IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B61 of 2018

BETWEEN:

LIEN-YANG LEE
Appellant

and

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

APPELLANT'S SUBMISSIONS

Part I:

1. I certify that this submission is in a form suitable for publication on the internet.

Part II:

2. The issues are whether:

   (a) the Court of Appeal failed to give adequate reasons for its judgement, even though the reasons given were substantial, by failing to address the evidence of Dr Grigg regarding the function of seatbelt pre-tensioners and the inferences submitted to arise from it;

   (b) what is the meaning of "misuse of the trial judge's advantage and did the Court of Appeal err by failing to conclude that the trial judge had done so and that the finding that the Appellant was the driver of the vehicle was contrary to compelling inferences from uncontroverted evidence.

Part III:

The Appellant certifies that he has considered whether any notice should be given to the Attorneys-General in compliance with s78B of the *Judiciary Act 1903* (Cth) and has concluded no such notice need be given.

Slater & Gordon Lawyers
Level 2, 8 Innovation Parkway
BIRTINYA QLD 4575

Tel: (07) 5413 8900
Fax: (07) 5413 8958
Nicola.Thompson@slatergordon.com.au
Contact name: Nicola Thompson

Part IV:

3. The primary judgment medium neutral citation is *Lee v Lee* [2017] QSC 042.

4. The Supreme Court, Court of Appeal judgment is reported at (2018) 84 MVR 316 and the medium neutral citation is [2018] QCA 104.

Part V:

Introduction

5. The Appellant (known as Mason Lee) was rendered an incomplete tetraplegic as a result of a head-on collision between a Toyota Tarago and a Nissan Patrol on 25 September 2013. The Toyota was occupied by the Appellant, the Appellant's parents and his two younger brothers.[1] The Nissan was driven by David Hannan, the sole occupant, with his dog.[2]

6. It was common ground at trial that the accident was caused by the negligence of the driver of the Toyota. The sole issue was who was the driver, the Appellant or his father.[3]

7. The Appellant was 17 years old.[4] He did not hold a driver's licence or a learner's permit.[5] The Appellant gave evidence that during the journey his father was driving and he was in the driver's side rear seat. He said he fell asleep and his next conscious recollection was when he was lying outside of the vehicle after the accident.[6]

8. The Appellant's mother gave evidence of the father being the driver of the vehicle at the time of the collision.[7] The Third Respondent ("the insurer") tendered a statement of the father, taken by its investigator, with the aid of an interpreter. In the statement the father said he was the driver. The father's English was poor.[8] No party called him to give evidence.[9]

9. Immediately after the collision, Mr Hannan reached the driver's side of the Toyota in around 30 – 90 seconds.[10] He did not see any person in the driver's seat. The father was standing up between the front and second rows of the seats tending to the children

---

[1] Joint Core Appeal Book (**CAB**) page 67 at [9]
[2] ibid page 68 at [12] and [18]
[3] ibid page 66 at [5]
[4] ibid page 66 at [3]
[5] ibid page 77 at [68]
[6] ibid page 67 and 69 at [10] and [14]
[7] ibid page 77 at [70]
[8] ibid page 78 at [80]
[9] ibid page 67 at [11]
[10] ibid pages 68 and 70 at [18] and [27]

in the back seat. Mr Hannan assisted the father in removing the Appellant through the right side rear sliding door.[11]

10. One of the first independent persons to arrive at the scene was Mr Hough, who saw the Appellant lying on the ground on the driver's side of the Toyota, with his father kneeling behind him, cradling his head and upper body, and touching the Appellant's face, on which there was bright red blood.[12]

11. A medical practitioner, Dr Lee, arrived at the scene soon after. He saw bloodstains on the palms of the Appellant's father's hands.[13]

12. Photographs tendered at the trial showed blood on the father's hands.[14] There was evidence he had gone back into the driver's compartment after he had been seen touching the Appellant's bleeding face.[15]

13. Photographs taken by police at the scene showed bloodstaining on the deflated airbag, not in the centre but rather dominantly on the "underside",[16] on the front left surface, the top of its rear surface, and the right of its rear surface, described from the driver's position, and they covered a very wide area.[17]

14. The Appellant was bleeding from his mouth and nose. The swab used to sample blood on the airbag returned a positive match for the Appellant's DNA only.[18]

15. The insurer's case was that the Appellant was the driver and his blood was on the airbag as a result of direct contact between his bleeding face and the airbag. The Appellant's case was that he was seated in the rear seat, his father was the driver and the Appellant's blood, it was to be inferred, was on the airbag by a transfer from his father's hands.

