IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S321 of 2011

BETWEEN:

MADELEINE LOUISE SWEENEY BHNF NORMA BELL

Appellant

and

ANDREW JOHN THORNTON

10 Respondent

APPELLANT'S REPLY

1. Issue of speed: The respondent's statement that: '*it was not until part way through the proceedings in the Court of Appeal that the appellant advanced any argument that the vehicle may have been travelling at a speed greater than 70kph*' (RS [5]) is contrary to the facts. The Court of Appeal dealt with this issue at CA [135] (AB2 754.20) and concluded that the trial transcript showed that the appellant '*invited [the Trial Judge] to find that the vehicle was travelling into the bend at 80kph*' and submitted to the
20 Trial Judge, as to the Court of Appeal, '*that the reduction in speed was due to the "washing off" effect as the vehicle slid and fish-tailed along its path. The argument has been raised in the notice of contention and is available to [the appellant] on the appeal.*'

2. As well as contending for 80kph in submissions, the appellant called Ms Fancourt early in her case in chief to testify that she saw the vehicle doing '*about 80kph*' about '*halfway*' around the bend (AS [22]), and on various assumptions the calculated speed could have been up to 86kph (CA [75] and [143], also [141]).

30 3. Further, the joint experts' report at Q16 (reproduced at CA [150]) recorded the opinion of both experts that Ms Fancourt's observation that the fishtailing was getting more exaggerated '*more probably relates to the additional steering over-corrections of the driver than of her having applied full throttle partway through the sequence of the vehicle's motion from the bend to the tyre marks.*'

4. This statement was contrary to the finding by both the Trial Judge and the Court of Appeal '*that Mrs Fancourt's evidence [of increasing magnitude of fishtailing] was indicative of harsh acceleration by the driver of the vehicle*'. The attempted reconciliation of the two statements at CA [149] to CA [151] is, it is submitted,
40 unconvincing. The respondent referred to both the competing pieces of evidence at RS [34] and [35], apparently without appreciating the question they raised.

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5. During the evidence of Mr Keramidas (T398) he was read the first five sentences of paragraph 15 of the respondent's statement (Exhibit E):

> '*It wasn't a large movement in our car but I saw Madeline (sic) start to correct the steering. I didn't think the movement in the car was enough to require much correction but I saw Madeline turn the steering wheel too much to the right. The car started to over correct. I heard Madeline say "oh shit". I saw Madeline start to turn the steering wheel to the left again. I think we had passed the on coming car by that time. I looked* ... ['had time to look' not read] *at the speedo and it was pointing to '70".*

6. The evidence continued:

> '*Q. Well that would mean, would it not, that since they passed the on coming car which finished up ... further to the west ...? A. Yes.*
> *Q. That what has been spoken about there is virtually the start of the yaw? A. Correct.*'

7. The significance of that evidence is that the next sentence in the passage from the respondent's statement reproduced above is:

> '*I looked down at her feet and could see Madeline lift off the accelerator at first then press it straight to the floor quite quickly.*'

8. The only inference properly to be drawn is that the '*harsh acceleration*' on which the respondent relies to negative a finding that the vehicle was travelling over 70kph – and so to overcome Ms Fancourt's evidence – did not occur (if it occurred at all) until about the start of the yaw, 91m from the apex of the bend – see the diagram at CA [23] – and would not have affected the speed of the car until then. This must destroy Mr Keramidas's evidence, relied on by the Trial Judge and the Court of Appeal, that the reason a speed of 70kph at the yaw meant 70kph also where control was lost was because '*harsh acceleration*' between the two points prevented the decrease in speed which would be expected from friction during the fishtailing (T319.9-319.24).

9. Geography of the bend, Ms Fancourt and Exhibit 9: The respondent's multi-layered attack on the finding that the initial slip occurred some distance west of the irregularity on the road surface (RS [19]-[26], [72(a)], [73]-[81] and [12]) demonstrates the crucial significance of this finding, and the need to overcome this rejection of his case by the Trial Judge and the Court of Appeal (AS [52], [15]-[17]). Even if the yaw marks are treated as '*incontrovertible fact*' (RS [74]) it is only the presence and position of those marks themselves that can be so treated: the accident reconstruction opinion of Mr Keramidas as to what those marks may or may not prove (RS [75]-[81]) is not – nor does it seem likely such opinion could in principle ever be – '*incontrovertible fact*'.

