SUPREME COURT OF QUEENSLAND

CITATION:	*Lee v Lee; Hsu v RACQ Insurance Limited; Lee v RACQ Insurance Limited* [2018] QCA 104
PARTIES:	**In Appeal No 3976 of 2017:** **LIEN-YANG LEE** (appellant) **v** **CHIN-FU LEE** (first respondent) **CHAO-LING HSU** (second respondent) **RACQ INSURANCE LIMITED** ACN 009 704 152 (third respondent) **In Appeal No 4378 of 2017:** **CHAO-LING HSU** (appellant) **v** **RACQ INSURANCE LIMITED** ACN 009 704 152 (respondent) **In Appeal No 4400 of 2017:** **CHIN-FU LEE** (appellant) **v** **RACQ INSURANCE LIMITED** ACN 009 704 152 (respondent)
FILE NO/S:	Appeal No 3976 of 2017 Appeal No 4378 of 2017 Appeal No 4400 of 2017 SC No 5357 of 2015
DIVISION:	Court of Appeal
PROCEEDINGS:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 42 (Boddice J)
DELIVERED ON:	1 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2017

JUDGES: Fraser and Philippides and McMurdo JJA

ORDER: **In each of Appeal No 3976 of 2017, Appeal No 4378 of 2017 and Appeal No 4400 of 2017:**

The appeal be dismissed with costs.

CATCHWORDS: INSURANCE – MOTOR VEHICLES – COMPULSORY THIRD PARTY INSURANCE AND LIKE SCHEMES – RECOVERY OR RECOURSE BY INSURER WHERE UNAUTHORISED USE, INEFFECTIVE CONTROL, DEFECTIVE VEHICLE, ETC – where a son (the appellant in Appeal No 3976 of 2017) sustained severe spinal injuries in a car accident that occurred when he was travelling in a car with his father, mother and two brothers – where the son sought damages for his injuries, alleging that they were caused by the negligence of his father (the first respondent in Appeal No 3976 of 2017 and the appellant in Appeal No 4400 of 2017), as the driver of the vehicle in which the family was travelling when the car accident occurred – where the third respondent in Appeal No 3976 of 2017 and the respondent in each of Appeal No 4378 of 2017 and Appeal No 4400 of 2017 was the compulsory third party insurer of the vehicle – where the parties agreed on the quantification of the son's injuries and that the accident was caused solely by the negligence of the driver of the vehicle in which the son and his family were travelling – where the only issue at trial was whether it was the son or the father who had been driving the vehicle – where the son was 17 years old at the time of the accident and did not hold a drivers licence – where the trial judge found that it was the son who had been driving and dismissed the son's claim – whether the trial judge's finding as to who was driving the vehicle is correct

Motor Accident Insurance Act 1994 (Qld), s 53

The Chairman, National Crime Authority & Anor v Flack (1998) 86 FCR 16; [1998] FCA 932, cited
Constantinou v The Queen [2015] VSCA 177, cited
De Innocentis v Brisbane City Council [2000] 2 Qd R 349; [1999] QCA 404, applied
Dearman v Dearman (1908) 7 CLR 549; [1908] HCA 84, applied
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, applied
Goodrich Aerospace Pty Ltd v Arsic (2006) 66 NSWLR 186; [2006] NSWCA 187, cited
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, cited
R v Hardy (1794) 24 St Tr 199, cited
Ren v Jiang [2014] NSWCA 1, cited
Robinson Helicopter Company Incorporated v McDermott (2016) 90 ALJR 679; [2016] HCA 22, cited

COUNSEL: In Appeal No 3976 of 2017:

G W Diehm QC, with M Callaghan, for the appellant
The first respondent appeared on his own behalf
M Grant-Taylor QC, with J M Hewson, for the second respondent
R J Douglas QC, with B F Charrington, for the third respondent

In Appeal No 4378 of 2017:

M Grant-Taylor QC, with J M Hewson, for the appellant
R J Douglas QC, with B F Charrington, for the respondent

In Appeal No 4400 of 2017:

