IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S321 OF 2011

BETWEEN: **MADELEINE LOUISE SWEENEY**
BHNF NORMA BELL
Appellant

and

ANDREW JOHN THORNTON
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Internet Publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The respondent opposes the granting of special leave and restates the reasons why it should not be granted, as set forth in Part I of the Respondent's Summary of Argument filed 31 October 2011.

3. The legal principles relating to the duty of care owed by a voluntary supervisor to a learner driver were considered by this Court in *Imbree v McNeilly* [2008] HCA 40 (28 August 2008). It cannot be said that there was any error in application of those principles in the circumstances of this case. The scope and the content of the duty of cared owed is not controversial and has not been the subject of dispute at any time between the parties in these proceedings.

4. The issue in this appeal is whether the Court of Appeal erred in finding that the appellant's case failed for want of proof (CA [133], AB2-754). That is, whether the evidence established that a reasonable person in the position of the respondent, acting as voluntary supervisor, in the circumstances which existed in this case would have instructed or directed the appellant to reduce the speed of the vehicle when entering the bend.

5. This issue raises a number of factual questions, most particularly, as to the speed of the vehicle before the initial slip occurred and the reasonableness of that speed. As

HUNT & HUNT LAWYERS
1 Macquarie Place
SYDNEY NSW 2000
DX 214 SYDNEY

Telephone: (02) 9391 3000
Fax: (02) 9391 3099
Ref: Fiona Hornsby

the Court of Appeal found, it is was "tolerably clear" that the judgment of the trial judge incorporated a finding that the speed of the vehicle entering and travelling through the bend was 70 kph (CA[77]-[78], AB2-733). Indeed, the appellant's case was put up to the trial judge on that basis (CA [156], AB2-761). It was not until part way through the proceedings in the Court of Appeal that the appellant advanced any argument that the vehicle may have been travelling at a speed greater than 70 kph, a matter which the Court of Appeal required the appellant to regularize by way of a Notice of Contention and on which the appellant failed (CA[158], AB2-762). The appellant now seeks to advance that as a factual issue in this Court.

Part III: *Judiciary Act 1903.*

6. Notice is not required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Factual Issues in Contention

7. The respondent submits that the appellant's narrative of facts is deficient in that it misstates the evidence as to a number of factual matters and also contains statements more in the nature of argument or submissions. In particular, the appellant has selectively lifted facts from the respondent's police statement, the statement of Ms. Taylor and has sought to elevate to the level of factual certainty the evidence of Ms. Fancourt which was only ever intended by the witness to be a rough estimation. The appellant's submissions also omit reference to the comfort and critical speeds for the bend on which the accident occurred.

The Respondent's Statement

8. The respondent's statement to the police (Exhibit E, AB1-331) formed part of the appellant's case. It was tendered by the appellant without any application to limit its use or effect. Later, the appellant's senior counsel told the Court that there were certain parts of the statement not relied on by the appellant but this does not diminish its evidential value. By that evidence, the following facts were established:

As to the appellant's driving and the respondent's supervision of same

(a) the appellant drove the respondent's car on four occasions, the fourth journey leading to the accident;

(b) the last of those journeys occurred within 12 hours of the first;

(c) all four trips involved the appellant negotiating the bend in the roadway where the accident occurred;

(d) on three of the four journeys, the appellant drove the respondent's car around the bend without incident. On two of those journeys, the appellant traversed the bend at night.

(e) when the appellant first got in the car, the respondent "kept a close eye on her to see if she knew what she was doing" (Exhibit E, paragraph 7, AB1-332);

(f) the appellant "started the car without any problem and adjusted the rear view mirror without prompting" (Exhibit E, paragraph 7, AB1-332, 333);

(g) "at that stage, (the appellant) appeared to be competent to at least get the car moving without any real instruction" (Exhibit E, paragraph 7, AB1-333);

(h) the respondent was paying close attention to the appellant's driving and she "seemed to be pretty competent behind the wheel" (Exhibit E, paragraph 8, AB1-333);

(i) the appellant was "very cautious and attentive to what she was doing...she was really fairly safe." (Exhibit E, paragraph 8, AB1-333);

(j) on the highway, she was "still being cautious and not overconfident" (Exhibit E, paragraph 9, AB1-333);

(k) the appellant braked a bit hard at one point and the respondent told her "to be a bit lighter on the pedal" (Exhibit E, paragraph 9, AB1-333);

(l) on the way back during the first trip, "there were only a few minor things (the respondent would) have to point out" (Exhibit E, paragraph 10, AB1-333);

(m) apart from that, the appellant was driving alright and "within her capabilities" (Exhibit E, paragraph 10, AB1-333);

(n) on the journey leading to the accident, the appellant "appeared to be handling the car without any problems" (Exhibit E, paragraph 14, AB1-333);

<u>As to the events leading to the accident</u>

(o) they came up to the bend which led to the accident and the appellant "turned into it normally" (Exhibit E, paragraph 14, AB1-333);

(p) as the car <u>came out of the corner</u>, the respondent felt "the back of the car move out very slightly to the right" (Exhibit E, paragraph 14, AB1-333, emphasis added);

(q) the respondent then became aware of Ms. Fancourt's vehicle and did not consider that there was any danger of colliding with it (Exhibit E, paragraph 14, AB1-333);

(r) the slip to the right was not a large movement of the car (Exhibit E, paragraph 15, AB1-334);

(s) the respondent saw the appellant start to "correct the steering" (Exhibit E, paragraph 15, AB1-334);

(t) the respondent did not think that the movement of the car was sufficient to require much correction (Exhibit E, paragraph 15, AB1-334);

(u) he saw the appellant "turn the steering wheel too much to the right" (Exhibit E, paragraph 15, AB1-334);

(v) the car started to overcorrect and the appellant said "Oh shit" (Exhibit E, paragraph 15, AB1-334);

(w) the appellant turned the steering wheel to the left again (Exhibit E, paragraph 15, AB1-334);

(x) the respondent looked at the speedo and it was pointing to 70 (Exhibit E, paragraph 15, AB1-334);

(y) the respondent looked down at the appellant's feet and saw her "lift off the accelerator at first then press it straight to the floor quite quickly" (Exhibit E, paragraph 15, AB1-334, emphasis added);

(z) it appeared to the respondent that the appellant "had meant to apply the brake but had accidentally pressed the accelerator instead" (Exhibit E, paragraph 15, AB1-334);

(aa) "it all happened very quickly" (Exhibit E, paragraph 15, AB1-334, emphasis added);

(bb) the movement of the car "was getting more exaggerated" (Exhibit E, paragraph 15, AB1-334).

9. Careful analysis of this evidence demonstrates that the respondent was closely supervising the appellant's driving and providing instruction and guidance when required. It also shows that the events leading to the collision occurred over a very short period of time.

Geography of the Bend

10. The entire bend was only 70 metres in length (AS [12]) which, for a vehicle travelling at 70 kph, would have been traversed in just 3.6 seconds. The bend consisted of a central section of 45 metres and two relatively straight transition sections on either side (AS [12]) of 12.5 metres each. The entry and exit transitions would be traversed in 0.64 seconds and the central section in 1.8 seconds.

11. It is presumably in the entry transition to the bend (that is, in .64 seconds) that it is said that the respondent should have:

- perceived a risk presented by the bend;
- made an assessment as to the reasonableness of the vehicle's speed; and
- instructed the appellant to slow down, if he thought that the speed was excessive or unsafe.

This will be developed in argument below.

