

BETWEEN:

LIEN-YANG LEE
Appellant



and

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

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APPELLANT'S REPLY

Part I:

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

Part II:

2. Paragraph 6 of the Third Respondent's submissions is wrong. Dr Lee's evidence as to having seen bloodstains on the palms of the hands of the father was neither objected to nor ruled inadmissible. What was ruled against, on objection, was oral evidence proposed to be led from Dr Lee of words spoken by the father to him.¹
3. As to paragraph 7 of the Third Respondent's submissions, the photograph of the driver's seat was taken after the seat had likely been moved by the ambulance
30 officers.²

¹ Core Appeal Book (CAB) page 71 at [31] and page 79-80 at [86] to [87].

² See para 107 of the Appellant's Submissions.

First Ground - Adequacy of Reasons

4. As to paragraph 11 of the Third Respondent's submissions, the Court of Appeal also found the trial judge underestimated the difficulty of the task of moving the Appellant to the rear seat³ and was in error in finding that the Appellant's injuries were themselves proof that he was the driver.⁴
5. The limits upon Dr Grigg's evidence because of his particular expertise, referred to at paragraph 14(a) of the Third Respondent's submissions, went to a different point, being the relative likelihood of the Appellant suffering his particular injuries as the driver.⁵ It was not part of the reasoning that dealt with the issue raised here by the Appellant, being how, once injured, his bleeding could have caused the stains on the deflated airbag.
6. The Third Respondent's submission in paragraph 14(b) concerns reasoning that was not connected in the reasons below with the issue referenced in 14(a). Further, the finding referenced in paragraph 14(b) did not deal with the argument of the Appellant as to how the operation of the seatbelt pre-tensioner bore upon the significance of the position of the stains.
7. At paragraphs 16 - 19 of its submissions, the Third Respondent contends that the airbag may have remained semi-inflated for some period and the coarse airbag material may have adhered to the driver's person after deployment, in addition to the movement of the driver in relation to the deployed airbag in the period following the impact.
8. These two propositions were not considered by the Court of Appeal. That the Third Respondent resorts to them in this Court as a post hoc attempt to support the ultimate conclusion illustrates the difficulty with the reasons of the Court of Appeal.
9. It is further added that the last explanation in paragraph 18 of the Third

³ CAB page 89 at [132]

⁴ CAB page 90 at [136]

⁵ *ibid*

Respondent's submissions, which references evidence cited in footnote 14, is not supported by that evidence at all.

10. Dr Grigg was not cross-examined on the speed of deflation issue. In any event, the now posited explanations are inconsistent with the finding that the staining was rather dominantly on the surface of the airbag facing the windscreen at the time of impact⁶ and more so, on the airbag as it emerged from the steering boss.⁷ The stains must have occurred when the airbag was deflated.

10 11. The Appellant's submission about the interplay between the operation of the pretensioner and the position of the bloodstaining was not dealt with in the manner required at law in the passages identified in paragraph 19 of the Third Respondent's submissions.

12. Contrary to paragraph 20 of the Third Respondent's submissions, the Court of Appeal did not find that that inference sought by the Appellant was "most unlikely".⁸ It regarded the competing hypotheses as "very closely balanced" but evaluated the probability in favour of the Third Respondent.⁹

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

13. None of the additional evidential matters identified in paragraphs 26, 27 or 28 of the Third Respondent's submissions were identified by either of the trial judge or the Court of Appeal in their reasons as bearing upon the assessment of credit.

14. As to paragraph 28, the Appellant, through his counsel, tendered documents at trial¹⁰ that went to that issue and made submissions¹¹ upon it. Again, neither the trial judge nor the Court of Appeal made any adverse credit finding referencing that

⁶ CAB page 38 at [210] and page 74 at [53]

⁷ Appellant's BFM pages 9 – 13, 19 and 21.

⁸ CAB page 92 at [148]

⁹ *ibid* at [149] – [152]

¹⁰ Court of Appeal record book page 811, (being Exhibit 16)

¹¹ Court of Appeal record book pages 2402 – 2403 (being Outline of Argument of Plaintiff Annexure D at page 66 – 67)

issue.

15. The Third Respondent points to submissions it made at the trial about the oral evidence of the Appellant and his mother. Paragraph 104 of the trial submissions criticized multiple requests for questions to be repeated, but only in cross-examination, it was said. Two examples of such in the Appellant's evidence are illustrative:

10 “Did you wish to gain knowledge about the Road Rules because it was your intention, shortly after the date that you're injured as it transpired, that you wanted to apply for your learner's permit?---Can – can you say that again?”¹²

“Would it be correct to say, Mr Lee, that you cannot put your hand on your Bible and give to his Honour a recollection of events clear in your mind about what occurred after you fell asleep after leaving Brown Lake?---Can you fully explain that, please.”¹³

16. The problem complained of lay in the way questions were asked by the cross examiner, of both witnesses.¹⁴

- 20 17. In paragraph 108 of the trial submissions of the Third Respondent, adopted again here, it was submitted, by implication at least, that evidence of the mother that there was blood on her husband's hands (when he re-entered the vehicle) was knowingly false. The trial judge found, based on photographs in evidence, that there was blood on the father's hands.¹⁵ The Court of Appeal proceeded on that basis.

18. There are other matters that could be pointed to about these credit submissions but they need not be. The Court of Appeal did not give weight to the trial judge's assessment because of any of the evidential matters raised by the Third Respondent. It did so solely because it considered he enjoyed an advantage from having seen
30 “the way in which he or she has given evidence”¹⁶ as it was being given.¹⁷

¹² Court of Appeal record book page 50 (being T 1 – 50) line 1 – 3.

¹³ Court of Appeal record book page 70 (being T 1 – 70) line 41 – 43.

¹⁴ See by further examples – Court of Appeal record book page 56 (being T1 – 56) line 40; page 62 (being T 1 – 62) line 31; page 122 (being T2 – 34) line 25 and page 124 (being T 2 – 36) line 1

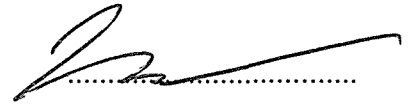
¹⁵ CAB page 32 at [168]

¹⁶ CAB page 88 at [127]

¹⁷ CAB page 92 at [152]

19. The issue of credit was contested. The Third Respondent's submission in paragraph 29 cannot be accepted. The articulated basis for the findings of credit by the trial judge were based on demeanor, attended by a fundamental flaw, and not the evidential matters advanced here.

10 Dated: 20 February 2019



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