HIGH COURT OF AUSTRALIA

4 September 2019

LEE v LEE & ORS; HSU v RACQ INSURANCE LIMITED; LEE v RACQ INSURANCE LIMITED
[2019] HCA 28

Today the High Court unanimously allowed three appeals in relation to a decision of the Court of Appeal of the Supreme Court of Queensland ("the Court of Appeal") arising from a motor vehicle collision ("the collision") in which the appellant in the first appeal ("the appellant") was rendered an incomplete tetraplegic. The High Court held that the Court of Appeal erred in dismissing an appeal against a decision of the Supreme Court of Queensland, which dismissed the appellant's claim against RACQ Insurance Limited ("the RACQ"), the compulsory third-party insurer of the vehicle.

At the time of the collision, the appellant was a 17-year-old youth, and was travelling in a Toyota Tarago ("the Toyota") with his mother ("the mother"), his father ("the father"), and his two younger brothers. The collision was caused by the negligence of the driver of the Toyota, which collided with a Nissan Patrol ("the Nissan") travelling in the opposite direction.

The appellant brought proceedings in the Supreme Court of Queensland claiming damages for negligence against the father, the mother, and the RACQ. The sole issue at the trial was the identity of the driver of the Toyota. The case pleaded by the appellant was that his father was the driver. The RACQ counterclaimed in deceit against the appellant, the father, and the mother, for the recovery of payments made to each. It was the RACQ's case that the appellant was the driver. Its case depended upon the inference to be drawn from the presence of the appellant's blood on the driver's deflated airbag. The bloodstaining was predominantly on the windscreen side of the airbag (when inflated).

The driver of the Nissan, Mr Hannan, estimated that he reached the driver's side of the Toyota within 30 to 90 seconds of the collision. He observed that, at that time, no one was in the driver's seat. The father was standing in the area between the first and second rows of seats. Mr Hannan opened the sliding driver's side passenger door and assisted the father to remove one of the three children from the vehicle. It was the RACQ's case that, in the interval between the collision and Mr Hannan's arrival, the father had lowered the driver's seat and pulled the appellant into the rear passenger seat. It was the appellant's case that the probable explanation for his blood on the airbag was that his father had wiped his hands on it after touching the appellant's bleeding face.

The trial judge found that the appellant was driving the Toyota at the time of the collision. The appellant, the father, and the mother appealed to the Court of Appeal. The Court of Appeal identified critical errors in the trial judge's findings and concluded that, save for the inference to be drawn from the blood on the airbag ("the DNA evidence"), it was "much more likely" that the appellant was not the driver. However, the Court of Appeal considered that the DNA evidence substantially weakened the appellant's case and thus that the trial judge's decision was not "glaringly improbable" or "contrary to compelling inferences". The appeals were dismissed.

By grant of special leave, the appellant, the father, and the mother appealed to the High Court. The High Court unanimously allowed the appeals. The High Court held that, having rejected the essential planks of the trial judge's reasoning, it was the duty of the Court of Appeal to weigh the conflicting evidence, draw its own inferences, and decide for itself which of the two hypotheses presented at trial was the more probable. The Court of Appeal's acceptance of the trial judge's assessment that the DNA

evidence was persuasive overlooked that the assessment was based upon a finding that the appellant was unrestrained by the seatbelt at the time of collision. The Court of Appeal overturned that finding, but did not return to consider the significance of unchallenged expert evidence concerning the operation of the driver's seatbelt pre-tensioners and the rates of inflation and deflation of the airbag. Given that it was largely a circumstantial case, the High Court held it was not appropriate to order a new trial. The High Court agreed with the Court of Appeal's tentative conclusion that it is much more likely that the father was the driver of the Toyota and, in light of the expert evidence of the operation of the seatbelt and the airbag, the High Court did not find that conclusion was weakened by the DNA evidence.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.