HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, NETTLE AND EDELMAN JJ

Matter No B61/2018

LIEN-YANG LEE	APPELLANT
AND	
CHIN-FU LEE & ORS	RESPONDENTS

Matter No B62/2018

CHAO-LING HSU	APPELLANT
AND	
RACQ INSURANCE LIMITED	RESPONDENT

Matter No B63/2018

CHIN-FU LEE	APPELLANT
AND	
RACQ INSURANCE LIMITED	RESPONDENT

Lee v Lee
Hsu v RACQ Insurance Limited
Lee v RACQ Insurance Limited
[2019] HCA 28
4 September 2019
B61/2018, B62/2018 & B63/2018

ORDER

Matter No B61/2018

1. The appeal is allowed.

2. *The third respondent is to pay the appellant's costs.*

3. *The order of the Court of Appeal of the Supreme Court of Queensland made on 1 June 2018 is set aside and in lieu thereof it is ordered:*

    (a) *the appeal to the Court of Appeal is allowed and the orders of the trial judge made on 23 March 2017 are set aside;*

    (b) *judgment for the appellant on his claim against the third respondent in the sum of $3,350,000.00 (clear of rehabilitation expenses by the third respondent pursuant to the* Motor Accident Insurance Act 1994 *(Qld)), with the date of judgment to take effect pursuant to r 660(3) of the* Uniform Civil Procedure Rules 1999 *(Qld) on 23 March 2017;*

    (c) *the counterclaim of the third respondent against the appellant is dismissed;*

    (d) *the third respondent pay the appellant's costs of and incidental to his claim on the indemnity basis; and*

    (e) *the third respondent pay the appellant's costs of and incidental to the third respondent's counterclaim and of the appeal to the Court of Appeal on the standard basis.*

Matter No B62/2018

1. *The appeal is allowed with costs.*

2. *The order of the Court of Appeal of the Supreme Court of Queensland made on 1 June 2018 is set aside and in lieu thereof it is ordered:*

    (a) *the appeal to the Court of Appeal is allowed;*

    (b) *the orders of the trial judge dated 23 March 2017 are set aside and in lieu thereof judgment for the appellant on the respondent's counterclaim against the appellant;*

    (c) *the respondent pay the appellant's costs of the counterclaim on the standard basis; and*

(d) the respondent pay the appellant's costs of the appeal to the Court of Appeal on the standard basis.

Matter No B63/2018

1. The appeal is allowed with costs.

2. The order of the Court of Appeal of the Supreme Court of Queensland made on 1 June 2018 is set aside and in lieu thereof it is ordered:

(a) the appeal to the Court of Appeal is allowed;

(b) the orders of the trial judge dated 23 March 2017 are set aside and in lieu thereof judgment for the appellant on the respondent's counterclaim against the appellant;

(c) the respondent pay the appellant's costs of the counterclaim on the standard basis; and

(d) the respondent pay the appellant's costs of the appeal to the Court of Appeal on the standard basis.

On appeal from the Supreme Court of Queensland

Representation

G W Diehm QC with M M Callaghan for the appellant in B61/2018 (instructed by Slater & Gordon Lawyers)

J M N Hewson for the first respondent in B61/2018 and the appellant in B63/2018 (instructed by VBR Lawyers)

M Grant-Taylor QC with J M N Hewson for the second respondent in B61/2018 and the appellant in B62/2018 (instructed by Littles Lawyers)

R J Douglas QC with B F Charrington for the third respondent in B61/2018 and the respondent in B62/2018 and B63/2018 (instructed by Gilchrist Connell Lawyers)

CATCHWORDS

Lee v Lee
Hsu v RACQ Insurance Limited
Lee v RACQ Insurance Limited

Insurance law – Motor vehicles – Personal injury – Where appellant injured in motor vehicle collision – Where appellant gave evidence father driving vehicle at time of collision – Where appellant alleged injuries caused by negligence of father – Where appellant's blood located on driver's airbag – Where expert evidence relating to possible source of blood – Where expert evidence relating to seatbelt and airbag design – Where trial judge concluded appellant driving vehicle – Where Court of Appeal dismissed appeal – Whether trial judge's findings glaringly improbable or contrary to compelling inferences.

Appeal – Rehearing – Where trial judge drew inferences and made findings of fact based on lay and expert evidence – Where Court of Appeal found inferences wrong in material respects – Whether Court of Appeal erred in failing to conclude trial judge misused advantage as trial judge – Whether Court of Appeal failed to conduct "real review" of evidence given and trial judge's reasons for judgment.

Words and phrases – "contrary to compelling inferences", "glaringly improbable", "real review", "trial judge's advantage".

1 KIEFEL CJ. The evidence relevant to the issue raised by these appeals is detailed in the reasons of Bell, Gageler, Nettle and Edelman JJ. It will be necessary for me to refer only to critical aspects of it. I agree with the orders proposed by their Honours for the reasons given, and wish only to add the following regarding the Court of Appeal's analysis of the evidence.

2 The appellant in the first appeal was seriously injured as a result of a collision between the motor vehicle in which he was travelling and another motor vehicle. The driver of his vehicle was at fault. The appellant claimed that his father was the driver. RACQ Insurance Limited ("the RACQ") defended the action on the basis that that claim was false and that the appellant himself had been the driver when the accident occurred.

3 Each of the parties sought to prove the factual scenario for which they contended by expert evidence of different kinds, from which inferences could be drawn. When considering the Court of Appeal's reasons, it is useful to bear in mind what fact a party has undertaken to prove, and to identify the evidence by which it seeks to prove it and the evidence by which the other party seeks to meet and deal with that case.