The appellant appeared on his own behalf
R J Douglas QC, with B F Charrington, for the respondent

SOLICITORS: In Appeal No 3976 of 2017:

Slater and Gordon Lawyers for the appellant
The first respondent appeared on his own behalf
Littles Lawyers for the second respondent
Gilchrist Connell Lawyers for the third respondent

In Appeal No 4378 of 2017:

Littles Lawyers for the appellant
Gilchrist Connell Lawyers for the respondent

In Appeal No 4400 of 2017:

The appellant appeared on his own behalf
Gilchrist Connell Lawyers for the respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of McMurdo JA. I agree with those reasons and with the orders proposed by his Honour.

[2] **PHILIPPIDES JA:** I agree with the orders proposed by McMurdo JA for the reasons his Honour has given.

[3] **McMURDO JA:** On 25 September 2013, the appellant Lien-Yang Lee sustained severe spinal injuries in a car accident on North Stradbroke Island. He was then aged 17 years and was still at school. He has been left with a partial tetraplegia from which he will not recover. Although he is one of three appellants, for convenience I will refer to him as the appellant.

[4] He claimed damages for his injuries, alleging that they were caused by the negligence of his father as the driver of the car in which he was travelling, which was a Toyota Tarago. His mother was the owner of that vehicle. The case was defended by the compulsory third party insurer, which I will call the respondent.

[5] The parties agreed on the quantification of the appellant's damages. They also agreed that the accident, which involved a head on collision between the Toyota and another vehicle, was caused solely by the negligence of the driver of the Toyota. The only issue at the trial was whether it was the appellant's father who had been

driving the Toyota, or instead, as the respondent contended, it had been the appellant himself.

[6] The trial judge found that it was the appellant who had been driving and consequently his claim was dismissed.[1] The ultimate question here is whether that finding was correct. The appellant says that it was affected by a number of errors and that he should be given a judgment in his favour.

[7] The respondent counter-claimed against the appellant and each of his parents, for payment of monies which the respondent had paid in response to notices of claim lodged by them after the collision. The respondent said that it had been induced to pay those monies by deceitful representations by the appellant and his parents that the driver had been the father. The trial judge upheld that counter-claim. He ordered the appellant and his parents to pay an amount of $439,840.96, and he ordered the appellant's parents to pay a further sum of $234,428.41. Those orders are also under appeal.[2] The outcome of those appeals again turns upon the question of whether the appellant was the driver. The appeals by the parents raise no ground which is not raised by the appellant.

[8] This case was and is finely balanced and it requires an assessment of the probabilities of competing hypotheses where many things are unknown. The question in this court is whether the decision of the trial judge was erroneous, having regard to the advantages of a trial judge in deciding factual questions where the credibility of witnesses was critical to the outcome.[3] For the following reasons, I am not persuaded that the decision was erroneous and I would dismiss the appeals. Before stating these reasons, it is necessary to set out the extensive evidence of the trial.

Before the collision

[9] The appellant was on holiday on North Stradbroke Island with his parents and his two younger brothers – one, whose English name is James and who is one year younger than the appellant, and the other, whose English name is Adam and who is five years younger than the appellant. The family had moved to Australia from Taiwan in 2008. They were staying on the island at a church camp. On the morning of the accident, the family had been to Brown Lake on the island, with the appellant's father driving the Toyota, as he usually did.

[10] At around 12.30 pm, the family left Brown Lake to travel to Blue Lake. The appellant's evidence was that he could recall that the family members were in their usual seating positions: his father was driving, his mother was in the front passenger's seat, behind her was James, next to him was Adam and the appellant was sitting behind his father. There was evidence from the appellant that his two brothers soon fell asleep, which was confirmed by their evidence. The appellant said that he also fell asleep for a short period before waking up when the Toyota stopped at one point because they had been travelling in the wrong direction. The appellant said that he then fell asleep again and did not wake until after the collision. James testified that he remained asleep until the collision. Adam said that he had no memory of what had happened from when he got into the car until after the accident.

