IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

No. A14 of 2015

BETWEEN

ALEX ALLEN
Appellant

and

DANIELLE LOUISE CHADWICK
Respondent

APPELLANT'S REPLY

PART I PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

PART II CONCISE REPLY TO THE ARGUMENTS OF THE RESPONDENT

Contributory negligence: travelling with an intoxicated driver

2. The respondent's central proposition is that the evaluation of the respondent's conduct must allow for a range of reasonable reactions and one only excludes reactions beyond the normal range (eg, RS [17], [26]), and that the majority and Kourakis CJ only differed on the outcome of that process of evaluation (eg, RS [40]). The respondent then supports the majority's evaluation, contending that reactions of confusion and panic were within a normal range, that the risks of travelling with an intoxicated driver were not great, and that, judged without hindsight, the risk of simply walking back to the hotel was significant.

3. However, there was a fundamental difference between Kourakis CJ and the majority as a matter of principle. Kourakis CJ started with what ought to have been known to a reasonable person in the respondent's position. By contrast, the majority started with the respondent and her assertions, asking whether her position was "understandable". The respondent would have it that because the respondent's decision-making lies within the range of what may be regarded as 'normal', it involves no fault. However the use of this approach at multiple steps in the chain of analysis both distorts the analysis and leads to error.

4. The objective inquiry posed by s 47(2)(b) essentially requires a binary analysis. One simply asks whether the reasonable person would or would not have avoided the risk of travelling with an intoxicated driver. If the reasonable person would have appreciated that she was only a short walk from the Hotel, the inquiry is resolved on that basis.

5. By starting with the respondent's claimed confusion and uncertainty about the source of the lights in the distance (FC [111]), the majority erred as a matter of law. It thereby failed

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consider whether a reasonable person would or would not be confused, and failed to consider whether that reasonable person would appreciate the approximate distance back to the Hotel. That error of principle explains the difference with Kourakis CJ.

6. Likewise, by assuming that the 'agony of the moment' was in play (FC [112]), the majority assumed the need to make an immediate decision. The anterior analysis, overlooked by the majority, is whether the reasonable person would have recalled the journey, seen the town lights, appreciated that it was a short walk back to the Hotel, and felt any need to make a rushed decision.

Other matters relevant to the objective inquiry

7. *Location of the change-over point.* The respondent emphasises that the journey occupied 10 to 15 minutes and went "beyond the confines of the town" before she stopped to urinate (RS [7]). In fact the point at which the respondent pulled over was when it was apparent she had left the township (see AS [42]), as the route the respondent agreed with under cross-examination made clear (Tr 1469). If the car travelled around the town before briefly leaving it, this could only have assisted the reasonable person. The town was small. It was simply laid out, with the coast on one side. The reasonable person in the respondent's position would have seen what Mr Martlew saw: that there were lights to the left and right, and town lights straight ahead (corresponding to Wilson Terrace, Songvaar Road and Main Street) (see Tr 4565, 4579 and 4591-4592).

8. *Intoxication of Mr Allen.* The respondent relies upon an absence of direct evidence that Mr Allen was exhibiting obvious signs of intoxication (RS [5]) and emphasises that there were periods where the respondent was not in Mr Allen's company (RS [6]), and in footnote 1 criticism is levelled at the reliance upon a BAC of 0.229. Apart from the evidence of drinking and conduct summarised in AS [38]-[40] it may be noted that one hour and 50 minutes after the accident Mr Allen's blood alcohol level was still 0.202[1] (over four times the permissible limit) and there was no challenge to Professor White's calculation. Indeed, in her police statement the respondent said Mr Allen and Mr Martlew were "getting pissed" in the front bar[2].

9. *Vulnerability of the respondent.* The respondent says repeatedly that she was pregnant at the time. At 10 weeks this caused no proved vulnerability and, in any event, the respondent told an ambulance officer at the scene that she was "going to get rid of it"[3], and hospital notes showed that she had decided to terminate her pregnancy and had been taking drugs[4]. Under cross-examination she conceded she would not have taken drugs if she was going to keep the baby (Tr 564-573), and Mr Allen said they had decided to terminate (Tr 3159-3160).