4 The reasons of the Court of Appeal commenced with a detailed review of the trial judge's findings. McMurdo JA was obliged to make a number of corrections to those findings. In relation to the trial judge's rejection of the evidence of the appellant and his mother, his Honour observed[1] that the statement that the appellant's evidence had been given through an interpreter was incorrect. His Honour did not consider that that error affected the trial judge's findings of credit, or the lack thereof. So much may be accepted. But the rejection of their evidence did not mean that the appellant was unable otherwise to prove his case or that the RACQ had succeeded in establishing that the appellant was the driver. Some of the other evidence, such as the medical evidence relating to the injuries suffered by the appellant, was neutral in the process of evaluation as was the fact that the father had not given evidence[2].

5 McMurdo JA made other, more important, corrections to the findings. One of these concerned the possibility, for which the RACQ had contended, that the appellant had been moved from the driver's seat to the passenger seat behind the driver's seat, where he was first observed by the driver of the other vehicle involved in the collision. That person arrived at the scene very shortly after the collision. McMurdo JA was strongly of the view that there would have been considerable practical difficulties for the father in relocating the appellant from the driver's seat within such a short period of time.

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1 *Lee v Lee* (2018) 84 MVR 316 ("*Lee*") at 340 [127].

2 *Lee* (2018) 84 MVR 316 at 342 [140], 343 [142].

6 These factors were sufficiently compelling for his Honour to state that, on the basis of the evidence to this point, he would have held that the appellant was not the driver[3]. His Honour may be understood to have meant that unless there was evidence which prevented that preliminary conclusion, the appellant's case was made out.

7 The evidence that his Honour went on to consider was the "DNA evidence". This was evidence as to the presence of the appellant's blood on the driver's airbag which had been led by the RACQ through its medical witness, Dr Robertson. The evidence, McMurdo JA observed, had been most influential in the trial judge's reasoning[4].

8 In McMurdo JA's view two inferences were available from that evidence[5] and one was more probable than the other. It was quite probable that the blood came to be on the driver's airbag because the appellant had been in the driver's seat, due to contact between the appellant's bleeding facial and teeth injuries and the airbag. The alternative hypothesis, that the appellant's father had transferred blood from the appellant's injuries to the airbag via his hands, was less probable. His Honour concluded that the trial judge's preference for the first hypothesis could not be said to be wrong[6]. The effect of its acceptance was to weaken the appellant's case[7].

9 Given the finding made by his Honour that it was improbable that the father could have moved the appellant from the driver's seat to the rear seat in the time available, it is not obvious that the DNA evidence compelled a conclusion that the appellant was present in the driver's seat. If the DNA evidence was the only other evidence to be taken into account, it was not a matter of choosing which of the two hypotheses it raised was the more probable in isolation from that earlier finding. Each hypothesis would have to be considered in light of the level of certainty which attended that finding.

10 There were other matters which it was necessary to consider but which were not taken into account. As the joint reasons explain, it is by this means that the Court of Appeal fell into error. These matters affected the weight which

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3 *Lee* (2018) 84 MVR 316 at 343 [143].

4 *Lee* (2018) 84 MVR 316 at 343 [144].

5 *Lee* (2018) 84 MVR 316 at 344 [150].

6 *Lee* (2018) 84 MVR 316 at 344 [152].

7 *Lee* (2018) 84 MVR 316 at 344 [151].

could be given to the DNA evidence and effectively forestalled any consideration of the two hypotheses.

11 In the first place, the DNA evidence was based upon an erroneous assumption. The evidence given by Dr Robertson about the presence of the appellant's blood on the driver's airbag and surrounds was based upon an assumption that the appellant was unrestrained by the driver's seatbelt at the time of the collision. In the second important correction to the trial judge's findings, but consistently with the cases of each of the parties, McMurdo JA had found that it was more probable than not that the driver was wearing the seatbelt provided[8].

12 This finding necessitated consideration of the evidence of Dr Grigg, the engineer called by the appellant. Dr Grigg's evidence was unchallenged. It was to the effect that a driver restrained by the type of seatbelt provided would have been immediately pulled back into the driver's seat upon impact due to the operation of the seatbelt pre-tensioners. So understood, had the appellant been the driver, the blood on the airbag could not be accounted for by direct contact between the appellant's face and the airbag. It must have come to be there by other means.

13 The finding concerning the use of the seatbelt and Dr Grigg's evidence of the seatbelt's operation rendered the DNA evidence of little, if any, value. The RACQ could not make out its case that the appellant was the driver. Nothing remained to prevent the Court of Appeal acting upon the foreshadowed conclusion that the appellant's case was made out.

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8 *Lee* (2018) 84 MVR 316 at 341 [134].

14 BELL, GAGELER, NETTLE AND EDELMAN JJ. These three appeals arise from a motor vehicle collision in which the appellant in the first appeal was rendered an incomplete tetraplegic. At the time, the appellant in the first appeal, then a 17-year-old youth, was travelling in a Toyota Tarago ("the Toyota") with his mother, Chao-Ling Hsu (the appellant in the second appeal), his father, Chin-Fu Lee (the appellant in the third appeal), and his two younger brothers, James and Adam. The appeals are brought on the same grounds and the interests of the three appellants are coincident. For convenience, the appellant in the first appeal will be referred to as "the appellant" and the appellants in the second and third appeals will be referred to as "the mother" and "the father" respectively.

15 The appellant brought proceedings in the Supreme Court of Queensland (Boddice J) claiming damages for negligence against the father, the mother and RACQ Insurance Limited ("the RACQ"), the compulsory third-party insurer of the Toyota. The case pleaded against the father was that he was the driver of the Toyota. The case pleaded against the mother was wholly defensive: if, as asserted by the RACQ, but denied by the appellant, the appellant was driving the Toyota, the father and the mother owed the appellant a duty of care which was breached in all the circumstances.

16 The collision was caused by the negligence of the driver of the Toyota: as it rounded a bend on a relatively narrow, unmarked bitumen road on North Stradbroke Island, it encountered a Nissan Patrol ("the Nissan") travelling in the opposite direction. The driver of the Nissan, David Hannan, swerved to the left and braked but the Toyota swerved to the right, colliding with the Nissan head-on, on the Nissan's side of the road. The sole issue at the trial was the identity of the driver of the Toyota.

