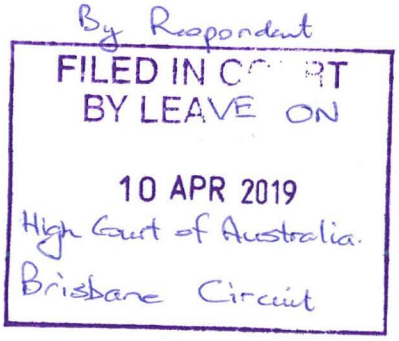
IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY
BETWEEN

No. B61 of 2018



LIEN-YANG LEE
Appellant
And
CHIN-FU LEE
First Respondent
CHAO-LING HSU
Second Respondent
RACQ INSURANCE LIMITED
Third Respondent

THIRD RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I:

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

Part II:

2. This court – unlike the appellate court below – is engaged in strict appeal, not a rehearing appeal: *Fox v Percy* (2003) 214 CLR 118 at [32]. Error in the appellate court reasoning need be identified. It is submitted there was none.

3. **Written submissions 22 – 39:** Recognition and correction of a trial judge error of fact upon appellate rehearing "real review" (*Fox v Percy* at [25]) does not command a different ultimate finding. Appellate disposition is fashioned by the character and effect of the relevant error or errors. Regard need be had to the entirety of factual findings and inferences yielded by, or surviving, the rehearing.

4. In that regard, here:

   (a) The appellate court directed itself in law, correctly, as to its functions: QCA [120], [121]. The court identified two (conceded) factual errors in the trial judge's reasons: appellant giving evidence by interpreter – QCA [93]; seatbelt utilisation – QCA [113]. Each was corrected: QCA [127], [137].

   (b) As to the appellant interpreter error, this did not displace the findings of the trial judge as to credit. Such credit findings were made as to the viva voce

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evidence of the appellant and Ms Hsu – as to demeanour and reliability, and also in respect of the documentary (statement) evidence of Mr Lee generally – as relevantly untrue in material respects. Each remained an operative element in the appellate court's reasoning in formulating the ultimate finding that the appellant was the vehicle driver: QCA [150], [152].

(c) As to the seatbelt error, the appellate court's reasons entailed a "real review" of the trial judge's findings, to the point that the court reasoned that – the DNA (ie airbag) evidence aside – it would have concluded it probable the appellant was not the driver: QCA [143]. That evidence then considered, however, a different probability ensued.

(d) The appellate court's reasoning at QCA [148]-[152] entailed the making of ultimate finding following that court's review, combining its review findings with the intact findings of the trial judge remaining following review. The totality of evidence was considered.

(e) The appellant's argument involves a misreading of QCA [150] to [152]. What the court descended to was the ultimate finding utilising the abovementioned appellate calculus: "The task of this Court is to rehear the case, but not without regard to the decision of the trial judge" [152]. The trial judge's credit findings remained a factor of some relative – but not principal – weight.

5. **Written submissions 8 – 21:** The appellate court was obliged to descend to thorough reasoning upon review and making the ultimate finding: *DL v R* (2018) 356 ALR 197 at [33], [130], [131]. It did so here, in particular at QCA [145] – [152] as to the airbag.

6. In that regard, considered in proper sequence:

(a) The appellant's blood was on the airbag. His facial injuries would yield copious blood flow. On the accepted medical evidence (maxillo-facial surgeon Prof Monsour in particular – QCA [138]) the dental and nasal injuries sustained were not inconsistent with airbag strike. So much required explanation as to blood transfer.

(b) The candidate hypotheses consisted in direct transfer by dint of the appellant being the driver at the time of collision and remaining in the driver's seat until removal, or alternatively indirect transfer by subsequent means.

(c) The appellant and Ms Hsu gave no explanation. There was an explanation forthcoming from Mr Lee in his statement, but that advanced a false version as to the source of blood in the driver's seat space. That falsity is not disputed in this appeal. The trial judge rejected the likelihood of subsequent "hand-wiping" by Mr Lee: QSC [211], upheld on appeal QCA [150].

(d) The third respondent does not cavil with the evidence of Dr Grigg to the extent of seatbelt tensioning or airbag deployment, read correctly (below). The appellate court noted and treated this evidence, and the airbag blood location at – in combination – QCA [64], [110], [112], [136], [146] and [149]. The argument of the appellant concerning the seatbelt tensioning was put by reference to a deflated airbag: BFMA pg 17. See also BFMA pg 6.

(e) As the appellate court's reasons appreciated, the accident events were dynamic. The accident was a violent head-on collision, both vehicles travelling to the appellant's right, upon collision with consequent bodily movement to the left (Grigg report 1 s 7). Airbag deployment would not necessarily have been square on, and entailed deflation which was not momentary (Grigg report 2, photographs 7 to 10). Movement of the airbag, together with movement of the appellant's head, with consequent blood passage into and through the airbag's nylon material, would inexorably have occurred in the aftermath of the collision and airbag deflation, and also airbag movement in his contended retrieval by Mr Lee from the driving position.

(f) The evidence of Dr Robertson – concerning absence of any suggestion of hand transfer, coupled with the likelihood of some movement of driver's face against the airbag after deployment – was proper evidence for acceptance by the trial judge and the appellate court within the range of relevant findings and inferences. She was expert to a point but there were variables not completely explicable of events. Nylon material spread was likely: BFMA pg 34.

7. This oral argument is also relied upon in appeals B62 and B63 of 2018.

Dated: 10 April 2019.

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