16. The trial judge concluded the Appellant was the driver and dismissed his claim.

17. The trial judge found the Appellant and his mother were not reliable or credible

---

[11] ibid pages 68 and 69 at [19] [20] and [21]
[12] ibid page 70 page 71 at [28]
[13] ibid page 71 at [31]
[14] ibid page 32 at [168]
[15] ibid page 37 at [205]
[16] ibid page 38 at [210]
[17] ibid page 74 at [53]
[18] ibid page 29 at [152]

witnesses, both were evasive and the Appellant particularly guarded.[19] The trial judge said he gave "due regard to the language difficulties associated with both the plaintiff and the second defendant having to give evidence with the assistance of an interpreter".[20] The mother's evidence that she saw the father exit the driver's door immediately after the collision was inherently improbable.[21]

18. The trial judge found the contents of the statement of the father to be neither reliable nor credible.[22] It did not provide any explanation for the presence of the Appellant's blood on the airbag.[23]

19. The trial judge found the Appellant had sustained facial injuries which resulted in significant bleeding initially. Direct contact between the "deployed airbag" and the Appellant's face would be a probable reason for the presence of the Appellant's blood on it if he was driving.[24]

20. There was no direct evidence to support the blood was transferred via the father's hands.[25] The father had not said so in his statement.[26] Dr Robertson, a pathologist, who had examined the photographs taken by the police, said it was possible that that had happened, but that it was probable that the blood patterning was a result of "direct contact with the bleeding source". His Honour accepted that evidence.[27]

21. The trial judge accepted that the position of the stains on the airbag were satisfactorily explained by Dr Robertson's evidence that the position of the head on contact with the employed airbag would be variable having regard to movement in the collision.[28] The blood on the airbag was deposited by direct contact with the Appellant's bleeding face with the airbag on deployment at the time of the collision.[29]

22. Whilst a rapid removal of the Appellant by his father to the back seat was required, given Mr Hannan's evidence, the time to do so would not be more than the time for

---

[19] ibid page 36 at [194]
[20] ibid page 36 at [196]
[21] ibid page 36 at [194]
[22] ibid page 37 at [198]
[23] ibid page 37 at [200]
[24] ibid page 37 at [203]
[25] ibid page 37 at [204]
[26] ibid page 38 at [206]
[27] ibid page 38 at [207]-[209]
[28] ibid page 38 at [210]
[29] ibid page 39 at [214].

the father to move himself.[30]

23. McMurdo JA gave reasons for dismissing the appeal which were agreed with by Fraser JA and Philippides JA.

24. McMurdo JA said the decision for the Court was whether the trial judge's decision was erroneous, having regard to the advantages of the trial judge in deciding factual questions where credibility of witnesses was critical to the outcome.[31]

25. His Honour noted Dr Robertson's evidence that if the contact that caused the bloodstaining was with other than the bleeding source, she would expect to see fingerprints or outlines and that it was "extremely unlikely" that transfer from a hand was the source. He noted her evidence that she had not been involved in a case concerning airbags, that she had no understanding of how they deployed and that she agreed that with the airbag being made of synthetic material, the blood would to some extent spread before it soaked in. [32]

26. McMurdo JA noted Dr Robertson's evidence that such analysis was an inexact science with a high mistake rate but as a pathologist she used input of interpretation of injuries to assess likelihood.[33]

27. His Honour noted Dr Robertson's evidence that she had not known that blood on the left side of the airbag was predominantly on the part facing away from the driver, but that she said that was not inconsistent with her opinion as there could have been even quite small movement of the face following initial contact with the airbag.[34]

28. McMurdo JA noted the unchallenged evidence of a mechanical engineer, Dr Grigg, that the front seatbelts were equipped with "pre-tensioners", activated by the airbag control module. When fired, the seatbelts tightened and locked to assist in preventing the occupants being thrown forward.[35]

29. His Honour observed the trial judge was mistaken in his recollection that the Appellant had given evidence with the assistance of an interpreter, though his mother

---

[30] ibid page 39 at [212]
[31] ibid page 67 at [8]
[32] ibid page 74 at [49] and 50]
[33] ibid page 73 at [48]
[34] ibid page 74 at [51]
[35] ibid page 76 at [64]

had done so.[36]