17 The collision occurred at around 1.30 pm on 25 September 2013. In its aftermath, Mr Hannan was concerned about the risk of fire. He got out of the Nissan and carried his dog to a point about 30 metres from the site of the collision. He then returned to the vehicles. He estimated that this took him between 30 and 90 seconds. At this time there was no-one in the driver's seat of the Toyota. He recalled that there were two adults and three children in the vehicle. The father was standing in the area between the first and second row of seats. He was trying to help one of the children. Mr Hannan opened the sliding door of the Toyota and the father passed the first child to him. Mr Hannan walked some metres and placed the child on the ground. The father repeated the manoeuvre with the other children although Mr Hannan could not remember whether he assisted with two or three children. While Mr Hannan was unable to state who had been driving the Toyota, in an earlier statement he said that there were three younger male children in the back seat and from what he saw he believed that the father must have been driving at the time of the collision.

18 Jeffery Harvey was among the police officers who attended the scene while the occupants of the Toyota were still present. He spoke with a number of people including Mr Hannan. He also spoke with the father, making use of a civilian at the scene who acted as an interpreter. The appellant and his family came from Taiwan in 2008. Mr Harvey recalled that he needed an interpreter to speak with all of them. He believed that the father identified himself as the driver of the Toyota. Mr Harvey commenced making notes at 2.22 pm. He recorded the positions of the occupants of the Toyota at the time of the collision: the father in the driver's seat, the mother in the front passenger seat, the appellant behind the driver, James behind the mother, and Adam in the middle.

19 Senior Constable Pepper, the principal investigating officer, attended the scene later that afternoon. By the time he arrived, none of the persons involved in the collision remained at the scene. Senior Constable Pepper does not appear to have been informed of the account obtained by Mr Harvey. Senior Constable Pepper examined the Toyota and noted, among other things, that there was apparent bloodstaining on the driver's airbag ("the airbag") and that the driver's seatbelt was buckled. He believed that the driver's seat was reclined slightly. When he returned from the scene, Senior Constable Pepper spoke to a volunteer fireman who attended the collision. Senior Constable Pepper was given to understand that the occupants of the Toyota had not been cooperative in identifying the driver.

20 A "forensic crash unit incident summary sheet" completed by Senior Constable Pepper was in evidence. This recorded that the driver of the Toyota was unknown as the occupants were refusing to state who was driving it, but that inquiries indicated that it may have been an unlicensed 16-year-old male. It was asserted that the driver was not wearing a seatbelt and that the seatbelt appeared to have been clipped in place to eliminate the warning beep. It was also noted that on 8 October 2013 the appellant was spoken to in hospital by police and that he did not recall much about the collision but said that his father was the driver.

21 Senior Constable Pepper arranged for a sample of bloodstaining from the interior of the Toyota to be taken for DNA testing. Apart from the bloodstains on the airbag there were also bloodstains in the well between the driver's seat and the passenger seat behind it. Only the bloodstaining on the airbag was tested. Samples were taken from three locations on the airbag using the same swab. The appellant and the father voluntarily supplied samples of their DNA. The results of testing established that the blood on the airbag came from the appellant.

22 The RACQ counterclaimed, in deceit, against the appellant, the mother and the father for the recovery of payments made to each upon the representation, pleaded as false, that the father was the driver of the Toyota. The RACQ's case

depended upon establishing that the bloodstains on the airbag were the result of direct contact with the appellant's face, which was bleeding from injuries sustained in the collision. On this case, in the immediate aftermath of the collision the father, who was seated behind the driver, lowered the driver's seat and pulled the appellant back into the passenger compartment, seating him in the seat behind the driver.

23 The appellant and his mother each gave evidence that the father was driving. Their accounts of the positions occupied by each occupant of the Toyota accorded with the account Mr Harvey recorded at the scene. On the appellant's case, his blood must have been transferred to the airbag by a third person. Photographs taken at the scene showed the father with blood on his hands. A doctor who rendered assistance at the scene satisfied himself that the father did not have any injuries although he noticed that the father had bloodstains on the palms of both hands. The mother, who was also badly injured, was trapped inside the Toyota. The appellant argued that it was likely that the father wiped his, the appellant's, blood from his hands on the deflated airbag in the course of attempting to assist the mother.

24 The father did not give evidence. A statement that he made to an insurance investigator was tendered in the RACQ's case. The statement was taken with the assistance of an interpreter. In the statement the father said that he was driving the Toyota. He said that when he saw the Nissan coming towards him he had tried to steer to the left but that he had trouble with the steering. He said that, after the collision, he tried to get out of the vehicle but he could not remove his seatbelt. He managed to move his seat backwards which enabled him to get out of the seat and the seatbelt. He said that the blood on the driver's seat was not the appellant's blood and "[t]hat would be my blood as I was bleeding from my hands". The evidence did not suggest that the father had suffered any injury to his hands. Nor did the evidence suggest that there was any difficulty with the mechanism of the Toyota's steering.

25 The trial judge formed an adverse impression of the credibility of the appellant and the mother. His Honour recorded that he had made allowance for the fact that their evidence was given with the assistance of an interpreter. In the case of the appellant's evidence, his Honour was mistaken; the appellant gave evidence in English without the assistance of an interpreter. His Honour rejected the evidence of each of them and found that the appellant was driving the Toyota at the time of the collision. The appellant's claim was dismissed and judgment was given in favour of the RACQ on its counterclaim. The appellant and his parents were ordered to pay the RACQ the sum of $439,840.96 and the parents were ordered to pay the RACQ a further sum of $234,428.41.