12. The appellant's submissions refer to the undulations on the road surface (AS [13]-[14]) and concede that they had the potential to generate a slip. The undulations were only 13 metres from the apex of the bend, placing them within the central section of the bend. At 70 kph a car would travel from the apex of the bend to the undulations on the road surface in just 0.67 of a second, making the difference in position barely discernible and the passing of the two points virtually simultaneous to an observer such as Ms. Fancourt, who was approaching from the opposite direction.

13. The other facts relevant to the bend which are not referred to by the appellant are the comfort speed and critical speed. The comfort speed is the speed at which a vehicle can safely traverse a bend so as to cause no discomfort or alarm to the occupants of the vehicle (CA [124], AB2-751, emphasis added). For this bend it was agreed between the experts that the comfort speed was between 73 (wet road surface) and 75 kph (dry road surface).

14. The critical speed is the speed at which a vehicle will inevitably lose traction. For this bend that was assessed and agreed between the experts at between 124 kph (wet) and 137 kph (dry) (CA [123]-[124], AB2-751).

15. Both the trial judge and the Court of Appeal found as a fact that the comfort speed and critical speeds as stated in the last two preceding paragraphs, respectively.

Ms. Taylor's Statement

16. Ms. Taylor's statement was also tendered as part of the appellant's case (Exhibit F, AB1-324). Again, there was no attempt to place any limitation or restriction upon

its use. What she said was extracted in part in the appellant's submissions (AS [27]). She had no recollection of the accident or the journey which immediately preceded it. She told the police about the earlier trip when she was a passenger in the vehicle when the appellant drove from Firefly to Forster, that is, what was the appellant's second of four trips that day.

17. Ms. Taylor told the police:

(a) the appellant was driving okay;

(b) there were times when the respondent would instruct her;

(c) it wasn't all the time but occasionally he'd say to her to watch her speed;

(d) I also heard him say when to pull the car up for stopping at intersections;

(e) it was only really little things that he'd have to tell her;

(f) she seemed to be driving alright;

(g) Ms. Taylor was not scared.

18. This evidence establishes from a source other than the respondent that:

- the respondent was supervising the appellant;
- he would give her guidance and instruction;
- such instruction would include "little things";
- the appellant was a competent learner driver capable of driving and negotiating the subject bend;
- the appellant was driving and handling the vehicle in such a way as not to cause any concern or alarm to its passengers.

Ms. Fancourt's Evidence

19. The appellant in its submissions seeks to elevate the evidence of this lay witness to the level of factual certainty, for example by stating that she first saw the vehicle at the "apex" of the bend. She said no such thing and her evidence cannot be viewed so robustly.

20. Ms. Fancourt's evidence comes from two sources. Her statement to the police (Exhibit D, AB1-321) and her oral evidence (AB1-60 to 66).

21. It is apparent from the witness' statement that even when she provided that, about 10 days after the accident, she was unable to be precise. She said that she was unable to accurately estimate the distance she was from the bend when she first saw the car but thought it was about 30 metres. When asked to estimate the speed of the vehicle, she said that she couldn't "other than to say it looked like around 80 kilometres per hour." She was able to tell immediately that the vehicle was out of control as it was fishtailing. She immediately braked and pulled over to the side of the road. The car passed her and she looked over her shoulder as she was still stopping her own car.

22. Her evidence was equally inexact. She said that the car was "about halfway" around the bend when she saw it (AB1-62.34) and that she would "roughly" estimate its speed at "about 80" (AB1-63.15). She said that she could not be certain (AB1-67.25) and that she was not endeavouring to be precise (AB1-67.29).

23. From this evidence, the appellant submits that Ms. Fancourt first saw the vehicle "at the apex of the bend" (AS [17]).

24. Ms. Fancourt also gave evidence about the nature of the bend. In response to a series of questions from the trial judge, the witness described the bend is "deceptive" (AB1.64). She said:

> "it is a very deceptive bend, and I know that bend clearly. It might appear to be quite a small bend, but once you are in it you realize it is harder to get around than you thought."

25. Ms. Fancourt agreed with her Honour's statement that "it is deceptive...in that you are travelling along a reasonably flattened straight stretch of road with the bend ahead. Which looks on approach to be a gentle curve" (AB1-64.37-45).

Ms. Fancourt then said:

> "I just – when I am driving on it don't sort of analyse it, I just know that I feel – you realize once you are in it that you need to slow down" (AB1-65.18, emphasis added).

26. This evidence has relevance to the question of breach as the appellant's case hinges on the submission that the respondent ought to have given an instruction to slow down on approach to the bend. That is, at a time, according to Ms. Fancourt, when there would have been no indication for special caution. This will be developed below but throws up another misleading aspect of the appellant's submissions. That is, the respondent's familiarity with the bend.

Familiarity with Bend

27. The appellant's submission as to the respondent's familiarity with the bend evolves from mere speculation about that fact (AS [36]) to a positive submission that he was "familiar with the bend" (AS [42]). The speculation about the matter arose from the fact that for an unknown period of time, Ms. Taylor was the respondent's girlfriend and may at some unspecified time during that unknown period have driven to/from her house at Firefly. Whilst it is possible that the respondent had travelled through this bend on occasions prior to the four times he did so when the appellant was driving, that is not a sufficient basis to suggest any knowledge on his part as to any unusual feature of one particular bend so as to warrant a pro-active warning. To make such a finding would be engaging in complete conjecture. Nor does the fact that the respondent did not give evidence fill this evidentiary lacuna in the appellant's case. This is especially so as the suggestion of prior knowledge on the part of the respondent was never pleaded or otherwise raised against him.

28. On the other hand, there is solid evidence which established familiarity of the bend on the part of the appellant. A finding that the appellant was, or ought to have been familiar with the bend is supported by the evidence that:

    (a) she had lived on two prior occasions at two separate addresses west of where the accident occurred which placed this section of road between where the appellant lived and Forster, where her parents lived and she later worked. Mr. Gordon told the Court that the appellant first lived with Ms. Taylor at Firefly (AB1-14.38-49) and later lived with Mr. Gordon and his family at Dyer's Crossing (AB1-21);

    (b) in the 12 hours preceding the accident the appellant had driven the same vehicle through the same bend on three occasions. Two of those trips were made at night when one would expect the driver to be paying particular attention.

Part V: Legislation

29. The appellant's statement of applicable statutes etc. is accepted, subject to the following additions:

    (a) *Civil Liability Act* 2002 (NSW) – all of Part 1A;

    (b) *Driving Instructors Act* 1992 (NSW) – sections 1-10, 47 and 48;

    (c) *Driving Instructors Regulations* (NSW) 2003, regulations 9, 10 and 12.

Part VI: Argument

Jones v Dunkel (1959) 101 CLR 298

30. The appellant describes as evidentially significant the fact that the respondent did not give oral evidence (AS [55]). That submission ignores completely the fact that the appellant tendered in her own case the respondent's detailed account of the accident and the relevant events leading to it. That is, his statement to the police dated 21 September 2005 (Exhibit E, AB1-331). Several things may be said about that evidence:

    (a) the account is detailed;

    (b) the statement was provided about one month after the accident at a time when the events would have been fresh in the respondent's mind;

    (c) the statement was provided to police and signed by the respondent with the following solemn acknowledgement:

    "This statement made by me accurately sets out the evidence which I would be prepared, if necessary, to give in court as a witness. The statement is true to the best of my knowledge and belief and I make it knowing that, it is tendered in evidence, I shall be liable for prosecution if I have wilfully stated in it anything that I know to be false, or do not believe to be true."