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1 Exhibit P26 (agreed police statements of Peter Harpas, Professor Jason White and Dr Graham Talbot).

2 Exhibit P26.

3 Exhibit P26 (agreed police statement of Richard Steele).

4 Exhibit P22 (Royal Adelaide Hospital notes - extracts).

Contributory negligence: failure to wear a seatbelt as required under the RTA

Qualified adoption of the norm of conduct and significance of context

10. The respondent asserts that s 49 of the Act "penalises a plaintiff by presumption of contributory negligence for failure to wear a seatbelt when it is the defendant's own conduct which unforeseeably prevents the plaintiff from engaging the seatbelt" (RS [3.1]) and submits that it is unlikely that Parliament intended that a person would be found guilty of contributory negligence without actual fault (RS [58]). The respondent asserts that it is wrong to hold a party responsible for an event over which she has no control, nor to impose a finding of contributory negligence where the "operative cause" of the plaintiff's default and damage is the defendant's act (RS [60]).

11. It is then said that while a legislative provision which adopts by incorporation another legislative provision cannot alter the meaning of the incorporated provision, it is open to interpret s 49 of the Act as imposing a qualified "requirement", being one which the plaintiff is reasonably capable of meeting (RS [61]).

12. This novel approach is unjustified in principle. It is one thing to accept, as the appellant does, that adopting the requirement to wear a seatbelt under the RTA and the Road Rules also involves the adoption of any available defences. However, this involves no super-added pre-condition that adherence to the RTA and Road Rules is only relevant in so far as they are "reasonably capable of being met". This approach lacks any textual foundation, and is not open where a specific exception is addressed: because by s 49(2) Parliament has averted to the permissible qualifications upon the norms of conduct in s 49(1).

13. The answer to whether the RTA and Road Rules are contravened when another person is implicated in the failure to fasten a seatbelt cannot depend on whether that other person is the defendant. In any event, the issue is contributory negligence. Contributory negligence assumes causative negligence by the defendant. Accordingly, this aspect of the appeal should simply be resolved on the ground on which it was fought below, namely, whether an "act of a stranger" defence was available and exonerated the respondent.

Whether failure to wear seatbelt attracts an "act of stranger" defence

14. The respondent points to the absence before the Full Court of a notice of contention on the availability of this defence as a matter of law (as distinct from whether such a defence was available on the facts) (RS [11]). Contrary to footnote 5 to the respondent's submissions, the appellant disputes the availability of the defence to the offence of failing to wear a seatbelt: AS [51]-[56][5]. The point is squarely raised in the notice of appeal in this Court (ground [3.1]) and it was addressed in submissions below[6]. It is a point of law.

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5 There is, however, a typographical error in AS [56]: the second sentence should read: "It is submitted that a number of considerations point against the conclusion that the recognition of an 'act of a stranger' defence *would* promote the purposes to be served by the Rules as incorporated into the RTA".

6 In a document titled "Failure to Wear a Seatbelt: Section 49 *Civil Liability Act* 1936 (SA)", the submission was made was that the offence was absolute, or alternatively that the only available defence was the *Proudman v Dayman* defence.

Factual footing upon which defence is to be considered (if it is available at law)

15. The respondent (RS [71]) disputes the appellant's submission (AS [66]) that the Full Court did not impugn the trial judge's finding as to the existence of opportunities to fasten the seatbelt which were not precluded by the motion of the car. It is accepted that the Full Court disagreed that there were "reasonable" opportunities (TJ [156]), but their Honours did not impugn the finding that the driving did not prevent the proper functioning of the seatbelt during the entire journey. That is unsurprising: it was the evidence of the respondent's expert (RS [73]), and at times the car travelled in a straight line.

Was the defence made out?

16. The real question is whether, even if one accepts that, *having placed herself in that position*, and assuming the availability in law of an "act of a stranger" defence, the defence was made out. In other words: where the person charged with a failure to wear a seatbelt decides to travel with an intoxicated driver, is the "act of a stranger" doctrine engaged where (1) during part of the journey, gravitational forces prevent the application of the belt, and (2) the failure to apply the belt is at times explicable by reference to panic or distraction?

