

SWEENEY (BHNF BELL) v THORNTON (S321/2011)

Court appealed from: New South Wales Court of Appeal
[2011] NSWCA 244

Date of judgment: 23 August 2011

Referred to enlarged bench: 9 March 2012

On 27 August 2005 Miss Madeleine Sweeney was severely injured when the car that she was driving crashed on a country road. She was 16 years old and held a learner driver's licence. At the time of the accident Miss Sweeney was being supervised by Mr Andrew Thornton, who owned the car and held an unrestricted driver's licence. It was their fourth journey that day along the 35 km stretch of road with Miss Sweeney driving under Mr Thornton's supervision. The road was slightly wet. When traversing a bend, an irregularity in the road's surface caused the car's rear wheels to skid to the right. Miss Sweeney then over-corrected, turning the steering wheel too far to the right and then back to the left. She also removed her foot from the accelerator and suddenly depressed it again, instead of the brake. The car left the road and collided with a tree, causing Miss Sweeney's injuries. Miss Sweeney (by her next friend) then sued Mr Thornton for negligence. At the trial, Miss Sweeney could not remember the events of the fateful day.

On 10 September 2010 Justice Fullerton held that Miss Sweeney's injuries resulted from Mr Thornton's negligence. Her Honour found that the car had entered the bend at about 70 kph. Justice Fullerton held that this speed was unsafe in the conditions, having regard to Miss Sweeney's level of experience. Her Honour found that Mr Thornton had negligently failed to instruct Miss Sweeney to reduce her speed, or to take action himself to control the vehicle after it had begun to slide.

On 23 August 2011 the Court of Appeal (Campbell JA, Sackville & Tobias AJJA) unanimously allowed Mr Thornton's appeal. Their Honours found that Justice Fullerton had not addressed the question of whether a reasonable person in Mr Thornton's position would have instructed Miss Sweeney to enter the bend at a speed lower than 70 kph. No evidence had been given of any sign beside the road indicating that the bend required caution or a speed lower than the general limit of 100 kph. Further, Justice Fullerton had found that the bend could be comfortably traversed at 73-75 kph. The Court of Appeal held that the evidence did not establish that a reasonable person supervising Miss Sweeney would have instructed her to slow down below 70 kph as she approached the bend. Their Honours therefore found that Justice Fullerton had erred in holding Mr Thornton to have been negligent.

On 9 March 2012 Chief Justice French and Justice Gummow referred this matter into an enlarged bench so that the application for special leave to appeal could be argued as on an appeal.

The questions of law said to justify the grant of special leave to appeal include:

- Whether the Court of Appeal's finding that negligence had not been established was the result of its error as to the statement of, and findings as to:
 - a) the content of the duty of care;
 - b) breach of duty of care; and
 - c) causation,

in the particular circumstances of the Applicant learner driver's claim against the Respondent supervising driver.

- Whether the Court of Appeal erred in its unjustified limitation of the effect of the Respondent's admission on the content of his duty of care to the Applicant.