    (d) the evidence was tendered by the appellant without any application to limit its use under s.136 of the *Evidence Act* 2005;

    (e) it is evidence to be relied upon by the Court for all purposes (s. 60 *Evidence Act*).

31. Any expectation that the respondent might give evidence was relieved by the appellant putting his version of relevant matters into evidence in her own case. There is no room for any inference as the decision not to call the respondent is fully explained. In these circumstances it would be unjust to draw any inference against the respondent, consistently with the comments in *Wigmore on Evidence*, extracted by Windeyer J in *Jones v Dunkel* (page 321, para. 15).

32. The appellant submits (AS [55]) that this leaves evidential gaps in the respondent's case. It does not and the gaps which do exist in the appellant's case cannot be filled by inference, resulting in a failure to discharge her onus of proof.

Generally

33. The Court of Appeal, it is submitted, correctly posed for itself the factual proposition upon which the result of the appeal turned, that is to say, whether the

trial judge erred in finding that she could not be satisfied that the vehicle entered and went through the bend at a speed greater than 70kph (CA [10], AB2-10).

34. The trial judge considered the body of expert evidence given by both Mr. G. Johnston and Mr. W. Keramidas and their joint report which was relevant to this issue, including the scientific significance of Mrs. Fancourt's observation that the fishtailing was getting more exaggerated as the vehicle proceeded along the road towards her car (CA [150], AB2-760). This more probably related to the additional steering over corrections of the driver than of full throttle being applied as the vehicle approached the yaw marks or perhaps after it had actually begun to yaw (CA [151], AB2-760).

35. Mr. Keramidas said in his oral evidence that he considered that the exaggerated fishtailing was consistent with harsh acceleration being applied to the vehicle. This is consistent with the respondent's observations that the appellant took her foot off the accelerator and then mistakenly pressed down again on the accelerator rather than the brake. The finding in the judgment of the Court of Appeal is that the oral evidence of Mr. Keramidas was not inconsistent with the terms of the joint report nor with Mr. Johnston's oral evidence (CA [151], AB2-760). It is submitted that this finding is correct.

36. The trial judge found that, on the evidence, she could not conclude that sufficient speed had been "*washed off*" between the breakaway and the start of the yaw marks to conclude that the vehicle was travelling at more than 70kph as it approached the point of the breakaway. In this regard, it is important to bear in mind that the vehicle was at all times under acceleration.

37. The Court of Appeal found that the trial judge was correct to conclude that the appellant had not established, on the balance of probabilities, that the vehicle's speed entering and travelling through the bend to the point of the breakaway was significantly in excess of 70kph (CA [152], AB2-760).

38. Mr. Keramidas in his report provided elaborate calculations to support an estimate that the vehicle speed at the commencement of the yaw marks was 69.28kph. The Court of Appeal accepted this factual statement (CA [156], AB2-761).

39. The speed at the start of the yaw was not seriously in dispute and indeed it became common ground when Mr. Toomey QC expressly conceded in his submissions at the trial that the vehicle was travelling at 70kph at the start of the yaw (CA [156], AB2-761). The appellant now seeks to move from that position by describing that speed as the average speed through the yaw (AS [19]).

40. The conclusion on speed of the vehicle by the Court of Appeal is that the appellant had not established that the primary judge should have found on the balance of probabilities that the vehicle was travelling at 80kph or at a speed significantly

greater than 70kph when it entered and travelled through the bend to the point of the breakaway (CA [158], AB2-762). This conclusion was based on the evidence and is correct.

Duty of Care

41. A voluntary supervisor of the learner driver, such as the respondent is only permitted to perform that task, and the learner driver is not permitted to drive a motor vehicle on a road or road related area, unless they each comply with the requirements of the regulatory regime laid down by clause 12 of the *Road Transport (Driver Licensing) Regulation* 2008 ("the Licensing Regulation"). This regulation, together with the *Civil Liability Act* NSW 2002 ("CLA") section 5B is the starting point for the consideration of the question of the scope of the duty.

42. On the other hand, a licensed instructor is governed by the *Driving Instructors Regulations* 2003 ("the Driving Regulations"). An important difference between those regulatory regimes is that it is mandatory for an instructor to give driving lessons in a dual control vehicle (the Driving Regulations, clause 12(1)).

43. The immediate effect of such a distinction is that a supervisor is restricted in the tasks which he or she can perform in the course of the driving of the vehicle. Of necessity, the actions which may be performed by the supervisor are confined to giving verbal instructions and advice to the driver, who at all times operates the vehicle.

44. It would be highly dangerous and conducive to causing an accident, if the supervisor attempted to seize the controls or to operate the steering or brakes whilst the vehicle was travelling in motion. Mr. G. Johnston conceded in cross-examination that any attempt by the respondent to pull the handbrake, interfere with the steering wheel or shift the transmission to neutral would not have prevented the accident (AB1-164.29).

45. In *Imbree* this court considered the duty of care owed by a supervisor who was a passenger in a motor vehicle being driven by an unlicensed driver. The joint judgment of Gummow, Hayne and Kiefel J.J. with whom Gleeson C.J. and Crennan J. agreed recognized the distinction between a supervisor and an instructor which reflects the relevant regulatory regime of learning to drive a motor vehicle on public roads (p.530 [60]). At p.532 [66] the court recognized that there are limits to what supervision or instruction can achieve. The court stated that there are such limits because no amount of supervision or instruction can alter the fact that, first, unless the vehicle has been specially modified to permit dual control, it is the learner driver not the supervisor who operates the vehicle and, second, that the skill that is applied in operating the vehicle depends entirely upon the aptitude and experience of the learner driver.

46. Their Honours in *Imbree* stated that it cannot be assumed that a voluntary supervisor has the necessary experience or skills in teaching learner drivers (p. 530 [60]). This applies *a fortiori* to the proposition that a voluntary supervisor acting reasonably could not be expected to have any knowledge of those matters which influenced Mr. Johnston in his opinion about the need for a contingency (CA [125], AB2-751). On all accounts, under the supervision of the respondent the appellant's driving of the vehicle on every occasion before the slip occurred was reasonable and cautious.

47. The decision of *Imbree* has stated the law on the scope of duty of care arising between a supervisor and a learner driver. It has been consistently applied since 2008. This court would not reconsider it or overturn the decision.

48. The standard of the duty of care which the Court of Appeal applied and the general principles stated at (CA [113], AB2-747) disclose no error and should not be disturbed.

49. Whilst the reasonable person in the position of a voluntary supervisor would be required to be vigilant and to give such verbal instructions and advice as reasonably necessary to prevent harm to the learner driver (*CLA*, section 5B(1)(c)) or to other persons, arising out of the driving of the vehicle, what precautions are reasonable depends upon the circumstances of the case (*CLA*, section 5B(2)). Particularly relevant here is that, according to Ms. Fancourt, there is nothing unusual about this bend until you are in it and that the appellant had a familiarity with the bend, as submitted above.

50. The appellant's primary criticism of the Court of Appeal's approach to the question of breach is that it failed to refer in terms to cl 12(5)(a) of the Regulations, instead focusing on cl 12(5)(b) (AS [25]-[30]). Sub-clause (a) states no more than the supervisor must *"supervise the learner with respect to the driving of the vehicle"*. It is submitted by the appellant that the Court's failure to refer to that matter was a significant error. That submission simply cannot stand.

51. It cannot be said that the Court of Appeal limited its inquiry in any way. Compliance with the road rules was one of many factors to which regard was had in assessing whether the respondent discharged his obligation of supervision with respect to the driving of the vehicle, that being just one aspect of the respondent's duty to the appellant.