30. His Honour noted the Appellant pointed to evidence given by Dr Robertson that it could have been several minutes during which this blood was left on the airbag.[37]

31. McMurdo JA found that the trial judge was in error in that it was more probable than not that the driver was wearing the seatbelt.[38]

32. McMurdo JA noted the Appellant's submission that if the Appellant was the driver and wearing a seatbelt it would not have been possible for his face to have left blood on the airbag in the fraction of a second in which there would have been contact.[39]

33. His Honour held that while the trial judge was mistaken about the Appellant's evidence being given through an interpreter, that was not to say the trial judge had not been justifiably influenced by the way in which the Appellant's evidence was given and his impression should not be disregarded.[40]

34. It was clear Mr Hannan was alongside the Toyota within a minute or so of the collision.[41] Contrary to the trial judge's finding, McMurdo JA found that moving the Appellant to the rear seat would have been a "much more difficult exercise" than the father removing himself to the rear.[42]

35. McMurdo JA held that the Appellant's injuries did not provide any clear indication that he was the driver.[43] His Honour said that the only inference which could arise from the father not being called was that he would not have given evidence that he had wiped his hands on the airbag, but not that he did not do so.[44]

36. McMurdo JA said that on the evidence discussed thus far, he would hold it was much more likely the Appellant was not the driver, mainly because of the difficulty in relocating the Appellant to the rear seat in the short time before Mr Hannan arrived.[45]

---

[36] ibid page 81 at [93]
[37] ibid page 85 at [110]
[38] ibid page 90 at [134]
[39] ibid page 86 at [113]
[40] ibid page 88 at [127]
[41] ibid page 89 at [129]
[42] ibid page 89 at [132]
[43] ibid page 90 and 91 at [136] and [140]
[44] ibid page 91 at [142]
[45] ibid page 91 at [143]

37. His Honour said he had not yet discussed the DNA evidence. Whilst no blood was on the section of the airbag "which would have been immediately in front of the driver as it inflated", Dr Robertson had given an explanation how it could have come onto those other parts.[46]

38. McMurdo JA again noted Dr Robertson's agreement that bloodstain pattern analysis was a "notoriously" inexact science, in the context of her rejection of the hypothesis of the transfer by the father's hands and also noted Dr Robertson's disavowal of experience as an analyst.[47]

39. His Honour said the nature of the Appellant's facial injuries made it inherently probable his blood would be on the airbag if he was the driver and the location of the stains did not negate that.[48]

40. Nothing about the blood stains suggested "a probability" that they were transferred by the hands of the father.[49] The Appellant's case then was substantially weaker.[50]

41. McMurdo JA concluded that while there were limits upon the use of which the trial judge could make of the way in which the Appellant and his mother gave their evidence, it was not shown the trial judge misused his advantage from hearing and seeing "this evidence" as it was given. The decision of the trial judge was not "glaringly improbable" or "contrary to compelling inferences".[51]

42. Police photographs of the car at the accident scene showed the driver's seatbelt buckled.[52] No party contended at the trial or on appeal that the seatbelt was unbuckled and rebuckled in the aftermath of the accident. There was no evidence of it happening.

Part VI: Argument

Ground One - Adequacy of reasons

43. The Appellant submits that the Court of Appeal erred by not giving reasons that traversed the argument by the Appellant, based on the uncontroverted evidence of Dr

---

[46] ibid page 91 at [146]
[47] ibid page 91 at [147]
[48] ibid page 92 at [149]
[49] ibid page 92 at [150]
[50] ibid page 92 at [151]
[51] ibid page 92 at [152]
[52] Book of Further Materials (**BFM**) page 26 (exhibit 20 photo 1443 JPG)

Grigg, about the operation of the seatbelt pre-tensioner in the subject vehicle and its implications for the inference that the Court drew, that the presence of the blood on the airbag was because the Appellant was the driver.