---

1 *Lee v Lee & Ors* [2017] QSC 42 ("the Primary Reasons").
2 The mother's appeal being 4378/17 and the father's appeal being 4400/17.
3 *Fox v Percy* (2003) 214 CLR 118 at 128 [29]; [2003] HCA 22.

[11] The appellant's mother testified that it was her husband who was driving. But the appellant's father, although present throughout the trial and a party to the counter-claim, did not testify. As I will discuss, the respondent tendered a statement which the appellant's father gave to an insurance investigator, in which he said that he had been the driver.

The collision

[12] The most reliable evidence of the collision came from the driver of the other vehicle, Mr Hannan. He was driving in the opposite direction to the Toyota when he noticed it coming around a bend towards him on his side of the road. The Toyota was about 50 metres in front of him and "could not have been any further into" Mr Hannan's side of what was a relatively narrow and unmarked bitumen road. Mr Hannan swerved to his left and braked. But the Toyota swerved to its right and the vehicles collided head-on on Mr Hannan's side of the road.

[13] The appellant's mother testified that immediately before the collision, she became concerned that the cars were very close and called out to her husband as the driver. She could not recall his reaction. Her evidence did not contradict Mr Hannan's account of the collision.

Immediately after the collision

[14] The appellant said that he did not awake until after the collision and when he was lying on the ground near the Toyota, with a woman holding his neck and telling him not to move it. He did not know the woman.

[15] The appellant's mother said that immediately after the collision, her husband was very nervous and wanted to get out of the car. She said he left the car through the driver's door. She could not recall him undoing his seatbelt or moving his seat before getting out. She was trapped in her seat by the damage to the Toyota and her own injuries. She said that although she could not see her husband, she could hear him in the seat behind her getting their children out of the car one by one. She also recalled hearing her husband speak to Mr Hannan who was outside the Toyota.

[16] The airbags for the front seats had deployed in the accident. The appellant's mother said that she could not recall any blood being on either of them. There was a substantial amount of blood on the driver's airbag, as several photographs demonstrated. She said that she recalled that her husband's hands had blood on them; at one point she described the blood as being on the top of his hands.

[17] Mr Hannan's evidence was recorded ahead of the trial, so that this Court has been able to see that evidence, as the trial judge did. Mr Hannan was called in the appellant's case, and in cross-examination, several written statements by him were tendered. I will discuss first his oral evidence.

[18] Immediately after the collision, Mr Hannan said, he noticed smoke coming from each vehicle. There was no other person in his car. His immediate concern was to remove his dog which was distressed. He carried the dog across the road, to a point about 30 metres away and immediately left the dog there as he returned to the vehicles. He went to the driver's side of the Toyota. He estimated that between 30 seconds and a minute passed between the collision and when he was alongside the Toyota. He described his actions as involving "a very quick decision, just put the dog out and go back and help the people [in the Toyota]".

[19] He was asked whether, as he made his approach to the Toyota, he saw any person outside the vehicle, to which he answered "no". He was asked whether he observed any person in the driver's seat as he arrived at the Toyota, to which he answered "no". And he gave the same answer to a question of whether he had observed at any prior time a person whom he could identify as sitting in the driver's seat.

[20] Mr Hannan was asked to recall the number of occupants of the Toyota whom he noticed as he reached that vehicle. He initially answered four, but then withdrew that answer, saying that it was an error and that he had noticed "three children and two adults". He said that all five persons were inside the Toyota, with "the elder male" (the appellant's father) standing between the first and second row of seats, or in other words, "between the driver's section and the second row." Mr Hannan was asked where the children were positioned in the vehicle to which he answered:

> "I believe the two that – I believe I helped two and I believe they were the two in that second row that he was passing, but I cannot swear to that, the exact …"

He was then then asked to explain his uncertainty to which he answered:

> "The uncertainty is which children we're talking about in particular at this stage. So which child. That's what my confusion is. I believe I helped two of them. And some help came by the time the third … I'm uncertain – I'm slightly confused about the children, who was the eldest, where were they positioned."