52. The Court's analysis of the duty commenced by reference to the statutory regime (including sub-clause (a) (CA [102], AB2-743). It then considered the remarks of this Court in *Imbree* (in particular at paragraph [60] of the joint judgment and following) before setting out a non-exhaustive list of general principles (CA [113], AB2-747). Implicit in the Court of Appeal's approach is an acceptance (which was

never in issue between the parties) that the respondent had a duty to supervise the learner with respect to the driving of the vehicle. No error is demonstrated.

Breach of Duty

53. The finding as to the speed of the vehicle at 70kph on approach to and through the bend raised the question of whether the respondent was in breach of the duty which he owed to the appellant.

54. The trial judge found the relevant breach to be the failure of the respondent to instruct the appellant or guide her as to the appropriate speed coming into the bend (CA [95], AB2-740), because 70kph was an unsafe speed to enter and negotiate the bend having regard to her inexperience and the wet road surface (CA [117], AB2-748).

55. Central to the trial judge's finding as to breach was whether in these factual circumstances 70kph was an unsafe speed to approach and negotiate the bend in the prevailing conditions. It was common ground between the experts that the comfort speed for the curve was about 73kph and the critical speed was 124kph for wet conditions (CA [123], AB2-751). As previously stated, both the trial judge and the Court of Appeal proceeded to make factual findings on that basis.

56. The trial judge accepted that "*critical speed*" is a function of friction co-efficient, the radius of the bend and speed and represents the point at which for any given rate of turn a vehicle will inevitably lose traction, while "*comfort speed*" is a speed at which a vehicle can safely traverse a bend so as to cause no discomfort or alarm to the occupants of the vehicle. She found that the critical speed for the subject bend was between 124kph and 137kph whilst the comfort speed was 73kph to 75kph (CA [124], AB2-751).

57. The Court of Appeal found that, in the light of this acceptance, the speed of 70kph was not, objectively regarded, an unsafe speed even in wet conditions with a learner driver at the wheel (CA [125], AB2-751). It is submitted that this finding is correct.

58. The finding by the Court of Appeal that there was no basis for concluding that such a supervisor should have appreciated and acted upon the matters influencing Mr. Johnston's opinion is correct (CA [125], AB2-751).

59. The Court of Appeal found that at a speed of 70kph the appellant was travelling 10kph below the limit applicable to a learner driver and 30kph below the speed limit applicable for licensed drivers. There was nothing to indicate to the respondent that the appellant was driving at a speed or in a manner that contravened the Road Transport Legislation or which should have alerted the respondent that her speed was such that she should have been told to slow down

before entering the bend. The finding continued that it cannot, therefore, be that the respondent failed to take all reasonable precautions to prevent such a contravention (CA [118], AB2-749). It is submitted that this finding is correct.

60. Mrs. Fancourt in her evidence said that the bend was "*very deceptive*" and that it was more difficult to negotiate than it appeared. The Court of Appeal found, it is submitted correctly, that there was no evidence that the respondent appreciated any particular danger in the configuration of the bend even though he had travelled over the road in the past. Nor was there evidence that a reasonable person in the respondent's position would have considered that the bend required special precautions beyond travelling well under the applicable speed limits (CA [120], AB2-750). As submitted above, the appellant had more recent experience in driving through the bend than the respondent.

61. The appellant's submissions on breach (AS [40], in particular) engage in a process of reasoning which is either influenced by or based entirely on hindsight. This *post hoc ergo propter hoc* approach offends logic and is an impermissible way to determine causation as a matter of legal principle. The concept of reasonableness and foreseeability must play a role not only in the context of duty of care but also in reaching a conclusion regarding breach and causation. The appellant's approach excludes these considerations.

62. The Court of Appeal found that the evidence did not establish that a voluntary supervisor, acting reasonably, would have considered that the configuration of the bend or the driving conditions posed such a risk that instructions or guidance should have been given to the respondent at any stage of the journey to slow down below 70 kph as she approached the bend. This is supported by the evidence of Ms. Fancourt, referred to above. Accordingly, the evidence did not support a finding that the respondent breached his duty of care to the appellant by failing to instruct or guide her to reduce the speed of the vehicle below 70kph when entering or traversing the bend (CA [133], AB2-754). The requirement of section 5B(1)(c) of the *Civil Liability Act* was not satisfied. It is submitted that this finding on the evidence is correct.

Causation

63. The trial judge's finding on causation (TJ [85]-[91], AB2-673 to 675) failed to draw any connection to her finding on breach (TJ [84]). It was not necessary for the Court of Appeal to consider the question of causation as it found that the appellant had not discharged her onus in proving breach (CA [133], AB2-754). This disposes of the appellant's submission that the Court of Appeal erred in finding that there was no cause of the accident (AS [39]).

64. The appellant now seeks to characterize the breach as excessive speed into the bend resulting in the initial slip leading to a loss of control. There is simply no evidence

which would support this statement either as a finding of breach or causation. The evidence of Mrs. Fancourt as to speed was unreliable and, indeed, she conceded that she was not attempting to be precise. In any event, Mrs. Fancourt first saw the vehicle after control had been lost and, therefore, cannot assist in determining the speed of the vehicle at any prior time.

65. In support of the submission on causation, the appellant refers to s.5D(1) CLA and states that the respondent's failure to instruct, guide and direct the appellant on approach to the bend was a necessary condition of the occurrence of the harm (AS [37]). Three things might be said about that submission.

66. First, there was no evidence that the respondent failed to instruct, guide or direct in the approach to the bend. Even assuming there was evidence that he failed to do so, it could hardly be considered significant given that this was the fourth time the appellant had negotiated this same bend in the same vehicle in the 24 hours prior to the accident. Further, given the evidence of Ms. Fancourt, any risk associated with the bend would not have been apparent until the vehicle was in it. The initial transition of the bend would have been traversed by the vehicle in 0.64 of a second, not even permitting any perception of the risk, let alone affording any response to it.

67. Secondly, the evidence failed to establish that the speed at which the vehicle entered the bend was excessive so as to warrant any intervention by the respondent at all.

68. Thirdly, in applying the test under s.5D, the court would have regard to the fact established in the appellant's own case that the respondent saw the driver lift her foot off the accelerator before pressing the accelerator straight to the floor quite quickly *"as though she had meant to apply the brake but had accidentally pressed the accelerator instead"* (TJ [27], AB2-653).

69. Following this court's interpretation of s.5D in *Adeels Palace v Moubarak* [2009] HCA 48 (10 November 2009) resulting in the re-instatement of the "but for" test as the test for factual causation, it cannot be said in this case that but for the respondent's failure to instruct the appellant to reduce the vehicle's speed approaching and entering the bend (assuming that he did not) the harm would not have been suffered. The appellant's act in applying acceleration after the initial slip by pressing the accelerator rather than the brake would be considered more causatively significant (in the relevant sense) than any assumed failure on the part of the respondent. It might be more readily said that but for the appellant's error in accelerating the vehicle after the slip on the bend, the harm would not have been suffered.

70. The appellant's criticisms of the Court of Appeal's judgment overlooks the fact that the appellant's case ultimately failed for want of proof. There was no error in the Court's approach. The judgment accorded with the proper function of appellate

review and legal principle established by this Court. The appellant has not demonstrated error in the Court of Appeal's findings or conclusions.

Part VII: Respondent's Argument on Notice of Contention

71. A Notice of Contention has been attached to an Affidavit by the respondent's solicitor and filed with these submissions.