44. Dr Grigg is a mechanical engineer. His evidence proving two particular facts was unchallenged.

45. The first was that contemporaneously with the detonation of the airbag, seatbelt pre-tensioners in the front seats were activated that instantaneously tightened the seatbelt of the driver, pulling the driver back into the seat and then locking.[53] The second was that the airbag inflated in 0.04 seconds, deflation commenced at 0.2 sec from impact and deflation took 0.2 seconds.[54]

46. The Appellant's submission was that none of the bloodstaining was on the part of the airbag that would present to the driver at the time it was inflated and, more significantly, substantial parts of the staining were on the surface facing the windscreen. There was bloodstaining on the airbag material at the steering wheel boss.[55] It was impossible for the Appellant's face to be in direct contact with those parts of the airbag to have produced that staining because the seatbelt would have fixed his torso to the backrest and the staining could only have occurred with the airbag deflated.

47. The speed of deflation was similarly relevant. With the driver's torso pulled back into the seat, it was not possible for his face to still be in direct contact with the airbag in the time required to produce the staining, given Dr Robertson's evidence that it would have required more than a second, unlikely to be 10 minutes, but could be several minutes, of contact.[56]

48. McMurdo JA noted these points in passing[57] but did not deal with the submissions or the evidence.

49. Whilst his Honour sought to deal with the significance of the location of the

---

[53] ibid page 76 at [64]
[54] Exhibit 4 Report of Dr Frank Grigg 10 October 2016 page 3; BFM page 6 (Appellant's outline of argument to Court of Appeal) at [28].
[55] BFM pages 9 - 13 (transcript of appeal T 11-11 to 14); page 19 (Exhibit 20 photo 7762 JPG); page 21 (exhibit 20 JPG 1440 at the accident scene); exhibit 5 pages 7 and 8 photos 7 – 10; and exhibit 6.
[56] BFM page 29 (transcript of trial T5 – 36 line 1 – 9) – neither the trial judge at CAB page 26 at [135] or McMurdo JA at CAB page 67 at [110] correctly recounted Dr Robertson's evidence in this regard.
[57] CAB page 87 at [113]

bloodstaining, he did not reference the evidence about the function of the seatbelt and its implications. He also did so with a subtle but significant change in the description of the location of the stains and without reference to the points raised by Dr Grigg's evidence.[58]

50. The trial judge did not deal with these arguments either. However, they were not relevant to his Honour's reasons because the trial judge erroneously found the Appellant, as the driver, was not wearing a seatbelt.

51. That finding was overturned by the Court of Appeal, as urged by the Appellant.[59]

52. The Appellant's submissions were not addressed by observing that the bleeding would have continued, as his Honour found.[60] What had to have occurred, on the insurer's case, was that there was direct contact. Dr Robertson disavowed the staining to have been from dripping or splatter[61] and no one suggested otherwise to her or to the court.

53. The Appellant's submissions on these points[62] were compelling against the inference drawn by McMurdo JA. These submissions were prominent in the hearing of the appeal.

54. Given the Appellant was seen in the back seat "a minute or so" after the collision and that the hypothesised task of moving him from the back seat was very difficult, the hypothesised time for contact, even without the above argument, must have been very short indeed.

55. It is well established that courts deciding cases such as this are obliged to give reasons and that a failure to give adequate reasons is an error of law.[63]

56. The obligation to give reasons is an incident of judicial power. In the case of judges of the Supreme Courts, the duty has a constitutional character.[64]

57. The reasons for the duty are not confined to their assistance in appellate review but are

---

[58] Contrast CAB page 74 at [53] and page 86 at [112] with page 91 at [146]
[59] ibid page 86 at [113]
[60] ibid page 92 at [149]
[61] ibid page 89 at [131]
[62] BFM pages 6 and 8 (Appellant's Outline of Argument) paragraphs 28 and 38 and BFM pages 10 – 13 and 15 - 17 (Appellant's oral submissions at appeal)
[63] *Wainohu v New South Wales* (2011) 243 CLR 181 French CJ and Kiefel J at 214 and 215 [56]–[58]; *Fleming v The Queen* (1998) 197 CLR 250 at 260 [22]; *DL v R* (2018) 356 ALR 197 at 229 [131]
[64] *Wainohu v New South Wales* (2011) 243 CLR 181 at 213-5 [53]-[58] per French CJ and Kiefel J

supported by policy considerations, being the promotion of good decision making, public confidence in the judicial process and accountability of judicial officers.[65]

58. To be reasons which fulfil the duty, the reasons must have certain qualities, with the extent of the obligation varying according to the circumstances.