26 The appellant, the mother and the father appealed to the Court of Appeal of the Supreme Court of Queensland (Fraser, Philippides and McMurdo JJA). The leading judgment in the Court of Appeal was given by McMurdo JA. McMurdo JA identified critical errors in the trial judge's findings, concluding that, save for the inference to be drawn from the DNA evidence, it was "much more likely" that the appellant was not the driver of the Toyota[9]. However, the DNA evidence, in McMurdo JA's analysis, substantially weakened the appellant's case[10]. Nonetheless, his Honour characterised the case as "very closely balanced". At this juncture McMurdo JA stated that the Court of Appeal's task was to re-hear the case "but not without regard to the decision of the trial judge". His Honour concluded that it had not been shown that the trial judge had misused his advantage in seeing and hearing the appellant and his mother give evidence, nor was the trial judge's decision "glaringly improbable" or "contrary to compelling inferences"[11]. The appeals were dismissed with costs.

27 On 16 November 2018, Bell, Keane and Nettle JJ granted the appellant and his father and mother special leave to appeal. The appeals are brought on two grounds. The first ground challenges the adequacy of the Court of Appeal's reasons. It is contended that on the determinative issue, being the inferences to be drawn from the DNA evidence, McMurdo JA failed to engage with a critical argument based on unchallenged expert evidence on which the appellant relied. The second ground challenges the Court of Appeal's restraint in the face of the trial judge's "advantage" in circumstances in which it is argued that the finding that the appellant was the driver of the vehicle was contrary to the compelling inferences from uncontroverted evidence.

28 The complaint as to the adequacy of the Court of Appeal's analysis of the inferences to be drawn from the DNA evidence is subsumed by the second ground of appeal, which, for the reasons to be given, must be upheld. A number of factual controversies were resolved by the Court of Appeal and are not in issue in these appeals. It suffices for present purposes to refer to the expert evidence that is the subject of the first ground of appeal.

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9 *Lee v Lee* (2018) 84 MVR 316 at 343 [143].

10 *Lee v Lee* (2018) 84 MVR 316 at 344 [151].

11 *Lee v Lee* (2018) 84 MVR 316 at 344 [152].

The expert evidence

Dr Grigg's evidence

29 Dr Grigg, a mechanical engineer with extensive experience in the investigation of motor vehicle accidents, was called in the appellant's case. Two reports prepared by Dr Grigg were in evidence. In the second report, Dr Grigg described the operation of the airbag and the seatbelts fitted to the front seats in a Toyota Tarago of the same model as the Toyota. Supplemental restraint system (SRS) airbags of the type fitted to the Toyota are deployed when the inflator, a solid chemical gas generator, receives a signal from crash sensors. The sensors detect sudden deceleration and an electrical signal from the diagnostic module causes the gas generator to fire in an explosive manner producing gas, which deploys the airbag. Inflation typically takes about 0.04 seconds and deflation occurs about 0.2 seconds after impact. The ordinary rate of deflation is typically less than 0.2 seconds. The airbags are made from a synthetic material with some form of protective coating, which protects the fabric from scorching from the heat generated during deployment.

30 The front seatbelts in the Toyota were equipped with pre-tensioners, which are activated by the airbag control module. The pre-tensioners fire when the airbag is deployed. As Dr Grigg explained in his oral evidence, when triggered, the pre-tensioners produce a powerful force pulling the wearer back against the seat. This may be contrasted with conventional, inertia seatbelts that serve merely to prevent forward movement beyond a fixed point.

31 The airbag is housed in the steering-wheel boss. The plastic cover of the boss is designed to break into upper and lower flaps when the airbag is deployed. The lower Y-shaped plastic flap has a tendency to spring back to its original position after deployment pressing on the deflated airbag. When the airbag is inflated the plastic flaps are on the windscreen side of the airbag.

32 The bloodstaining was predominantly on the windscreen side of the airbag (when inflated) on both the left and the right side. There was bloodstaining on the underside of the airbag beneath the lower plastic flap. There were no bloodstains on the central front portion of the airbag, which, when inflated, faced the driver.

Dr Robertson's evidence

33 Dr Robertson, whose speciality is in forensic medicine and pathology, was retained by the RACQ to provide an expert opinion on the likely source of the bloodstaining on the airbag. Dr Robertson considered that the appearance of the

bloodstaining was consistent with close contact between the airbag and a person with heavily bleeding facial injuries. The staining was not consistent with the deposit of blood by dripping or splatter. Dr Robertson did not examine the airbag. Her opinion was based on photographs of the airbag taken by the police. She could not exclude that the blood may have been deposited by some means other than direct contact with the bleeding source but she considered that the absence of impressions of fingerprints or handprints made the hypothesis of transfer by a third party less likely.

34 Dr Robertson acknowledged that bloodstain pattern analysis is a "notoriously inexact science", one in which there is considerable scope for subjective judgment and a "reasonably high error rate in any assessment". She said that she had taken into account the fact that the presence of a large bloodstain on the left side of the collapsed airbag was consistent with the appellant's dental injuries, which were to the left side of his mouth.

35 Dr Robertson was unaware at the time she formed her opinion that the bloodstaining on the left of the airbag was predominantly on the windscreen side when it was deployed. Her attention was drawn to this circumstance in cross-examination and she maintained her opinion, stating that she had "not discounted that there could have been even quite small movement of the face following initial contact with the airbag".

36 Dr Robertson had not previously examined blood patterns on an airbag and she had no knowledge of how airbags are deployed. She accepted that blood on synthetic material such as the airbag material can spread before it soaks in. Nonetheless, she said that she expected that some trace, such as a handprint, would be visible had the blood been transferred by an intermediary. The appearance of the bloodstaining, in her view, made it extremely unlikely that it was transferred from a person's hand.

Dr Hallam's evidence

37 Dr Hallam, a DNA forensic biology consultant, explained that, because of the high concentration of DNA in blood, it was possible, if the appellant's blood had been transferred to the airbag by a third person, that only the appellant's DNA would be detected from the sample. Dr Hallam considered it was possible that the blood could have been transferred to the airbag by an intermediary.

The trial judge's analysis

38 The trial judge described the appellant and the mother as evasive in giving evidence. The appellant had been "particularly guarded" in his responses.

