ALLEN v CHADWICK (A14/2015)

Court appealed from: Full Court, Supreme Court of South Australia [2014] SASCFC 100

Date of judgment: 16 September 2014

Date special leave granted: 19 June 2015

At around 2.00 am on 12 March 2007, the respondent (Chadwick) suffered serious spinal injuries resulting in paraplegia, in a car accident which occurred near Port Victoria on Yorke Peninsula. She was a rear-seat passenger in a vehicle driven by the appellant (Allen). Her seatbelt was not fastened and she was thrown from the vehicle. It was not disputed that at the time of the accident, Allen had a blood alcohol reading of 0.229. The trial judge (Judge Tilmouth) declined to make a reduction of 50% in accordance with s 47 of the *Civil Liability Act* 1936 (SA) ('the CLA'), holding that no person in Chadwick's situation could reasonably be expected to have had any practical choice other than to get into the vehicle with an intoxicated driver and that the exception in s 47(2)(b) was thus enlivened. His Honour did, however, reduce Chadwick's damages by 25% because of her failure to wear a seatbelt, in accordance with s 49 of the CLA.

Allen appealed to the Full Supreme Court (Kourakis CJ (dissenting in part), Gray and Nicholson JJ) against the judge's failure to reduce Chadwick's damages pursuant to s 47. Chadwick cross-appealed, with respect to the reduction of damages pursuant to s 49. Both parties challenged aspects of the judge's assessment of damages.

With respect to s 47, the majority (Gray and Nicholson JJ) noted that the onus fell on Chadwick to show that she could not reasonably be expected to have avoided the risk of the driver's intoxication. The exception in s 47(2)(b) called for the Court to assess whether a reasonable person in Chadwick's circumstances would have avoided the risk in question. This assessment had to be made without the benefit of hindsight. Their Honours found that the following considerations were relevant in this case: Chadwick was faced with an unexpected and confusing situation; she was aged 21 years and pregnant; and Allen, her de facto partner, was some seven years older. The Court noted that she was in an unlit rural area at 2.00 am and that when she got in the car, she asked to drive, but Allen responded aggressively, directing her to "get in the fucking car". He had created a situation in which Chadwick had to make a choice. On the one hand, she could stay out of the car and attempt to locate and walk to the hotel where they were staying, or she could get into the car and run the risk associated with Allen's intoxication. In assessing whether Chadwick could not reasonably be expected to have avoided the risk, she was not to be judged against the standard of a perfectly rational decision maker, equipped with the relevant statistical evidence and capable of accurately assessing and weighing the probability of encountering harm attendant on two particular courses of action. It was to be expected that any young woman in an unfamiliar, rural area would perceive a significant risk to her personal safety in walking alone along an unlit road at 2.00 am. The majority held that Chadwick satisfied the onus and the statutory exception was established.

Kourakis CJ noted that s 47 of the CLA is expressed in terms which the law has long understood to impose an objective, normative standard. Applying that standard, he concluded that the reasonable person would not have impulsively jumped into a vehicle driven by someone whom she knew to have drunk excessively during the day and to have acted recklessly in taking control of the car. The reasonable person would have refused to get into the car and would have walked towards the hotel.

With respect to s 49, the Full Court noted that the *Road Traffic Act* 1961 (SA) (the RTA) required compliance with Rule 265 of the *Australian Road Rules* (SA). A person does not offend against that Rule if the failure to wear a seatbelt is caused by the act of a stranger. Chadwick contended that Allen engaged in an aggressive and uncontrolled manner of driving, that she made repeated attempts to fasten her seatbelt and, further, that she attempted to move to a seat with a functioning seatbelt, with the accident intervening before she could do so. Thus Allen's manner of driving was the cause of the failure of the seatbelt to extend, both as a consequence of establishing a countervailing gravitational force and by causing Chadwick to panic. The Court noted that to conclude that, in those circumstances, a passenger should be sufficiently calm and collected to wait for an opportunity to fasten the seatbelt, was wholly unrealistic. This was not a case where Chadwick simply refused, through laziness, inadvertence, carelessness or simple obduracy, to wear the seatbelt, which were the paradigm cases embraced by s 49 of the CLA. The Court was satisfied that Chadwick had made out the act of a stranger exception to s 49 on the balance of probabilities.

The grounds of appeal include:

- The majority of the Full Court erred in considering that the statutory exception to the 50 per cent reduction in damages was analogous to or accommodated the common law doctrines of 'alternative danger' and 'agony of the moment' and erred in considering there was any relevant alternative danger or emergency justifying agony of the moment.