59. This court has most recently examined the scope of the obligation to give reasons in *DL v R* (2018) 356 ALR 197. The Appellant submits that the description by Nettle J at 228-9 [131] is particularly germane to the issues arising in this appeal. His Honour's observations though are relevantly consistent with the statements of legal principle in the judgments of the other members of the court.[66] The observations in *Macks v Viscariello*[67] are relevant here too.

60. Here, at stake was not only the Appellant's entitlement to damages agreed in the sum of $3,350,000, but also whether findings of fraud and consequential judgements against each of the Appellants could be sustained.[68]

61. Without having considered the point concerning the seatbelt pre-tensioner and its implications, the Court of Appeal regarded the case as "factually complex" and "very closely balanced".[69]

62. Given the Court of Appeal was charged with conducting a rehearing, in the *Fox v Percy* sense,[70] the Court of Appeal had the same obligations as a trial judge with respect to giving reasons. The underlying policy for the requirement to give reasons is equally invoked for an intermediate appellate court conducting a rehearing. Rule 766(1) of the *Uniform Civil Procedure Rules* (Qld) conferred on the Court of Appeal all the powers and duties of the court below, which should be taken to include the duty to give reasons.

63. The submission made by the Appellant was that the evidence of Dr Grigg, in combination with other uncontroverted evidence, showed that it was not possible for the blood to have come on to the airbag by virtue of the Appellant having been the

---

[65] See *AK v Western Australia* (2008) 232 CLR 438 at 470 per Hayden J and *Wainohu v New South Wales* (2011) 243 CLR 181 at 214-5 [56]
[66] See pages 204-5 [32]-[33] per Kiefel CJ, Keane and Edelmann JJ and page 215 [82] per Bell J
[67] (2017) 130 SASR 1 at 109 [523]
[68] See amended judgment of Boddice J at CAB page 44 and 45
[69] CAB page 92 at [152]
[70] Addressed in more detail in the submissions on the second ground of appeal

driver.

64. By failing to record, consider and engage with the submission made and the evidence upon which it was based, the Court of Appeal has left the Appellant unable to see the extent of which his case has been "understood and accepted". The point was one "critical to the contest". It was a "substantial argument".

65. The Court of Appeal thereby committed an error of law by failing to give adequate reasons. The implication of the failure is more conveniently addressed in the second ground of Appeal.

Second Ground - Misuse of advantage of the trial judge and the drawing of an inference contrary to compelling inferences from uncontroverted evidence

66. It is submitted that the Court of Appeal failed to properly follow the instruction of this Court in *Fox v Percy*,[71] and the series of cases leading to it, in the conduct of a rehearing.

67. The relevant passages of judgment of the Court of Appeal in that respect are at paragraphs 146 to 152 following the observation made at [143],[72] though what was said at [127] is also relevant.[73]

68. The trial judge made findings of credit against two critical eye witnesses, the Appellant and his mother. They were dealt with collectively and with limited analysis.[74]

69. The authorities have long acknowledged the constraint on appellate court intervention in findings of fact by trial judges. The cases have commonly referred to "misuse of the advantage of the trial judge" as one such ground. This Court has applied that test to appeals in a number of decisions[75], referring to Lord Sumner's reasoning in *SS Hontestroom v SS Sagaporack,*[76] without elaboration of the meaning of the phrase.

70. The Court of Appeal held, without discussing the meaning, that there was no such

---

[71] (2003) 214 CLR 118
[72] CAB page 91 and 92
[73] CAB page 88
[74] CAB page 36 at [194] and [196]
[75] *Paterson v Paterson* (1953) CLR 212 at 224; *Abalos v Australian Postal Commission* (1990) 171 CLR 167; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479;
[76] [1927] AC 37 at 47

misuse here.

71. Determining whether there had been such a "misuse" requires consideration of what are the advantages of a trial judge. In *Fox v Percy,* this Court referred to the advantages of "seeing and hearing the witnesses", "evaluation of witnesses' credibility and of the 'feeling' of a case" and "the obligation at trial to receive and consider the entirety of the evidence and opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole". [77]

72. It is submitted that a trial judge misuses his or her advantage by making findings inconsistent with having had any such benefit. That may occur by finding facts which are "glaringly improbable" or "contrary to compelling inferences based on uncontroverted evidence".

73. A trial judge may also misuse his or her advantage by misconceiving the case of a party, particularly if it causes the trial judge to then not consider and decide upon important contentions of fact that arise on the real controversy.