Mr Hannan was asked where the children were positioned, within the van, to which he answered:

> "In the second row, because of the situation that he was passing me – trying to get the children out of the car immediately. I felt at the time he was as worried as I was about the smoke in the car, that he was panicking."

[21] Mr Hannan said that as he first approached the Toyota, he could recall pulling open the sliding door to the rear seats, before the appellant's father passed a child to him, whom Mr Hannan then carried a "very short distance" from the car, putting the child down and returning to repeat "the same type of manoeuvre" with a second child. He said that he still did not recall whether he assisted three of the children or two of them, but that at some stage, whilst the appellant's mother was still in the car, "some help arrived" and he was told to go and lie down himself, because he was starting to realise that he was injured. He said at that point "I really lost visibility of everything that was happening".

[22] He was asked whether he had any recollection of the apparent injuries to the children, to which he answered:

> "Not crystal clear memories, but I believe one was either unconscious or nearly unconscious and the other one had head wounds. But seemed to have … some sort of injuries, anyway, restricting movement."

[23] In cross-examination he was asked whether he recalled any door in the Toyota being open as he first approached it, to which he answered:

> "I have a fairly firm memory that there was no door open; that I opened the sliding door."

[24] He was referred by the cross-examiner to an earlier statement by him that some 60 to 90 seconds passed between the collision and his arrival at the Toyota and he agreed that this estimate was possibly correct. He said he had no "recollection either way" as to whether either of the front seats of the Toyota was reclined when he arrived at the car. But he confirmed that the appellant's father, when first seen by him, was standing in the area between the front and second rows of seats in which there was "a reasonable amount of room. Certainly enough to be standing up …"

[25] There were three previous statements which had been made by Mr Hannan, each of which were tendered by the cross-examiner. The first of them was a statement given to police on 13 October 2013, less than three weeks after the collision. In that statement, Mr Hannan described going to the driver's side of the Toyota, but he said there that he did not know whether he had opened the sliding door or whether it was open already. In that statement he described getting "the children out of the car" with the appellant's father handing the children to him. In the statement he said "I think it was two children but it might have been three. I recall one younger child and one older child." He said that "at no stage did I see anyone in the driver's seat of the vehicle." He said there that "after the kids were out of the car", he saw other people arriving at the scene.

[26] The second of these statements was dated 23 January 2014, and was prepared by an investigator for the respondent. In that statement, Mr Hannan said:

> "I went to the driver's side of the Tarago and there was an older male there and he was in the rear of the Tarago and he was getting his children out of the back seat and he passed them to me and I helped him remove the children and we moved them away from the car. As far as I can remember there were three (3) younger male children in the back seat of the Tarago however I am not certain of that.
>
> I assumed that the older male who met me at the driver's side of the Tarago had been the driver at the time of the accident. I didn't actually see him in the driver's seat. I don't recall who I saw in the driver's seat but from what I remember and what I saw I believe the older male must have been driving at the time of the accident and the children were in the rear of the Tarago.
>
> …
>
> We got the children out and then a number of other cars and people stopped and helped us and I think the adrenaline started to wear off a bit by that stage and I went and sat down. The Police and Ambulance arrived just after that and they looked after everything."

[27] The third of these statements was given on 26 December 2015. Mr Hannan there said that he went to the Toyota about 60 to 90 seconds after the collision, and that "everything happened very quickly as I was worried the cars would go on fire." He said that when he got to the Toyota, there was no one outside of the car and the driver's seat was empty. He could not recall how many children whom he helped to remove. He said that he was "certain no one had exited the vehicle when I first approached it straight after the accident".

Others at the scene

[28] The first people to arrive at the scene were a Mr Hough and his family together with a friend. Only the appellant's mother was then in the Toyota. The appellant was then outside the Toyota, about one metre from the driver's side, lying against his father who was supporting his upper body. At the same time the father was touching the appellant's face and calling his name to try to keep the appellant conscious. Mr Hough recalled seeing fresh bright red blood on the appellant's face.

