it came to pass that his case was pleaded initially with an alternative allegation that he was the driver of the Toyota.[32]

29. The error by the trial judge as to the appellant giving evidence with the assistance of an interpreter properly did not impact upon the credit findings. Those adverse features founding the findings were of substance, and remained.

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[26] BFMR at pages 6-10 (Respondent's written submissions at trial).
[27] CAB 36, QSC [194].
[28] BFMR at pages 6-10 (Respondent's written submissions at trial).
[29] BFMR at pages 34-39 (transcript T2-29 to T2-34).
[30] BFMR at pages 52-53 (transcript T2-50 to T2-51).
[31] CAB 68, QCA [12].
[32] BFMR at pages 19-21 (exhibit 2); BFMR at pages 29-32 (transcript T1-71 to T1-74).

30. The appellate court recited the evidence of the appellant and Ms Hsu,[33] the appellant's arguments apropos of same (including the said error)[34] and then dealt with same in decision.[35] No more was required.

31. The appellant's submissions at [73] to [75] misapprehend the exercise undertaken by the trial judge, despite the identified factual error concerning the driver being seatbelted. The critical finding required of the trial judge, and the appellate court on rehearing, was to determine who was driving the Toyota.

32. The issue of whether the driver was wearing a seatbelt was one of fact, but not determinative. Evidentiary support for the appellant being the driver and not wearing a seatbelt was found in the evidence of Dr Michael Weidmann.[36] The respondent did not advance or seek that finding. It was unnecessary to do so.

33. As to [85] of the appellant's submissions, it is correct to say that the *Fox v Percy* [37] jurisprudence required the appellate court upon rehearing to conduct a "real review" and where apt to draw different inferences, and make different findings, to that of the trial judge. The result of such rehearing, however, need not result in different ultimate findings. Rather, intact trial judge findings of fact, and those of the appellate court, fall to be considered together in order to review the ultimate finding. The relevant ultimate finding here was driver identity. That finding was sustained, and on proper reasoning.

34. The appellate court,[38] after earlier recital of the evidence and arguments, engaged in a detailed consideration of the evidence. That detail is pointed up by McMurdo JA noting, at QCA [143] – the airbag evidence aside – it more likely than not that the appellant was the driver. Discussion of impact of the airbag evidence then ensued at QCA [145]-[152].

35. At QCA [146] the appellate court identified the positioning of blood stains on the airbag of itself as relevant to driver identity. The court, however, went on

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[33] CAB 80, QCA [68]ff.
[34] CAB 85, QCA [108]-[109].
[35] CAB 88, QCA [127].
[36] CAB 24, QSC [121]; CAB 25, QSC [126]; CAB 39, QSC [217]; CAB 75, QCA [58].
[37] (2003) 214 CLR 118.
[38] CAB 80-92, QCA [126]-[152].

at QCA [147] to [150] – by reference to the evidence of Dr Robertson, the medical evidence concerning the appellant's facial and teeth injuries and the improbability of the hand deposit thesis – to underwrite a finding that the appellant was the driver. The court also did so, at QCA [152], by reference to its own findings after review, and upon the appeal vindicated credit findings of the trial judge.

36. The trial judge,[39] and the appellate court,[40] were persuaded by the evidence of Dr Robertson as to the probability of the appellant's blood being transferred to the driver's airbag by direct contact, through movement during and after collision, over a short period of time, as opposed to indirect deposition by hand. The criticisms made of Dr Robertson's evidence were considered at first instance and in the appeal, and were not considered persuasive.

37. The question for the appellate court posed at [98] of the appellant's submissions is erroneous. The proper question, as identified by McMurdo JA, was driver identity. The narrow question contended by the appellant concerned some evidentiary features of this proper question.

38. It is also erroneous to contend that contact between the driver's face and the airbag would only have been momentary. The airbag deployment evidence of Dr Grigg, canvassed above in respect of the first ground of appeal, evidences as much. That is, the airbag, having been inflated and contacting the driver's upper body, while retaining some significant measure of inflation.[41]

39. The appellant's submissions at [101] to [103] as to the inference he seeks to be drawn to establish transfer of his blood to the airbag by the hands of Mr Lee, is untenable for four reasons:

    (a) The absence of evidence to that effect from Mr Lee.

    (b) The absence of any evidence of the blood stains being consistent with deposit by hand.

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[39] CAB 38, QSC [208].
[40] CAB 91, QCA [146]-[147]; CAB 92, QCA [149] and [152].
[41] BFMR at pages 43-50 (Exhibit 5).

(c) The absence of any evidence that the extent of blood deposited onto the airbag was possible through transfer by hands that had been touching blood on the appellant that was already congealed by the time of Mr Hough's arrival at the Toyota;[42] and

(d) The only evidence of Mr Lee re-entering the vehicle after attending to the appellant being evidence from Mrs Hsu, a witness rejected by the trial judge as not credible.[43]

Conclusion:

40. In lengthy reasons the appellate court undertook a detailed review of the trial judge's decision, as required by appellate jurisprudence. Account was taken of two factual errors in the judgment below. Upon analysis the appellate court found that those errors did not serve to displace the trial judge's ultimate finding as to driver identity.

41. There was no error – legal or factual – in the appellate court's disposition of the appeal.

Part VI:

42. Not applicable.

Part VII:

43. I estimate 3 hours to present the respondent's case.

Dated this 8th day of February 2019.

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[42] BFMR at page 17 (transcript T2-74).
[43] CAB 36, QSC [194].