74. Here the trial judge misconceived the insurer's case as being that the Appellant, as the driver, was not wearing a seatbelt. In turn, his Honour did not then consider the great difficulty there was with the insurer's case, by considering the speed of inflation and deflation of the airbag, the actions of the seatbelt pre-tensioner and the location of the bloodstains.

75. The Court of Appeal, having corrected the underlying error regarding the use of a seatbelt by whoever the driver was, was bound then to conclude that the trial judge had misused his advantage. It declined to do so.

76. The Court then compounded that error by failing to have regard to the evidence and the case based upon it that showed the impossibility of the fact the Court went on to infer. It was necessary for it to do so, if it was to conduct a "real review".

77. A trial judge may misuse his or her advantage by making findings of credit which shows the judge did not at the time of giving judgement actually enjoy such an advantage.

---

[77] *Fox v Percy* (2003) 214 CLR 118 at [93] and [23]

78. The trial judge's belief, five months after hearing the evidence of the Appellant and his mother, that both, rather than just one of them, gave evidence through an interpreter, showed incontrovertibly that his Honour did not enjoy an advantage from having seen and heard them give their evidence.

79. The trial judge gave only one instance as a criticism of the credibility of the mother's evidence. It concerned her evidence that the father exited the driver's seat "immediately" after the collision, which his Honour regarded as improbable given that the seatbelt buckle was found locked in place.[78]

80. That criticism was seriously undermined by the conclusion of the Court of Appeal that it could not be safely concluded that it was improbable.[79] That was a further reason for the Court to properly regard the trial judge's findings as to credit to be of no assistance. Dr Grigg gave evidence that he had in fact encountered such a circumstance previously, and explained how it can happen. He was not cross-examined upon that evidence.[80]

81. Where a challenged finding is affected by "demonstrated mistake or misapprehension about relevant facts", the advantage may be of little significance or even irrelevant.[81]

82. Kirby J was drawn to express reservations about use of the phrase "palpable misuse of the trial judge's advantage" in *State Rail Authority (NSW) v Earthline Constructions (in Liq).*[82] In *Fox v Percy* the majority, including Kirby J, rather expressed the point of deference to the trial judge's advantage in terms of giving it "due" [83] and "proper"[84] allowance.

83. Given the errors made by the trial judge here, the "due" or "proper" allowance was none.

84. By rule 765(1) of the *Uniform Civil Procedure Rules*, the appeal to the Court of Appeal was by way of rehearing. By rule 766(1) the Court had all the powers and duties of the court below and could draw inferences of fact and make any order the

---

[78] CAB page 36 at [194]
[79] CAB page 90 at [135]
[80] See BFM page 41 lines 1 to 35
[81] *Devries v Australian National Railways Commission* (1993) 177 CLR 474 Deane and Dawson JJ at 480
[82] (1999) 73 ALJR 306 at 324 [77]
[83] Fox v Percy [2002] 214 CLR 118 at 127 [25]
[84] ibid at [27]

nature of the case required. This Court has accepted that the principles in *Fox v Percy* are applicable to an appeal to the Queensland Court of Appeal.[85]

85. By the instruction in *Fox v Percy*, the Court's role was to conduct a "real review". It was obliged to weigh conflicting evidence and draw its own inferences and conclusions.

86. The Court of Appeal identified a number of subsidiary facts that it determined differently than the trial judge. It rejected the finding of the trial judge that the exercise of lowering the backrest of the driver's seat from behind it and pulling the Appellant into the father's seat[86] would have been no more difficult than the father removing himself to the back row space where he was seen standing.[87] If this exercise took place, it must have been achieved in well less than a minute or so.[88]

87. Another of the facts especially critical to the exercise of the rehearing was the Court of Appeal's finding that whoever was the driver was wearing a seatbelt. Once that finding was made, at the least, the Court had to consider its implications in combination with the uncontroverted evidence of Dr Grigg about the role of seatbelt pre-tensioners, together with the objective evidence about the location of the bloodstaining and Dr Robertson's evidence (to that extent) that the bloodstaining was not caused by drip or spatter and could have required several minutes of contact to produce, together with the assessment of the other evidence as reflected at [143][89].

88. The Court of Appeal did not do that. The explanation given at [149] of the judgment[90] was not any meaningful engagement with the arguments that had been advanced by the Appellant.