His Honour considered the mother's account, that the father got out of the Toyota through the driver's door immediately after the collision, as inherently improbable given that the seatbelt was locked in position after the collision[12]. As will appear, this conclusion appears to be at odds with his Honour's finding that the driver was not wearing the seatbelt.

39 His Honour found that Mr Hannan's evidence was the most reliable account of the collision. A critical consideration in assessing the RACQ's case was how the appellant in his paralysed state could have been moved from the driver's seat to the rear passenger seat in the brief interval before Mr Hannan arrived. The trial judge reasoned that, if the father was able to extricate himself from the driver's seat in no more than 90 seconds, there was no reason to find that he could not have removed the appellant into the back seat in the same period of time[13].

40 The trial judge found, contrary to the case put by each party, that the driver had not been wearing a seatbelt. The conclusion took into account that the seatbelt was in the locked position after the collision. His Honour thought it likely that the driver had buckled it to disengage the alarm[14]. The analysis took into account acceptance of the opinion of a medical expert, Dr Weidmann, who considered that it was more likely that the appellant's spinal injury would have been sustained were he the driver and had he not been wearing a seatbelt.

41 The trial judge considered that Dr Robertson's evidence was highly persuasive as to the probable explanation for the presence of the appellant's blood on the airbag. Dr Robertson's opinion, that the appellant's face may have moved after deployment of the airbag, provided a reasoned, rational explanation for the fact that the bloodstaining was heaviest towards the underside of the airbag[15]. Given the finding that the driver was not wearing the seatbelt, it was unnecessary for his Honour to consider the likelihood of this explanation being correct if the appellant were held against the driver's seat by the seatbelt. His Honour rejected as implausible the appellant's case that the appellant's blood on the father's hands might have been transferred to the airbag. Had the father been minded to wipe

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12 *Lee v Lee* (2017) Aust Torts Reports ¶82-328 at 64,157 [194] per Boddice J.

13 *Lee v Lee* (2017) Aust Torts Reports ¶82-328 at 64,159 [212] per Boddice J.

14 *Lee v Lee* (2017) Aust Torts Reports ¶82-328 at 64,160 [217] per Boddice J.

15 *Lee v Lee* (2017) Aust Torts Reports ¶82-328 at 64,158-64,159 [208]-[210] per Boddice J.

his hands, his Honour observed, he had "his own clothes or the seats of the Tarago" on which to do so[16].

The Court of Appeal

42 McMurdo JA recognised that the trial judge's recollection of the appellant's evidence as having been given through an interpreter was mistaken. However, his Honour considered that that mistake did not mean that the trial judge's credibility finding had not been justifiably influenced by the way the appellant's evidence was given. McMurdo JA did not consider that the appellant's criticisms of the trial judge's credibility finding justified disregarding the trial judge's impression of the credibility of the appellant and his mother[17]. At the commencement of McMurdo JA's analysis, he observed[18]:

> "This case was and is finely balanced and it requires an assessment of the probabilities of competing hypotheses where many things are unknown. The question in this court is whether the decision of the trial judge was erroneous, having regard to the advantages of a trial judge in deciding factual questions where the credibility of witnesses was critical to the outcome."

43 As will appear, his Honour returned at the conclusion of his analysis to the advantages of the trial judge in seeing and hearing the evidence of the appellant and his mother. This restraint in the face of the trial judge's advantage is the subject of the appellant's second ground. Notably, McMurdo JA did not in fact approach the determination on the footing that the credibility of witnesses was critical. As the first sentence of the above passage suggests, his Honour approached this as a circumstantial case.

44 For McMurdo JA, the critical circumstance was that, within 90 seconds of the collision, the paralysed appellant was seen by Mr Hannan in the second row of seats. Contrary to the trial judge's analysis, McMurdo JA considered that, in the aftermath of the collision, it would have been much more difficult for the father to remove the appellant from the driver's seat into the rear passenger seat than for the father to extricate himself from the driver's seat in no more than a

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16 *Lee v Lee* (2017) Aust Torts Reports ¶82-328 at 64,159 [211] per Boddice J.

17 *Lee v Lee* (2018) 84 MVR 316 at 340 [127].

18 *Lee v Lee* (2018) 84 MVR 316 at 319 [8], citing *Fox v Percy* (2003) 214 CLR 118 at 128 [29]; [2003] HCA 22.

minute or so[19]. The conclusion took into account a number of uncontroversial circumstances. First, the appellant was unable to move. Secondly, the Toyota had come to rest after the collision with its front end lower than its rear, such that the father would have had to pull the appellant from the driver's seat up a slight grade. Thirdly, the space between the driver's seat and the passenger's seat behind it would have been taken up by the driver's seat, if it had been fully reclined. Fourthly, the father would have had to pull the appellant back into the rear passenger seat while standing to the side of it in front of his other injured sons. Finally, there was the difficulty of lowering the driver's seat from the father's position in the rear passenger section, given that the lever was on the side of the driver's seat adjacent to the driver's door[20].

45 As McMurdo JA observed, the question of whether the driver was wearing the seatbelt was potentially decisive. This was because, if the appellant was the driver, and if he was not wearing the seatbelt, it was highly unlikely that his father would have moved him into the rear seat. The more obvious and the easier way to move the appellant would have been through the driver's door. It was not a realistic possibility that, in the stress of the situation, and in the short interval before Mr Hannan arrived, the father would have been so concerned to make it look as if the appellant had not been the driver, that he would not only remove the appellant from the driver's seat but then place the appellant into the rear passenger seat. McMurdo JA concluded that, if the driver was not wearing the seatbelt (as the trial judge found), there was "no real prospect that the driver was the appellant"[21].

46 McMurdo JA considered that there was, however, little support for an inference that the seatbelt was not worn by the driver. There was no direct evidence to support such a finding and it was no more than a theoretical possibility that the seatbelt had been buckled so that, when the driver sat on it, he would not be troubled by the alarm. It was likely that the driver was wearing the seatbelt. His Honour considered there were a number of possible explanations for why, assuming the seatbelt was worn by the driver, the photographs taken after the collision showed that it was buckled. These explanations included the

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19 *Lee v Lee* (2018) 84 MVR 316 at 341 [132].