10. In this case, *(i)* Mr Johnston did not agree with Mr Keramidas' opinion (AB1 129.40-132.45) (raised to sanctity by the respondent's assertion at RS [80]); *(ii)* Ms Fancourt, with her familiarity with the bend where the accident occurred, said when she first observed the vehicle it was out of control about halfway around the bend (AS [22]);

(iii) Ms Fancourt was not challenged in cross-examination on this testimony (AB1 66.30-67.30); and *(iv)* the irregularity on the road was about 48m from the start of the bend, only 4.5m less than three quarters of the way around the bend: the bend was 70m (AS [12]), so quarter way around the bend was 17.5m from the start, half way was 35m, three quarters was 52.5m. Furthermore, that was the way in which the question to Ms Fancourt about where she first saw the vehicle was framed.

11. The respondent in RS [80] (also RS [73]) suggests that its assertion that the yaw marks meant that it was '*impossible*' for the slip to occur at or before apex of the bend was established by an exchange between Mr Keramidas and the Trial Judge (AB1 230.5). But that exchange does not set out a proposition from the Trial Judge: rather, it shows her Honour seeking to test the steps in Mr Keramidas' opinion, and she made it plain, after that topic had been related to the evidence of Ms Fancourt (AB1 230.50-233.50), that '*it will be a matter for submissions as to how that is factored into the various scenarios that are presented for consideration*' (AB1 233.48-50) (noting also that Mr Johnston's contrary opinion was also then presented to Mr Keramidas (AB1 234.10-236.30)).

12. *Jones v Dunkel*: The respondent contends that because his unsworn signed police statement was in evidence he was '*relieved*' of '*any expectation*' that he '*might give evidence*', and so there was no room for any inferences from his failure to give evidence as that failure was '*fully*' explained (RS [31]).

13. In *Jones v Dunkel* (1959) 101 CLR 298 the plaintiff tendered into evidence the signed statement of the defendant obtained from the defendant by a police officer and the defendant did not give evidence (p.316, per Windeyer J). It was on those facts (identical to those here) that Windeyer J said that the direction to the jury should have included reference to fact that the statement was unsworn and as the defendant was not called there was no opportunity of testing it by cross-examination (p.316). Windeyer J, after referring (pp.320 and 321) to the inference that is available, makes specific comment that it is available also where a witness is not called (p.321). The inference is available, therefore, not only by reference to the failure to call a witness to put a version of events before the Court, but also by reference to failure to allow that version to be tested by cross-examination.

14. The fact that the respondent's statement was tendered by the appellant does not preclude an inference being drawn. As has been pointed out in the last paragraph, those were the very facts in *Jones v Dunkel* (see 316.4, per Windeyer J) and the inference was drawn in that case. The assertion (RS [31]) that the fact that the statement was tendered by the appellant leaves '*no room for any inference as the decision not to call the respondent is fully* explained' does not deal with the true question: were there relevant facts known to the respondent and not to the appellant which could have been tested if the respondent had given evidence?

15. The answer must be in the affirmative. The respondent must have known: *(i)* was he aware of the appellant's experience, if any, of driving on wet roads?; *(ii)* did he ask her about such experience?; *(iii)* was he aware of the danger of driving on wet roads?; *(iv)* did he give her any advice or instruction as to what special precautions ought be taken on wet roads?; *(v)* how often had he driven around the accident bend in wet or dry conditions? over what period of time?; *(vi)* did he agree with Ms Fancourt that the

bend was 'deceptive'? If 'yes' did he warn the appellant?; *(vii)* what was his state of sobriety when he first went with the appellant to Firefly?; *(viii)* did he ask the appellant to drive on that occasion and if so, why?; *(ix)* how much sleep did he have after staying up with Ms Taylor to watch the sunrise? No doubt many other questions could also have been asked as to the truth or falsity of the factual assertions which were in his statement. It is submitted that the respondent's submission (RS [32]) that the failure to call the respondent did not leave evidential gaps in the respondent's case is clearly wrong.