72. The respondent contends that the decision of the Court of Appeal should be affirmed on the grounds that:

(a) the Court erred in its treatment of Exhibit 9 (AB2-623) and Mr. Keramidas' evidence regarding same (CA [91], AB2-739); and/or

(b) by reason of its findings on the question of the respondent's breach it was not necessary for it to consider the question of contributory negligence and, if the court had, it ought to have assessed contributory negligence at 100% so as to defeat the appellant's claim, in any event.

Exhibit 9

73. The appellant's case rests heavily on the evidence of Ms. Fancourt that the initial slip occurred at the apex of the bend. Whilst the reliability of such evidence is questionable, for reasons referred to above, it is also inconsistent with the scientific analysis provided by Mr. Keramidas. In his opinion, losing control at or before the apex of the bend would render impossible the continuation of the vehicle along the road to the point where it deposited the yaw marks and left the roadway to the left hand side of the carriageway.

74. The yaw marks are the only available objective evidence. They should be afforded the status of "incontrovertible fact". The interpretation placed on Ms. Fancourt's evidence that the initial loss of control occurred at or before the apex to the bend is inconsistent with the location of the yaw marks. The trial judge ought to have preferred the incontrovertible fact. This court, confronted with similar circumstances in *Fox v. Percy* 214 CLR 118 at 129, cautioned judge's about preferring witnesses over objectively established facts.

75. From the incontrovertible scientific evidence provided by the yaw marks, both experts agreed based on the laws of physics that:

(a) at the commencement of the yaw marks, the vehicle had a slip angle of 11 degrees to the left; and
(b) at that time, the vehicle was travelling at a speed of approximately 70 kph.

76. In order then to determine the events leading to the loss of control, the court would work backwards from the yaw marks and take into account, so far as is consistent

with that objective evidence, the observations made by the two witnesses to the accident, Ms. Fancourt and the respondent.

77. Dealing with Ms. Fancourt, her observations fit perfectly with the analysis by Mr. Keramidas (based on the yaw marks) if one accepts that what she saw commenced in the exit transition of the curve (or coming out of the corner as the respondent said in Exhibit E) then the trigger for loss of control was at or about the irregularity of the road surface in the area of the culvert which is only 13 metres from the exact centre of the bend, a distance traversed in 0.67 seconds at 70 kph.

78. According to the calculations of Mr. Keramidas, the appellant would have had only 0.5 of one second to correct the initial slip to the right before leaving the roadway. Such action was, in the opinion of Mr. Keramidas, beyond any driver; let alone drivers with the limited experience of the appellant. This evidence was depicted diagrammatically, which became Exhibit 9.

79. This analysis then excludes Ms. Fancourt's evidence being construed to mean that the loss of control occurred precisely at the apex of the bend. It is plain from the account provided by the respondent that the initial slip occurred as the vehicle "came out of the corner" and that is entirely consistent with the location of the yaw marks and the reasoned analysis of Mr. Keramidas (at AB1-225 and following). The respondent's description of events is also consistent with "*the apparent logic of events*"[1]. That is, it is illogical to suggest that the loss of control occurred at an earlier point in the bend and that the Plaintiff managed to control the vehicle throughout it only leaving the roadway after completing the bend.

80. Put simply, if one accepts the yaw marks as having been deposited by the vehicle then the possibility of the loss of control occurring at or before the apex to the bend is necessarily excluded. Mr. Keramidas agreed with the proposition raised by the trial judge that it was impossible for the slip to occur at or before the bend "and to have created the yaw marks where they were positioned on the roadway" (AB1-230.45).

81. Accordingly, the correct finding is that the initial slip occurred in the area of the irregularities on the road surface and was caused by them. The effect of such a finding is that the rearward slip of the vehicle was unexpected and not something that a reasonable person in the position of the respondent could or should have foreseen.

100% Contributory Negligence

82. In *Imbree*, this court emphasized the paramount significance of the fact that it is the learner driver not the voluntary supervisor who is in actual control of the vehicle. A

---

1 *Fox v. Percy* 214 CLR 118 at para 31.

single standard of care was applied to drivers. That is, the test is that of a reasonable driver. S. 5R of the *CLA* makes it abundantly clear that the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person.

83. In applying that standard to the present facts the court would take into account the following matters:

(a) the appellant had more recent experience of the bend than the respondent;
(b) the appellant was the only person in a position to exercise physical control over the vehicle;
(c) the respondent had no active control over the vehicle;
(d) the respondent's role and duty was limited to provide supervision and guidance;
(e) implementation of any guidance was dependant upon the appellant responding to such instruction;
(f) the proximate cause of the accident was the vehicle going out of control as a result of the appellant overcorrecting the steering and applying the accelerator of the vehicle instead of the brake.

84. Weighing those factors, it is submitted that, in the event that breach by the respondent was found, the appellant's culpability is such as to defeat her claim entirely.

Dated: 21 May 2012

Robert Stitt QC
Telephone: (02) 8224 3012
Facsimile: (02) 9233 1849
Email: stittqc@sevenwentworth.com.au

David Wilson
Telephone: (02) 8224 3007
Facsimile: (02) 9233 1849
Email: wilson@sevenwentworth.com.au

Catherine Gleeson
Telephone: (02) 8224 3000
Facsimile: (02) 9233 1849
Email: gleeson@sevenwentworth.com.au

A A

Civil Liability Act 2002 No 22

Status Information

Currency of version
Historical version for 1 July 2005 to 25 October 2005 (accessed 21 May 2012 at 15:38).
Legislation on this site is usually updated within 3 working days after a change to the legislation.

Provisions in force
The provisions displayed in this version of the legislation have all commenced. See Historical notes

See also:
Civil Liability Amendment (Mental Illness) Bill 2003 [Non-government Bill: Mr A A Tink, MP]
Defamation Bill 2005
Civil Liability Amendment (Offender Damages Trust Fund) Bill 2005
Confiscation of Proceeds of Crime Amendment Bill 2005

Authorisation
This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the Interpretation Act 1987.

File last modified 21 September 2005.

Contents

(b) section 15A (Damages for loss of superannuation entitlements),

(c) section 17A (Tariffs for damages for non-economic loss),

(d) Division 7 (Structured settlements) of Part 2,

(e) Part 3 (Mental harm),

(f) section 49 (Effect of intoxication on duty and standard of care),

(g) Part 7 (Self-defence and recovery by criminals),

(h) Part 8 (Good samaritans).

(3) The regulations may exclude a specified class or classes of civil liability (and awards of damages in those proceedings) from the operation of all or any specified provisions of this Act. Any such regulation may make transitional provision with respect to claims for acts or omissions before the commencement of the regulation.

3C Act operates to exclude or limit vicarious liability

Any provision of this Act that excludes or limits the civil liability of a person for a tort also operates to exclude or limit the vicarious liability of another person for that tort.

4 Miscellaneous provisions

(1) **Act to bind Crown**
This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

(2) **Regulations**
The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(3) **Notes**
Notes included in this Act do not form part of this Act.

(4) **Savings and transitional provisions**
Schedule 1 has effect.

Part 1A Negligence

Division 1 Preliminary

5 Definitions

In this Part:

harm means harm of any kind, including the following:

(a) personal injury or death,

(b) damage to property,

(c) economic loss.

negligence means failure to exercise reasonable care and skill.

personal injury includes:

(a) pre-natal injury, and

(b) impairment of a person's physical or mental condition, and

(c) disease.

5A Application of Part

(1) This Part applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

(2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

Division 2 Duty of care

5B General principles

(1) A person is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm.