20 *Lee v Lee* (2018) 84 MVR 316 at 341 [131]-[132].

21 *Lee v Lee* (2018) 84 MVR 316 at 341 [133].

possibility that it had been fastened by the paramedics to keep it out of the way as they endeavoured to remove the mother from the Toyota[22].

47 McMurdo JA agreed with the trial judge that the negligence of the driver of the Toyota did not indicate that the driver was inexperienced. As McMurdo JA observed, the reaction of the father may well have been to swerve to the right, given that most of his driving experience had been in Taiwan[23]. Contrary to the trial judge's finding, McMurdo JA concluded that the appellant's injuries were neutral in that they provided no clear indication of whether he was the driver or a passenger[24].

48 Notwithstanding that the father was a defendant, McMurdo JA said it was to be expected that he would have been called in the appellant's case had it been thought that his evidence would be helpful. The likelihood was that, if called, the father's evidence would have been consistent with his statement in asserting that he had been the driver. The inference to be drawn from the failure to call the father was that he would not have given evidence of wiping his bloodstained hands on the airbag. McMurdo JA observed that this did not require a finding that the father did not wipe his hands on the airbag; he may simply have not had a memory of doing so[25]. McMurdo JA's conclusion that, save for the DNA evidence, it was much more likely that the appellant was not the driver was principally based on the improbability of him having been pulled from the driver's seat and seated in the rear passenger seat where Mr Hannan first saw him[26].

49 McMurdo JA's analysis of the DNA evidence is critical to the appellant's challenge on each ground. His Honour noted that the appellant's facial and dental injuries were likely sources for the blood on the airbag[27]. His Honour recognised that no blood was deposited on the section of the airbag which would have been immediately in front of the driver as the bag inflated but he said that

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22 *Lee v Lee* (2018) 84 MVR 316 at 341-342 [134]-[135].

23 *Lee v Lee* (2018) 84 MVR 316 at 342-343 [141].

24 *Lee v Lee* (2018) 84 MVR 316 at 342 [136]-[140].

25 *Lee v Lee* (2018) 84 MVR 316 at 343 [142].

26 *Lee v Lee* (2018) 84 MVR 316 at 343 [143].

27 *Lee v Lee* (2018) 84 MVR 316 at 343 [145].

this fact "did not prove that the blood on the airbag had not come from the driver"[28]. His Honour said that Dr Robertson's explanation for how the blood could have come from the driver and yet be deposited on those other parts of the airbag could not be readily rejected. The inherent probability that if the appellant was the driver his blood would be on the airbag was not negated by the locations of the bloodstains on the airbag. His Honour reasoned that, if the appellant was in the driver's seat, the bleeding would have continued after the split second in which the airbag had been fully inflated. The hypothesis in favour of the RACQ's case was therefore "quite probable"[29]. The same, in his Honour's view, could not be said for the alternative hypothesis advanced by the appellant. While there were other possible explanations for the bloodstaining, McMurdo JA observed that "the question for the trial judge was which of the two hypotheses is the more probable"[30].

The adequacy of the Court of Appeal's reasons

50 In written and oral submissions in the Court of Appeal, the appellant argued that Dr Grigg's evidence of the operation of the airbag in conjunction with the seatbelt pre-tensioner was inconsistent with acceptance of Dr Robertson's opinion that it was likely that the blood was deposited on the airbag by direct contact with his face. Shortly put, his argument was that, had he been the driver, at the moment of impact he would have been pulled back against the seat and any contact between his face and the airbag before it deflated would have been fleeting and insufficient to explain the location and extent of the bloodstaining.

51 In the course of reviewing the evidence, McMurdo JA referred to Dr Grigg's evidence, noting that each of the front seatbelts was equipped with pre-tensioners, which, when fired, tighten and lock to prevent the person being thrown forward. His Honour did not return to Dr Grigg's evidence when considering which of the competing inferences concerning the DNA evidence was the correct inference.

52 The appellant's argument acknowledges that McMurdo JA's review of the evidence was in many respects comprehensive. Success on his first ground requires demonstration that Dr Grigg's evidence was of such moment that the Court of Appeal's failure to address it when dealing with the inferences to be

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28 *Lee v Lee* (2018) 84 MVR 316 at 343 [146].

29 *Lee v Lee* (2018) 84 MVR 316 at 344 [149].

30 *Lee v Lee* (2018) 84 MVR 316 at 344 [150].

drawn from the DNA evidence amounted to legal error. The appellant seeks to make good that contention by demonstrating that, when Dr Grigg's evidence of the operation of the airbag in conjunction with the seatbelt pre-tensioner is taken together with the other circumstances found by the Court of Appeal, the conclusion that the appellant was the driver of the Toyota is contrary to compelling inferences. Success on the first ground of appeal is thus dependent upon success on the second ground of appeal. For that reason, these appeals do not provide the occasion to consider the circumstances in which an appellate court's failure to deal with a particular line of reasoning might constitute legal error[31].

The Court of Appeal's treatment of the trial judge's advantage

53 The appellant's second ground fastens on McMurdo JA's concluding observation[32]:

> "This factually complex case was very closely balanced. The task of this Court is to rehear the case, but not without regard to the decision of the trial judge. Although there were limitations upon the use which the judge could make of the way in which the appellant and his mother gave their evidence, it is not demonstrated that the trial judge misused the advantage which he had from hearing and seeing this evidence as it was being given. The decision of the trial judge was neither 'glaringly improbable' nor 'contrary to compelling inferences'. The appellant's careful and sometimes forceful arguments do not demonstrate that the *decision* of the trial judge was erroneous." (emphasis added)

54 This passage is not without difficulty. True it is that McMurdo JA considered that the trial judge's mistaken recollection of the way in which the appellant gave evidence did not justify disregarding his Honour's assessment of his credibility, nor did allowance for the difficulty of assessing the mother's evidence, which was given through an interpreter, justify disregarding his Honour's assessment of her credibility[33]. The rejection of the appellant's and

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31 *Macks v Viscariello* (2017) 130 SASR 1 at 109 [523]; *DL v The Queen* (2018) 92 ALJR 636 at 643 [33] per Kiefel CJ, Keane and Edelman JJ, 661 [131] per Nettle J; 356 ALR 197 at 204, 228; [2018] HCA 26, citing *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 259, 279.