17. The answer is "no" for two essential reasons. First, the relevant act (erratic driving by an intoxicated driver) is not sufficiently extraneous or incalculable to qualify as an "act of a stranger" (it is not an "incalculable intervention from the outside"[7]). Secondly, the relevant act was not the offending conduct, but merely one cause of what transpired.

No need for conduct relied upon to be extraneous or incalculable?

18. The respondent points to broad statements of the rationale which informs the construction of statutory offences (such as *Hardgrave v The King* (1906) 4 CLR 232 at 237[8]) to found the submission that "[t]he true touchstone is simply want of control whether or not that is to be characterised as a result of the act of a stranger" (RS [67]).

19. There is no defence of "no control" or "no reasonable control". That is illustrated by *Boucher v G J Coles & Co* (1974) 9 SASR 495. If the defence was available simply by demonstrating that the supermarket could not control whether one of the cans of peas was spoiled, the defence would have succeeded. There was there no suggestion of any capacity to control against the risk that manifested. As Wells J said (at 500):

> [T]here was nothing on or around the can in question that, by sight or smell, could have suggested that something was wrong with the peas; from the moment it left the processor till the time it was opened by the buyer it was, to all outward appearances, a sound, merchantable can of peas.

20. As Bray CJ said, what happened was an ordinary chance of commercial life (at 497). However, both Bray CJ (at 497) and Wells J (at 509) would have taken a different attitude to a case where it could be shown the offending peas were the result of malevolent

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7 *Boucher v G J Coles & Co* (1974) 9 SASR 495 at 497-498.

8 However, as was pointed out by Chamberlain J (at first instance) in *Norcock v Bowey* [1966] SASR 250 at 254-255, the observations in *Hardgrave* were made in respect of an indictable offence of misapplying and improperly using and fraudulently converting public money which clearly required proof of *mens rea*.

interference or substitution. The element of extraneousness was critical. It has been said that, despite the possible existence of an "act of a stranger" defence where a third party has intervened, there "may be some gaps" in common law defences to "an offence committed by a servant of the defendant without his knowledge despite all possible care by him in the selection and instruction of his employees": *Kain & Shelton v McDonald* (1971) 1 SASR 39 at 46 (Bray CJ).

No control?

21. The reference to a defendant having "no control" over the relevant act of the stranger or its consequences must be understood in the context in which the defence usually arises[9], namely, in respect of "status offences"[10] such as *Norcock v Bowey* [1966] SASR 250 where the offence was committed where the defendant's cattle strayed in a public place – no specific act or omission was required to be proved for the offence to be made out. If a trespasser let the cattle out, the act of the stranger is the offending conduct and the defendant truly has "no control" over the "extraneous cause" (at 268).

22. It is insufficient to show that the relevant act caused conduct by the defendant which was a natural and non-negligent response. The defence is not concerned with the absence of negligence, as the cases make plain[11].

This case

23. The 'act of a stranger' is said to be the erratic driving of the respondent's drunk partner. The risk of erratic driving by a drunk is not relevantly extraneous to the activity of being the passenger of a drunk driver. These matters must be judged objectively.

24. It is therefore no answer to assert that "the respondent expected to apply her seatbelt" (RS [68], [32]), especially as the respondent falsely claimed at trial that the seatbelt kept "getting stuck" and was "just an absolute headache all day" (Tr 138).

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9 See the observations of Wells J in *Boucher v G J Coles & Co Ltd* (1974) 9 SASR 495 at 505.

10 "A status offence is one which attaches criminal responsibility to someone merely by reason of his status, capacity, or physical situation apparently dispensing with the need for either act or omission as a pre-requisite for conviction": Howard, *Strict Responsibility* (1963) at 46, referred to with approval by Hogarth J in *Kain & Shelton Pty Ltd v McDonald* (1971) 1 SASR 39 at 50.

11 See, eg, *Norcock v Bowey* [1966] SASR 250 at 266 (Napier CJ), *Boucher v G & J Coles & Co Ltd* (1974) 9 SASR 495 at 504 (Wells J).