89. Nor, in the context of the errors identified by the Court of Appeal concerning the trial judge's reasons, was it consistent with the requirements of *Fox v Percy* to revert, as the Court did in the final sentence of [150][91], to posit that the matter was to be resolved by reference to what the question for the trial judge was. It was now the

---

[85] See eg *Robinson Helicopter Company Incorporated v McDermott* [2016] 90 ALJR 679 at 686 [43]
[86] The difficulty can be pictured by examining the photographs at BFM page 43 (exhibit 20 JPG 1434); page 45 (exhibit 20 JPG 0703); page 47 (exhibit 20 JPG 1444); page 49 (exhibit 20 JPG 1439) and page 61 (exhibit 20 JPG 1442)
[87] CAB page 89 at [131]-[132]
[88] CAB page 89 at [129]
[89] CAB page 91
[90] CAB page 92
[91] CAB page 92

question for the Court of Appeal, on the premise of the new findings it had made.

90. The error then was repeated at [152][92].

91. Reference to the police photographs of the bloodstained airbag [93] (and comparison of the location of the seams on it to those on the comparable airbag tendered and the photos of that airbag when inflated) illustrate, as the Court of Appeal found, that the blood was not on the part of the airbag facing the driver as it inflated.[94]

92. The photographs show that the locations of the bloodstains were predominantly on parts of the airbag facing the windscreen when inflated and even on material barely protruding from the boss of the steering wheel at the point of insertion of the airbag into it.[95]

93. Given Dr Grigg's evidence, the position of the stains could only be explained by accepting that they were made after the airbag had deflated. They were made after the seatbelt detonator had fired, pinning the occupant to the seat. The face of the then quadriplegic Appellant[96] could not have been in contact with it.

94. The Court of Appeal noted Dr Robertson's disavowal of experience as an analyst of blood spatter patterns and her agreement that such analysis is "notoriously inexact".

95. Dr Robertson's actual area of practice was in forensic pathology. She considered herself an "injury pattern specialist".[97] She had no particular knowledge about how airbags operated.[98] She had not had the opportunity to examine the scene of the accident soon after its occurrence, the undoubtedly preferred approach in the blood spatter analysis branch of science.[99] She accepted that there was a reasonably high error rate in the assessment that was undertaken in the discipline.[100]

96. The opinion the subject of her reports and oral evidence referred to "close contact" between the bloodied surface and the airbag. In oral evidence she confirmed that by

---

[92] ibid
[93] BFM pages 19 and 21
[94] CAB page 91 at [146]
[95] The Court of Appeal was taken to these photographs – see BFM pages 2 - 5
[96] CAB page 18 at [80] and [81] and BFM pages 37 and 38 (transcript of trial T4-70.45 to T4-71.12
[97] BFM pages 30 and 31 (T5-36.25 and T5 - 37.20 to .30)
[98] BFM pages 32 and 33 (T5-39.43 and T5-40.1)
[99] BFM page 29 and 30 (T5-36.40 and see also T5-37 line 1 to 18)
[100] BFM page 29 (T5-36.28)

that she meant a literal touching of the two surfaces.[101]

97. Dr Robertson had not appreciated before cross-examination that the location of the bloodstains on the airbag were predominantly on the part of the airbag that faced away from the driver.[102] She then sought to explain that, being the explanation referred to at [146][103], by saying "I have not discounted that there could have been some even quite small movement of the face following initial contact with the airbag".

98. The question for the Court of Appeal was whether that explanation could properly be reconciled with the location of the bloodstaining on the airbag in the context of the Appellant, if he was to have been the driver, being by then affixed to the driver's seat by the pre-tensioner. It is submitted that the exercise the Court was obliged to engage in, but did not, could only have resulted in the answer that the explanation of Dr Robertson had to be rejected.