32 *Lee v Lee* (2018) 84 MVR 316 at 344 [152].

33 *Lee v Lee* (2018) 84 MVR 316 at 340 [127].

the mother's evidence did not establish, however, that, contrary to their evidence, the appellant was the driver. The trial judge's conclusion that the appellant was the driver was based upon a line of inferential reasoning proceeding from other, circumstantial, evidence, particularly the forensic evidence.

55 A court of appeal is bound to conduct a "real review" of the evidence given at first instance and of the judge's reasons for judgment to determine whether the trial judge has erred in fact or law[34]. Appellate restraint with respect to interference with a trial judge's findings unless they are "glaringly improbable" or "contrary to compelling inferences"[35] is as to factual findings which are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence. It includes findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts[36]. Thereafter, "in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge"[37]. Here, the trial judge's findings of primary fact were not disturbed. However, in material respects, the Court of Appeal found that the inferences that his Honour drew from those findings were wrong. Notably, the trial judge's finding that the driver was not wearing the seatbelt not only was contrary to each party's case but, if correct, on the Court of Appeal's analysis, would lead to the conclusion that there was no real prospect that the appellant was the driver[38]. And the trial judge's acceptance of the RACQ's case, that the appellant had been pulled from the driver's seat to the passenger seat immediately behind in

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34 *Fox v Percy* (2003) 214 CLR 118 at 126-127 [25] per Gleeson CJ, Gummow and Kirby JJ; *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679 at 686 [43]; 331 ALR 550 at 558; [2016] HCA 22.

35 *Fox v Percy* (2003) 214 CLR 118 at 128 [29] per Gleeson CJ, Gummow and Kirby JJ; *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679 at 687 [43]; 331 ALR 550 at 558-559.

36 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 434-435 [144]; [2013] HCA 25; *Thorne v Kennedy* (2017) 263 CLR 85 at 104 [42]; [2017] HCA 49.

37 *Warren v Coombes* (1979) 142 CLR 531 at 551 per Gibbs A-CJ, Jacobs and Murphy JJ; [1979] HCA 9; see also *Fox v Percy* (2003) 214 CLR 118 at 127 [25].

38 *Lee v Lee* (2018) 84 MVR 316 at 341 [133].

something less than 90 seconds, was, in the Court of Appeal's analysis, unlikely[39].

56 Having rejected the essential planks of the trial judge's reasoning, it was not to the point for the Court of Appeal to formulate the question as which of the two hypotheses the trial judge considered to be the more probable[40]. Nor was it to the point to consider whether the trial judge had been unduly influenced by the DNA evidence[41]. It was an error for the Court of Appeal to dismiss the appeals in this "very closely balanced" case on the footing that the trial judge's *decision* was neither glaringly improbable nor contrary to compelling inferences. It was the duty of the Court of Appeal to decide for itself which of the two hypotheses was the more probable. It was the duty of the Court of Appeal to persist in its task of "weighing [the] conflicting evidence and drawing its own inferences and conclusions"[42], and, ultimately, to decide for itself which of the two hypotheses was the more probable. It did not. The appellant's second ground is made good.

57 McMurdo JA's restraint in the face of the trial judge's decision had the consequence that his Honour did not return to consider whether his tentative conclusion, contrary to the trial judge's reasoning, that it was much more likely that the appellant was not the driver, was displaced by the DNA evidence. And his Honour's agreement with the trial judge, that the DNA evidence was persuasive, was apt to overlook that the trial judge's acceptance of Dr Robertson's opinion was based upon the assumption that the appellant was unrestrained by the seatbelt at the time of the collision. Proceeding in this fashion was, in turn, to overlook the significance of Dr Grigg's unchallenged evidence regarding the existence and operation of the seatbelt pre-tensioners and the rates of inflation and deflation of an airbag of the type found in the Toyota.

The father was the driver of the Toyota

58 In circumstances in which the evidence of the appellant and his mother is not critical to the determination of this largely circumstantial case it is not

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39 *Lee v Lee* (2018) 84 MVR 316 at 343 [143].

40 *Lee v Lee* (2018) 84 MVR 316 at 344 [150].

41 *Lee v Lee* (2018) 84 MVR 316 at 344 [151].

42 *Dearman v Dearman* (1908) 7 CLR 549 at 564; [1908] HCA 84, quoting *The Glannibanta* (1876) 1 PD 283 at 287; *Fox v Percy* (2003) 214 CLR 118 at 127 [25].

appropriate to order a new trial. This Court in the exercise of its appellate jurisdiction may give such judgment as ought to have been given in the first instance[43]. The RACQ does not challenge the Court of Appeal's conclusion that the driver of the Toyota was wearing the seatbelt. Indeed, that has been its case throughout.

59 It is not correct to argue, as the RACQ does, that it was incumbent on the appellant to establish how his blood came to be on the airbag. The question is whether it is more probable than not that the father was the driver. As McMurdo JA reasoned, the fact that the appellant was located in the rear passenger seat within 90 seconds of the collision is a circumstance powerfully in favour of the conclusion that he was not the driver[44]. The likelihood that the driver was wearing the seatbelt makes acceptance of Dr Robertson's opinion that the bloodstaining on the airbag was the result of direct contact with the appellant's bleeding face distinctly less sustainable when assessed in light of Dr Grigg's evidence.