[29] Mr Hough recalled that the sliding door to the rear seats to the Toyota was open but he could not remember anything about the driver's door.

[30] Mr Hough drove to Dunwich to call for assistance. He was away for approximately 30 minutes before returning to help his wife look after the appellant.

[31] Dr Cheng Chang Lee was a medical practitioner who was attending the same church camp on the island and knew the appellant's family. On hearing that there had been an accident, he immediately drove to the scene where he found the appellant on the ground beside the Toyota with a woman sitting or squatting beside him. Dr Lee had been an emergency medicine doctor in Taiwan. He recalled the appellant saying that he could not feel anything below his chest. He observed a shallow wound on the appellant's face. He recalled the appellant's brother James having a facial laceration and showing the signs of a significant head injury. He made himself sure that the appellant's father did not have any injuries, although he noticed that the father had bloodstains on the palms of his hands. Dr Lee was still at the scene when police and ambulance officers arrived. The appellant's counsel was prevented from calling further evidence from Dr Lee, to which I will return.

[32] Evidence was given by two paramedics, Mr Bradbury and Mr Moss. They were directed by Dr Lee to the injured persons. Mr Bradbury was soon aware that there was an adult male and a young boy who had only relatively minor injuries. He did not recall the adult having any visible injuries, bleeding or blood. He said that there were two boys on the ground beside the Toyota, the younger of which had a significant facial injury and a head injury. The other boy did not have any obvious injuries but he suspected that that boy had a significant spinal problem.

[33] Mr Bradbury thought that the driver's door of the Toyota was open. A woman in the front seat of the Toyota was treated by the paramedics. They succeeded in removing her from the Toyota, by laying back the front passenger seat. Mr Bradbury said that it was possible that the driver's seat was also laid back by them in order to use an "extrication device" to effect the removal of the appellant's mother. He had no recollection of lowering the driver's seat but said that it was possible that the paramedics had done so.

[34] Mr Moss recalled that both the sliding door to the rear seats and the driver's door to the Toyota were open.

[35] Two police officers from Dunwich Station soon arrived. Each gave evidence but in neither case was that significant.

[36] Another police officer, Senior Constable Pepper, attended the scene later in the afternoon. He was the principal investigating officer, with the responsibility to assess whether any offence had been committed. When he arrived, helicopters had already taken the injured persons away for treatment and none of the occupants of either vehicle were still at the scene. He took about 90 photographs, which were tendered at the trial. He noted that both airbags in the front seat of the Toyota had

been deployed and that there was blood on one of them. He noted that a seatbelt was still latched in place and that the back rest of that seat was slightly reclined. His notes did not identify the particular seat, but it became clear that this was the driver's seat.

[37] Senior Constable Pepper spoke to the appellant on 8 October 2013, when the appellant said that he did not have much recollection of the collision, but that it was his father who had been driving.

DNA evidence

[38] On the day after the collision, two police officers, Sergeant Kee and Constable Dalgliesh, examined the Toyota at a holding yard in Brisbane. Sergeant Kee took a number of photographs before using the one swab to take three DNA samples from the driver's airbag. His intention was to identify the driver by a DNA analysis. Subsequently, he obtained DNA samples from the appellant and his father. No DNA sample was sought from the appellant's brother James.

[39] Sergeant Kee recalled using the swab to take samples from three locations on the airbag, but could not recall precisely where they were. As I will discuss, there were bloodstains on many parts of the airbag.

[40] Constable Dalgliesh could not recall the parts from which the samples were taken.

[41] Mr Pippia, a forensic scientist, gave uncontested evidence that he found a match between the DNA on the airbag and the sample provided by the appellant. He found no match with the DNA sample provided by the appellant's father, but said that the absence of a person's DNA profile from a surface did not mean that the person had not come into contact with that surface.

[42] Two experts then testified about whether the appellant's DNA was likely to have been present on the airbag from the appellant's face or head coming into contact with it or by some other means. A critical issue was whether the appellant's blood had been directly deposited there or whether it had been carried there on the hands of the appellant's father, which had then touched the airbag and thereby transferred to it the appellant's DNA.