16. Further, Windeyer J discussed the fact finding consequences of the failure to call the defendant in that case (pp.319ff): relevantly they include that the facts proved by the appellant are uncontradicted (p.319), an acquiescence in the primary facts (p.319) and eloquent support for an inference from the primary facts (p.319) (compare RS [32]). Similarly, Kitto J in *Jones v Dunkel* (p.308) said that '*any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence.*'

17. The respondent's statement: The respondent contends, as if by way of principle, that once the respondent's statement (Exhibit E) was admitted into evidence without limitation on its use or effect, the '*evidential value*' of the various matters contained in it was, in substance, all equal (RS [8] and [9]). Whether or not s.136 of the *Evidence Act* 1995 (NSW) (or the common law) could or should be given such a potentially troublesome meaning, cases such as *Blatch v Archer* (1774) 98 ER 969, 970, *De Gioia v Darling Island Stevedoring & Lighterage Co Ltd* (1941) 42 SR(NSW) 1, 4, *Hampton Court Ltd v Crooks* (1957) 97 CLR 367, 371 demonstrate that not all materials admitted into evidence will be accorded equal evidential weight, and one of the important factors in weighing evidence will be the power of the party to produce it. The respondent's statement (Exhibit E) was self-serving. The respondent emphasises the statement's assertion that '*as the car came out of the corner, the respondent felt "the back of the car move out very slightly to the right"*' (RS [8(p)]) (emphasis added). Curiously, the respondent's case was not that the slip was initiated coming out of the corner, but by the irregularities in the roadway just over two-thirds of the way around the bend. This is made plain by how the respondent sets out its case by reference to the opinion of Mr Keramidas (RS [77]).

18. This demonstrates a curious paradox in the way in which the respondent seeks to treat the evidence and the fact finding process in the case: the tested oral evidence of Ms Fancourt that the vehicle was out of control about half way around the bend (which was not challenged by Mr Stitt QC in his cross-examination) is to be accorded less weight than the unsworn statement of the respondent that the slip occurred as the vehicle came out of the corner, notwithstanding that the respondent's case (based on expert opinion) had the slip being initiated by the irregularities less than three quarters of the way around the bend.

19. The 28 matters set out in RS [8] do not lead to the conclusion at RS [9], not least because the statement of the respondent was not the only evidence relevant to the conclusion stated in RS [9]. Further, even if all the matters were accorded the same evidential weight – and no other evidence were considered – the conclusion stated in

RS [9] is not correct: none of the 28 evidential matters concern the respondent's decision (if he made one, or thought of it) to give no warning of the conditions leading into the corner and in the corner (including speed, the nature of the corner and the condition of the road). It can be no answer that things were happening over a short period of time because that is the dynamic nature of supervising a learner driver in a moving vehicle.

20. Ms Taylor's statement: A similar contention said to flow from the absence of limitation or restriction of use is made in respect of Ms Taylor's statement (Exhibit F) (RS [16]). Even if it were appropriate to treat that statement as giving rise only to the seven short passages set out at (RS [17]), there is no basis to conclude on this material that a learner driver requiring instruction to watch her speed (RS [17(c)]) and to pull up for stopping at intersections (RS [17(d)]) '*was a competent learner driver capable of driving and negotiating the subject bend*' (RS [18]). It is important that Ms Taylor was 16 years old at the time of the accident and there was no evidence as to whether she was licensed, or had any driving knowledge.

21. Contributory negligence: The respondent's claim for 100 per cent contributory negligence could be described as '*expansive*' given that if liability is found it arises because the respondent allowed the appellant to enter the bend too fast, and that resulted in the slip, from which the appellant learner driver did not have the skills to recover. Section 5R(2) of the *Civil Liability Act* 2002 (NSW) makes it plain that the test is subjective in the appropriate case, as it must be, otherwise the five year old child who runs on to the road and is struck by an oncoming vehicle will be judged as an adult. In fact, it is clear that the appellant was blameless in this case.

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