60 The RACQ contends that Dr Robertson's opinion is not inconsistent with Dr Grigg's evidence. It argues that the latter should not be understood as suggesting that an airbag deflates much like a balloon. That submission relies on photographs attached to Dr Grigg's second report, which show an airbag of the same description as the airbag in the Toyota in a state of partial deflation following deployment. The RACQ also submits that Dr Grigg did not address to what degree the "coarse airbag fabric may adhere or attach to the driver's person after deployment". The latter submission appears to have been raised for the first time in this Court. No basis for it was explored in evidence.

61 Dr Robertson was unable to estimate the length of contact between the appellant's bleeding face and the airbag that would have been required to deposit the blood other than to say that "it would be more than instantaneous, more than a few – a second or so". Dr Robertson agreed that it could have taken several minutes. She volunteered that contact with the airbag might produce some compression and help to stem the bleeding. Dr Robertson understood that the airbag "would be inflated, at least initially" when in contact with the appellant's face, but she was "not sure if the airbag subsequently deflates after deployment at some stage, but there could still be contact".

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43 *Judiciary Act 1903* (Cth), s 37.

44 *Lee v Lee* (2018) 84 MVR 316 at 341 [133].

62 Dr Grigg's evidence of the commencement and rate of deflation of an airbag of the type found in the Toyota was unchallenged. A difficulty with the RACQ's submission based on the photographs appended to Dr Grigg's second report is that the evidence is silent on whether the photographs depict the airbag at the moment of deployment or at some later time. Moreover, even if deflation is to be understood as a gradual process, it remains that within about 0.2 seconds of impact the airbag would have been subsiding towards the steering wheel. Contrary to the Court of Appeal's conclusion, Dr Robertson's opinion that some small movement of the appellant's face could account for the presence of substantial bloodstaining on the windscreen side of the airbag including under the Y-shaped plastic flap at the boss (and the absence of bloodstaining to the front side, which would be expected to make contact with the driver) is not readily reconciled with the finding that he would have been held in place against the driver's seat.

63 In determining whether the appellant proved upon the balance of probabilities that the father was driving the Toyota at the time of the collision, all the circumstances must be taken into account. Contrary to Senior Constable Pepper's understanding, the father appears to have been cooperative at the scene. About an hour after the collision, when spoken to by Mr Harvey, he stated that he was the driver. The presence of the appellant's blood on the airbag appears to have given rise to the hypothesis upon which the RACQ's case relied. As the Court of Appeal recognised, it is an hypothesis that is, to a high degree, improbable: in less than 90 seconds the father pulled the paralysed appellant from the driver's seat and positioned him in the rear passenger seat in which he, the father, had been sitting, where Mr Hannan first saw the appellant.

64 One of the first civilians to arrive on the scene, Mr Hough, saw the appellant lying with his back against the father's chest. The father was cradling the appellant in a seated position, supporting his upper body, while touching his face and calling his name in an apparent attempt to keep him conscious. Mr Hough recalled seeing bright red blood on the appellant's face. A likely explanation for the blood on the father's hands is that it came from the appellant. How the appellant's blood came to be deposited largely on the windscreen side of the airbag (when inflated) is unknown. However, in light of the finding that the driver was restrained by the seatbelt, the likelihood that it was the product of direct contact with the appellant's bleeding face cannot be accounted greater than the likelihood that it was transferred from the father's hands.

65 McMurdo JA's tentative conclusion that it is much more likely that the father was the driver is correct for the reasons that his Honour gave. It is not a conclusion that is weakened, much less contradicted, by the presence of the appellant's blood on the airbag given Dr Grigg's unchallenged evidence of the

operation of the seatbelt and the airbag. For these reasons the appeals must be allowed.

Orders

66 The parties were agreed in this event upon the orders in the first appeal. There should be the following orders:

B61 of 2018 – Lien-Yang Lee v Chin-Fu Lee & Ors

1. The appeal is allowed.

2. The third respondent is to pay the appellant's costs.

3. The order of the Court of Appeal of the Supreme Court of Queensland made on 1 June 2018 is set aside and in lieu thereof it is ordered:

    (a) the appeal to the Court of Appeal is allowed and the orders of the trial judge made on 23 March 2017 are set aside;

    (b) judgment for the appellant on his claim against the third respondent in the sum of $3,350,000.00 (clear of rehabilitation expenses by the third respondent pursuant to the *Motor Accident Insurance Act 1994* (Qld)), with the date of judgment to take effect pursuant to r 660(3) of the *Uniform Civil Procedure Rules 1999* (Qld) on 23 March 2017;

    (c) the counterclaim of the third respondent against the appellant is dismissed;

    (d) the third respondent pay the appellant's costs of and incidental to his claim on the indemnity basis; and

    (e) the third respondent pay the appellant's costs of and incidental to the third respondent's counterclaim and of the appeal to the Court of Appeal on the standard basis.

B62 of 2018 – Chao-Ling Hsu v RACQ Insurance Limited

1. The appeal is allowed with costs.

2. The order of the Court of Appeal of the Supreme Court of Queensland made on 1 June 2018 is set aside and in lieu thereof it is ordered:

   (a) the appeal to the Court of Appeal is allowed;

   (b) the orders of the trial judge dated 23 March 2017 are set aside and in lieu thereof judgment for the appellant on the respondent's counterclaim against the appellant;

   (c) the respondent pay the appellant's costs of the counterclaim on the standard basis; and

   (d) the respondent pay the appellant's costs of the appeal to the Court of Appeal on the standard basis.

B63 of 2018 – Chin-Fu Lee v RACQ Insurance Limited

1. The appeal is allowed with costs.

2. The order of the Court of Appeal of the Supreme Court of Queensland made on 1 June 2018 is set aside and in lieu thereof it is ordered:

   (a) the appeal to the Court of Appeal is allowed;

   (b) the orders of the trial judge dated 23 March 2017 are set aside and in lieu thereof judgment for the appellant on the respondent's counterclaim against the appellant;

   (c) the respondent pay the appellant's costs of the counterclaim on the standard basis; and

   (d) the respondent pay the appellant's costs of the appeal to the Court of Appeal on the standard basis.