99. The insurer's case was that the Appellant came to be in the back seat by the father lowering the backrest and pulling him into the rear seat next to his brothers, where the father had been sitting.[104] The insurer's case was that the seatbelt remained buckled.[105]

100. As noted, there were serious limitations upon the evidence of Dr Robertson as a blood spatter analyst. There were two matters though, as a forensic pathologist and injury pattern analyst, that she could and did give unchallenged evidence upon, and they were that dripping or spatter could not have been involved as the cause of the staining (which was evidence tendered in chief by the insurer) [106] and the period of time that it would take for there to be sufficient bleeding to cause the staining in a direct contact scenario.[107]

101. There was direct evidence that the father was driving the Toyota.[108] That he would be, and not the Appellant, who did not possess a learner's permit let alone a driver's license, was inherently plausible. The question then became whether the presence of

---

[101] BFM page 28 (T5-35.25)
[102] BFM page 51 (T5-50.30)
[103] CAB page 91
[104] CAB page 89 at [130]
[105] BFM 53 and 54 (para 92 and para 100 - trial submissions of the Third Respondent)
[106] Exhibit 32 and BFM page 56 and 57 (T5-33 and 5-34)
[107] BFM page 29 (T5-36.1)
[108] CAB page 9 at [20] and [22], page 10 at [24] –[26] and page 30 at [158]

the Appellant's blood on the airbag, in all of the circumstances, showed he was the driver. The direct evidence, strongly supported by the circumstantial evidence provided by Mr Hannan, was to be accepted, even without proof of the means by which the blood did come to be there.

102. Still, if such proof was needed, there was evidence the Appellant's face was bleeding, there was evidence of the father touching the Appellant's face when there was fresh blood upon it, there was evidence of the father having bloodstained palms. There was evidence of the father going back into the car, into the driver's seat, to tend to his wife, trapped in the front passenger seat.

103. There was then evidence from which it should have been inferred, in the absence of any other more persuasive explanation, that the father's bloodied hands made contact with the airbag, transferring the Appellant's blood to the area sampled.

104. Dr Robertson had vacillated between saying she could not exclude such a method[109] and saying that her analysis of the patterns of the stains and the appearance of the staining suggested that a transfer from a person's hands was extremely unlikely.[110]

105. That opinion though depended upon her analysis of staining patterns, for which she had cautioned about the limits of her expertise, as well as frankly conceded the significant problems with the "science" in any case. She had also in evidence acknowledged that the pattern that she might expect to see could be distorted in a case like this because of the airbag being constructed of nylon, rather than a natural fibre such as cotton, though it was taking her outside of her expertise to be able to say how one could assess the difference that had been generated.[111]

106. Ultimately her evidence about the absence of swipe or wipe patterns on the airbag in the photographs as being of any significance was further discounted by her in the circumstance that she had not personally examined the airbag.[112]

107. It may finally be added, given the insurer's hypothesis, accepted as being "quite probable" by the Court of Appeal,[113] uncontroverted evidence would properly have led

---

[109] CAB page 73 at [46]
[110] CAB page 74 at [50]
[111] See BFM pages 33 – 35 (T5 - 40.35 to T5-42.35)
[112] BFM page 59 (T5 - 56.22)
[113] See CAB page 89 at [130] and page 92 at [149]

to a conclusion that the backrest of the seat had been lowered by emergency personnel in their efforts to extricate the mother from the front passenger seat when the vehicle was otherwise empty.[114]

Conclusion

108. Had the Court of Appeal given proper reasons, engaging with the submissions made on these important points, it should have concluded the Appellant was not the driver. Given the Court of Appeal's view of the strength of the Appellant's case but for the DNA evidence, and the uncontroverted evidence relied on here by the Appellant concerning it, this Court can and should make the orders sought.

10 **Part VII:**

Orders Sought

1. That the orders of the Court of Appeal made on 1 June 2018 be set aside.
2. That the orders of the trial judge dated 23 March 2017 be set aside.
3. In lieu of such order, it be ordered:

(a) there be judgment for the appellant on his claim against the third respondent, with the date of judgment to take effect, pursuant to rule 660(3) of the *Uniform Civil Procedure Rules 1999*, on 23 March 2017;

(b) that the counterclaim of the third respondent against each of the appellant and
20 the first and second Respondents be dismissed;

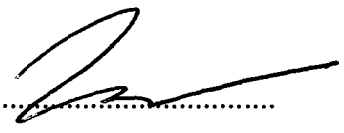
(c) the third respondent pay the appellant's costs of and incidental to his claim on an indemnity basis;

(d) the third respondent pay the appellant's costs of and incidental to its counter claim and of the appeal on the standard basis.

Part VIII:

It is estimated that the oral argument will take 2 hours.

Dated:



Geoffrey Diehm QC
30 Telephone: 07 3236 3561
Facsimile: 07 3210 6330
Email: gwdiehm@jeddart.com

---

[114] CAB page 16 at [71] and page 17 at [72] and page 71 at [33]