5C Other principles

In proceedings relating to liability for negligence:

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

Division 3 Causation

5D General principles

(1) A determination that negligence caused particular harm comprises the following elements:

(a) that the negligence was a necessary condition of the occurrence of the harm (***factual causation***), and

(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (***scope of liability***).

(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

5E Onus of proof

In determining liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

Division 4 Assumption of risk

5F Meaning of "obvious risk"

(1) For the purposes of this Division, an ***obvious risk*** to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.

(2) Obvious risks include risks that are patent or a matter of common knowledge.

(3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.

(4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

5G Injured persons presumed to be aware of obvious risks

(1) In determining liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.

(2) For the purposes of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

5H No proactive duty to warn of obvious risk

(1) A person (***the defendant***) does not owe a duty of care to another person (***the plaintiff***) to warn of an obvious risk to the plaintiff.

(2) This section does not apply if:

(a) the plaintiff has requested advice or information about the risk from the defendant, or

(b) the defendant is required by a written law to warn the plaintiff of the risk, or

(c) the defendant is a professional and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant.

(3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

5I No liability for materialisation of inherent risk

(1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.

(2) An ***inherent risk*** is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.

(3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

Division 5 Recreational activities

5J Application of Division

(1) This Division applies only in respect of liability in negligence for harm to a person (***the plaintiff***) resulting from a recreational activity engaged in by the plaintiff.

(2) This Division does not limit the operation of Division 4 in respect of a recreational activity.

5K Definitions

In this Division:

dangerous recreational activity means a recreational activity that involves a significant risk of physical harm.

obvious risk has the same meaning as it has in Division 4.

recreational activity includes:

(a) any sport (whether or not the sport is an organised activity), and

(b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and

(c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

5L No liability for harm suffered from obvious risks of dangerous recreational activities

(1) A person (***the defendant***) is not liable in negligence for harm suffered by another person (***the plaintiff***) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.

(2) This section applies whether or not the plaintiff was aware of the risk.

5M No duty of care for recreational activity where risk warning

(1) A person (***the defendant***) does not owe a duty of care to another person who engages in a recreational activity (***the plaintiff***) to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff.

(2) If the person who suffers harm is an incapable person, the defendant may rely on a risk warning only if:

(a) the incapable person was under the control of or accompanied by another person (who is not an incapable person and not the defendant) and the risk was the subject of a risk warning to that other person, or

(b) the risk was the subject of a risk warning to a parent of the incapable person (whether or not the incapable person was under the control of or accompanied by the parent).

(3) For the purposes of subsections (1) and (2), a risk warning to a person in relation to a recreational activity is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity. The defendant is not required to

establish that the person received or understood the warning or was capable of receiving or understanding the warning.

(4) A risk warning can be given orally or in writing (including by means of a sign or otherwise).

(5) A risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk).

(6) A defendant is not entitled to rely on a risk warning unless it is given by or on behalf of the defendant or by or on behalf of the occupier of the place where the recreational activity is engaged in.

(7) A defendant is not entitled to rely on a risk warning if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific practices or procedures for the protection of personal safety.

(8) A defendant is not entitled to rely on a risk warning to a person to the extent that the warning was contradicted by any representation as to risk made by or on behalf of the defendant to the person.

(9) A defendant is not entitled to rely on a risk warning if the plaintiff was required to engage in the recreational activity by the defendant.

(10) The fact that a risk is the subject of a risk warning does not of itself mean:

(a) that the risk is not an obvious or inherent risk of an activity, or

(b) that a person who gives the risk warning owes a duty of care to a person who engages in an activity to take precautions to avoid the risk of harm from the activity.

(11) This section does not limit or otherwise affect the effect of a risk warning in respect of a risk of an activity that is not a recreational activity.

(12) In this section:

incapable person means a person who, because of the person's young age or a physical or mental disability, lacks the capacity to understand the risk warning.

parent of an incapable person means any person (not being an incapable person) having parental responsibility for the incapable person.

5N Waiver of contractual duty of care for recreational activities

(1) Despite any other written or unwritten law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.

(2) Nothing in the written law of New South Wales renders such a term of a contract void or unenforceable or authorises any court to refuse to enforce the term, to declare the term void or to vary the term.

(3) A term of a contract for the supply of recreation services that is to the effect that a person to whom recreation services are supplied under the contract engages in any recreational activity concerned at his or her own risk operates to exclude any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.

(4) In this section, ***recreation services*** means services supplied to a person for the purposes of, in connection with or incidental to the pursuit by the person of any recreational activity.

(5) This section applies in respect of a contract for the supply of services entered into before or after the commencement of this section but does not apply in respect of a breach of warranty that occurred before that commencement.

(6) This section does not apply if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific practices or procedures for the protection of personal safety.

Division 6 Professional negligence

5O Standard of care for professionals

(1) A person practising a profession (***a professional***) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.

(2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.

(3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.

(4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

5P Division does not apply to duty to warn of risk

This Division does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in respect of the risk of death of or injury to a person associated with the provision by a professional of a professional service.

Division 7 Non-delegable duties and vicarious liability

5Q Liability based on non-delegable duty

(1) The extent of liability in tort of a person (***the defendant***) for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the

person by the defendant is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task.

(2) This section applies to an action in tort whether or not it is an action in negligence, despite anything to the contrary in section 5A.

Division 8 Contributory negligence

5R Standard of contributory negligence

(1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.

(2) For that purpose:

(a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and

(b) the matter is to be determined on the basis of what that person knew or ought to have known at the time.

5S Contributory negligence can defeat claim

In determining the extent of a reduction in damages by reason of contributory negligence, a court may determine a reduction of 100% if the court thinks it just and equitable to do so, with the result that the claim for damages is defeated.

5T Contributory negligence—claims under the Compensation to Relatives Act 1897

(1) In a claim for damages brought under the *Compensation to Relatives Act 1897*, the court is entitled to have regard to the contributory negligence of the deceased person.

(2) Section 13 of the *Law Reform (Miscellaneous Provisions) Act 1965* does not apply so as to prevent the reduction of damages by the contributory negligence of a deceased person in respect of a claim for damages brought under the *Compensation to Relatives Act 1897*.

6–8 (Repealed)

Part 2 Personal injury damages

Division 1 Preliminary

9, 10 (Repealed)

11 Definitions

In this Part:

Driving Instructors Act 1992 No 3

Historical version for 1 September 2003 to 29 September 2005 (accessed 9 April 2010 at 08:51) **Current version**

Status information

New South Wales

Status information

Currency of version

Historical version for 1 September 2003 to 29 September 2005 (accessed 9 April 2010 at 08:51). Legislation on this site is usually updated within 3 working days after a change to the legislation.

Provisions in force

All the provisions displayed in this version of the legislation have commenced. For commencement and other details see the Historical notes

Does not include amendments by:

Road Transport (General) Act 2005 No 11 (not commenced)

File last modified 14 April 2005.

New South Wales

An Act to provide for the licensing of instructors engaged for reward in teaching persons to drive motor vehicles; to repeal the *Motor Vehicle Driving Instructors Act 1961*; and for other purposes.

Part 1 Preliminary

1 Name of Act

This Act may be cited as the *Driving Instructors Act 1992*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

2A Objects of Act

The primary objects of this Act include:

(a) to ensure that driving instructors meet minimum standards relating to competency in driving instruction, probity and character in order to protect the community and to benefit the driving instruction industry, and

(b) to minimise the potential for corruption in the driving instruction industry and inappropriate behaviour by driving instructors, and

(c) to promote the safety and protection of persons receiving driving instruction.

3 Definitions

(1) In this Act:

application includes an application for the renewal of a licence.

authorised officer means a person authorised in writing by the Authority for the purposes of the provision of this Act in which the expression is used.

Authority means the Roads and Traffic Authority constituted under the *Transport Administration Act 1988*.

driver licence means:

(a) an Australian driver licence under the *Road Transport (Driver Licensing) Act 1998* (other than a learner licence, a provisional licence, a probationary licence or a restricted licence within the meaning of that Act), or

(b) a corresponding licence under the law for the time being in force in any other country,

to drive all classes of motor vehicles (or motor vehicles of the relevant class).

driving instructor is defined in section 4.

driving school is defined in section 5.

instructions includes advice, demonstrations and courses of training.

licence means a licence under this Act.

misconduct means any conduct of the following kind:

(a) sexual assault, whether in connection with the provision of driving instruction or otherwise,

(b) sexual harassment in connection with the provision of driving instruction (including making an unwelcome sexual advance, or an unwelcome request for sexual favours, to a person, or engaging in other unwelcome conduct of a sexual nature in relation to a person),

(c) fraud or dishonesty punishable on conviction by imprisonment, whether in connection with the provision of driving instruction or otherwise,

(d) the commission of any offence involving dangerous driving, whether in connection with the provision of driving instruction or otherwise,

(e) the commission of any offence involving assault, whether in connection with the provision of driving instruction or otherwise.

motor vehicle means a motor vehicle (including any trailer towed by the vehicle) within the meaning of the *Road Transport (General) Act 1999*.

(2) In this Act, a reference to a ***relevant class of motor vehicles*** is a reference to a class of motor vehicles in respect of which the applicant for a licence has applied.

4 Meaning of "driving instructor"

(1) For the purposes of this Act, a ***driving instructor*** is a person:

(a) who instructs another person for the purpose of teaching that other person to drive a motor vehicle, and

(b) who receives a monetary or other reward for so instructing (whether from the person under instruction or otherwise).

(2) It does not matter whether the driving instructor gives instructions on the instructor's own account or in conjunction with any other person or as the agent or employee of any other person.

(3) However, the regulations may provide that certain persons or classes of persons are not driving instructors for the purposes of this Act.

5 Meaning of "driving school"

For the purposes of this Act, a ***driving school*** is a business (including any franchise or co-operative) which provides persons with instructions for the purpose of teaching those persons to drive motor vehicles.

Part 2 Licences relating to driving instructors

6 Unlicensed driving instruction

A person must not act as a driving instructor unless the person is the holder of a licence.

Maximum penalty: 50 penalty units.

7 Unlicensed person not to be employed as driving instructor

A person must not engage or permit another person to act, as the person's employee or agent, as a driving instructor unless that other person is the holder of a licence.

Maximum penalty: 50 penalty units.

8 Unauthorised promotions

(1) A person who is not the holder of a licence must not advertise or state that the person acts or is willing to act as a driving instructor.

(2) A person who is not the holder of a licence authorising the person to act as a driving instructor in respect of motor vehicles of a particular class must not advertise or state that the person acts or is willing to act as a driving instructor in respect of vehicles of that class.

(3) A person must not advertise or state that the person is willing to procure another person to act as a driving instructor, or as a driving instructor in respect of motor vehicles of a particular class, unless that other person is the holder of a licence authorising the person to act as a driving instructor or as a driving instructor in respect of the class concerned.

(4), (5) (Repealed)

Maximum penalty: 50 penalty units.

9 Authority conferred by licence

A licence authorises its holder to act, in accordance with any conditions imposed on the licence, as a driving instructor.

10 Prerequisites for licence

(1) An applicant for a licence is not eligible to be issued with a licence unless the applicant:

(a) has reached the age of 21 years, and

(b) is the holder of a driver licence, and

(c) has, for a period of not less than 3 years during the period of 4 years before the date of the application, held a driver licence, and

(d) has been authorised by the Authority to undertake, and has passed, a course in driving instruction approved by the Authority and conducted by an organisation approved by the Authority.

(2) An applicant for a licence is not eligible to be issued with a licence while serving a period of good behaviour under section 16 (8) or 16A (7) of the *Road Transport (Driver Licensing) Act 1998* (or a corresponding provision under the law of any other State or Territory).

(3) The Authority may exempt any person or class of persons from the requirement under subsection (1) (d) to be authorised to undertake, or to pass, a course in driving instruction.

(4) The Authority must not authorise a person to undertake a course in driving instruction for the purposes of subsection (1) (d) unless:

(a) the person has made an application for a licence in accordance with section 11, and

(b) after considering a report on the person made under section 13, the Authority is satisfied that the person is of good character.

11 Application for licence

(1) An application for a licence is to be in a form approved by the Authority and is to be lodged with the Authority.

(2) The application is to be accompanied by the fee prescribed by the regulations.

12 Referral of application to Commissioner of Police

(1) The Authority must, as soon as practicable after receiving an application for a licence, notify the Commissioner of Police of the application.

(2) The Authority is not obliged to notify the Commissioner of Police of an application for the renewal of a licence.

(1) A person the subject of a prohibition order must not contravene any of its terms.

(2) A person must not permit another person to conduct a driving school or to engage in the control, management or administration of a driving school in contravention of a prohibition order if the person knows, or could reasonably be expected to know, that the other person is subject to the order.

Maximum penalty: 50 penalty units.

Part 5 Records relating to driving instructors and driving schools

45 Authority to keep records

The Authority must keep records of:

(a) licences and matters relating to licences, including particulars of the issue, refusal, suspension and cancellation of licences, conditions imposed on licences and the variation of such conditions, and

(b) prohibition orders under Part 4 and matters relating to such orders, including particulars of their making, variation and revocation, and

(c) particulars of the service of notices or documents under this Act.

46 Evidence as to Authority's records

(1) A certificate purporting to be signed by an authorised officer and to certify that on any date or during any period specified in the certificate the particulars set out in the certificate as to any of the matters referred to in section 45 did or did not appear on or from the Authority's records is, in all courts and on all occasions, evidence of the particulars certified by the certificate.

(2) In particular, a certificate purporting to be signed by an authorised officer and to certify that on any date or during any period specified in the certificate:

(a) a specified person was or was not the holder of a licence, or

(b) a licence held by a specified person was or was not subject to a specified condition, or

(c) a specified person was or was not subject to a specified prohibition order, or

(d) a specified notice or document was served under this Act on a specified person,

is admissible in evidence in any legal proceedings and is evidence of the particulars certified by the certificate.

(3) This section applies without the necessity for proof of the signature or of the official character of the person purporting to have signed the certificate and without the necessity for the production of any record or document on which the certificate is founded.

47 Driving schools to keep records

(1) The proprietor of a driving school must keep or cause to be kept such records relating to the operation of the driving school as may be prescribed by the regulations.

Maximum penalty: 50 penalty units.

(2) The Authority may, by notice in writing to the proprietor of a driving school, exempt that

proprietor from the requirement to keep records, and may in the same way withdraw that exemption.

48 Driving instructors to keep records

The holder of a licence must keep such records relating to the giving of driving instruction as may be prescribed by the regulations.

Maximum penalty: 50 penalty units.

49 Production of records

(1) A police officer or an authorised officer may, at any reasonable time, require the proprietor of a driving school or a driving instructor:

(a) to produce for inspection by the officer any record required by this Act to be kept by the proprietor or by the instructor, as the case may be, and

(b) to allow the officer to make copies of or take extracts from the record, and

(c) to permit the officer to make an endorsement or notation on the record, and

(d) to provide such information as may reasonably be required by the officer in connection with the record.

(2) A proprietor of a driving school or a driving instructor must not, without reasonable excuse, fail to comply with a requirement under this section.

Maximum penalty: 50 penalty units.

(3) Any person who wilfully obstructs or hinders a police officer or an authorised officer in the exercise of any power conferred by this section is guilty of an offence.

Maximum penalty: 50 penalty units.

Part 6 Miscellaneous

50 Act binds the Crown

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

51 Identification of persons offering driving instruction

(1) A police officer or an authorised officer who suspects on reasonable grounds that a motor vehicle is a vehicle used, or sometimes used, for the purpose of teaching any person to drive or for the purpose of advertising a driving school or advertising the fact that any person is willing to act as a driving instructor, may require:

(a) the owner of the vehicle, or

(b) the person who has custody of the vehicle, or

(c) if the vehicle is registered under the *Road Transport (Vehicle Registration) Act 1997* (or registered or licensed under the law of any other State, or of any Territory or country that corresponds to the requirements of that Act relating to the registration of motor vehicles)—the person in whose name the vehicle is registered,

Driving Instructors Regulation 2003

Historical version for 1 July 2005 to 30 June 2006 (accessed 9 April 2010 at 08:52) **Repealed version**

Status information

New South Wales

Status information

Currency of version

Historical version for 1 July 2005 to 30 June 2006 (accessed 9 April 2010 at 08:52).
Legislation on this site is usually updated within 3 working days after a change to the legislation.

Provisions in force

All the provisions displayed in this version of the legislation have commenced. For commencement and other details see the Historical notes

Does not include amendments by:

Driving Instructors Amendment (Fees) Regulation 2006 (313) (GG No 82 of 23.6.2006, p 4606) (not commenced — to commence on 1.7.2006)

Authorisation: This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the Interpretation Act 1987.

File last modified 23 June 2006.

New South Wales

instruction and allows that person time to examine the driving instructor's licence.

Maximum penalty: 20 penalty units.

8 Improper use or care of driving instructor's licence

(1) A person who holds a driving instructor's licence must not act as a driving instructor in a motor vehicle, or drive, or cause or permit to be stood or driven, a motor vehicle used for the giving of driving instruction, on which is fixed a driving instructor's licence which:

(a) has been altered, mutilated or defaced in any manner, or

(b) was not issued to the person, or

(c) contains any particulars which the person knows to be false or misleading in a material respect.

(2) A person must not, in purported compliance with clause 7 (2), produce a driving instructor's licence of a kind referred to in subclause (1).

(3) A person must not, without reasonable excuse, alter, mutilate or deface a driving instructor's licence.

(4) A person must not lend or otherwise part with possession of his or her driving instructor's licence.

Maximum penalty: 20 penalty units.

9 Records to be kept by driving schools

(1) For the purposes of section 47 (1) of the Act, the proprietor of a driving school must keep or cause to be kept in a form approved by the Authority a record of the following:

(a) the name of the school,

(b) the name of each person who is an owner of the school (that is, a person who has any share in the capital of the business of the school, or any entitlement to receive any income derived from the school, whether the entitlement arises at law or in equity or otherwise, and may include a proprietor, or a person having principal control, management and administration, of the school),

(c) the name of the person having principal control, management and administration of the school,

(d) the name of any other person who engages in the control, management or administration of the school,

(e) the name, driver licence number and driving instructor's licence number of each driving instructor working for the school,

(f) the name, address and telephone number of each student who receives driving instruction from the school,

(g) the registration number of each motor vehicle used by the school to provide driving instruction,

(h) details (including the name of the insurer, the name of the insured, the number of the policy and the date on which the policy expires) of the comprehensive motor vehicle

insurance policy in force in respect of each motor vehicle used by the school to provide driving instruction.

(2) The proprietor of a driving school must retain such a record for at least 5 years after the record is made.

Maximum penalty: 20 penalty units.

10 Records to be kept by driving instructors

(1) For the purposes of section 48 of the Act, the holder of a driving instructor's licence must keep in a form approved by the Authority a record of the following:

(a) the name, driver licence number and driving instructor's licence number of the driving instructor,

(b) the name of each driving school for which the driving instructor works,

(c) the name, address and telephone number of each student who receives driving instruction from the driving instructor,

(d) the learner's licence number of each such student,

(e) the dates and times of theory and practical instruction for each such student,

(f) the registration number of each motor vehicle used for practical instruction by the driving instructor,

(g) the dates, locations and number of driving tests presented for by each student of the driving instructor,

(h) if the driving instructor's motor vehicle is hired solely for a driving test, the name, address and learner's licence number of the person presenting for the test.

(2) The holder of a driving instructor's licence must retain such a record for at least 5 years after the record is made.

Maximum penalty: 20 penalty units.

11 Compulsory comprehensive motor vehicle insurance

(1) A comprehensive motor vehicle insurance policy required by section 54C (1) of the Act:

(a) must provide cover of at least $5,000,000 against any liability for damage to property caused by or arising out of the use of any motor vehicle to which the policy relates, and

(b) must indemnify each person for the time being receiving driving instruction by means of or in connection with any such motor vehicle in relation to any damage (including any excess payable on a claim) arising out of the use of the motor vehicle, and

(c) must be maintained with a corporation authorised under the *Insurance Act 1973* of the Commonwealth to carry on insurance business.

(2) The Authority may exempt a person from compliance with section 54C (1) of the Act.

Part 4 Miscellaneous

12 Duplicate driving controls

(1) The holder of a driving instructor's licence must not use a motor vehicle to give driving instruction unless the motor vehicle is equipped with duplicate driving controls of a type approved by the Authority.

Maximum penalty: 20 penalty units.

(2) This clause does not apply:

(a) in the case of a motor cycle, or

(b) in any case in which a motor vehicle is provided by a person undergoing driving instruction, or

(c) in any case in which the use of a particular motor vehicle has been approved by the Authority in writing, or

(d) to any motor vehicle exceeding 4.5 tonnes manufacturer's gross vehicle mass, or

(e) to an implement within the meaning of the *Road Transport (Vehicle Registration) Regulation 1998*.

13 Saving

Any act, matter or thing that, immediately before the repeal of the *Driving Instructors Regulation 1993*, had effect under that Regulation continues to have effect under this Regulation.

Schedule 1 Fees

(Clause 6)

Document	$
~~Licence subject to a condition that the holder complete a further course of training within a specified time~~	~~40~~
Any other licence	132
Renewal of licence	132
Duplicate licence	19
Certificate under section 46 of the Act	17

Historical notes

The following abbreviations are used in the Historical notes:

Am	amended	LW	legislation website	Sch	Schedule
Cl	clause	No	number	Schs	Schedules
Cll	clauses	p	page	Sec	section
Div	Division	pp	pages	Secs	sections
Divs	Divisions	Reg	Regulation	Subdiv	Subdivision
GG	Government Gazette	Regs	Regulations	Subdivs	Subdivisions
Ins	inserted	Rep	repealed	Subst	substituted

Table of amending instruments

Driving Instructors Regulation 2003 published in Gazette No 132 of 29.8.2003, p 8367 and amended as follows:
Driving Instructors Amendment (Fees) Regulation 2004 (GG No 110 of 1.7.2004, p 4891)

2005 (305) Driving Instructors Amendment (Fees) Regulation 2005. GG No 81 of 1.7.2005, p 3326. Date of commencement, 1.7.2005, cl 2.