[43] One of those witnesses was Dr Robertson, a specialist in forensic and general pathology. The trial judge found her evidence to be "highly persuasive", in that she "gave cogent, compelling reasons why the blood patterning observed by her was not consistent with a swiping, wiping or transfer of blood" but was instead "deposited as a result of direct contact with the bleeding source."[4] If the blood on the airbag had been deposited by direct contact with it, then as the judge said, that could only have occurred if the appellant had been the driver.[5]

[44] In her principal report, Dr Robertson wrote:

> "My experience of blood-stain pattern analysis indicates that the apparent bloodstaining of the driver's deployed airbag suggests close contact with an individual who has heavily bleeding facial injuries. According to the documentation regarding the medical examination at the Princess Alexandra Hospital of the presentation of Lien-Yang

---

4 Primary Reasons at [208].

5 Ibid.

> Lee following the accident, Mr Lee suffered a number of facial and dental injuries. Interpretation of these injury patterns indicates that they are likely to have been associated with considerable blood loss. The facial injuries sustained by Lien-Yang Lee are entirely consistent with having caused the staining to the deployed airbag. Analysis of the facial injuries identified as having been sustained by [the appellant's father] are unlikely to have been associated with considerable blood loss and concomitant staining of the deployed airbag had he been seated in the driver's seat when the airbag deployed. Although only 3 areas of bloodstaining of the bag were sampled, the results of the DNA comparison studies indicate that those samples match the DNA of Lien-Yang Lee. These two features of the blood stain pattern suggest the occupation of the driver's seat … by Lien-Yang Lee rather than [the appellant's father]."

[45] That report did not consider the possibility that the appellant's blood had been transferred by some means to the airbag, instead of being placed there by direct contact between it and the appellant. But prior to the trial, Dr Robertson conferred with the appellant's counsel and solicitor on that subject. The notes of that conference, which were tendered into evidence, record that:

> "Dr Robertson said that she is not familiar with the term "transfer" in this field of expertise but it was possible that blood on a surface came into contact with another surface [and that] it could be from this type of contact but if the blood came from other than the bleeding source, you may see the pattern of the object, such as a fingerprint."

In the same conference, Dr Robertson is recorded as saying that the injuries suffered by the appellant "were also consistent with him sitting in any other position in the car".

[46] Also tendered into evidence was a file note of a conference between the respondent's lawyers and Dr Robertson, a few days later. The note of that conference, like the previously mentioned note, was signed by her as an accurate record of her opinion. She is there recorded as saying that she could not "exclude the fact that the blood may have been deposited from something other than a bleeding source but the evidence is more consistent that it was from a bleeding source" and that "[i]t is more probable than not that the blood from the airbag came from a bleeding source." She said that the pictures of the airbag which she had seen "did not show evidence of blood spatter". She said that she had not seen any fingerprints in the photographs of the airbag "which would imply transfer from a bloodied hand". The note continued:

> "A hypothetical scenario was put to me in that one way the blood could have come to be on the airbag could be that after the accident, someone has blood on their hands and tries to wipe it off by using the airbag. However, there is nothing in the pictures to suggest that is the case. There is also no pattern on the airbag which would suggest a particular object had been used to transfer the blood.
>
> In my opinion, the pictures of the blood on the airbag are entirely consistent with direct contact from a bleeding source. I cannot exclude beyond all doubt the possibility that it came from another

source, but there is nothing to indicate that."

[47] A few days later, after seeing further photographs of the airbag, she again conferred with the respondent's lawyers. Again she said that she could not see anything suggesting "a fingerprint, handprint or direct transfer of blood from another object" and that the pictures of the airbag were "more consistent with contact with a direct bleeding source." She added that "there is a large stain on the left side of the collapsed driver's airbag" and that the appellant's dental injuries had been "on the left side of his mouth".

[48] In cross-examination by the appellant's counsel, Dr Robertson agreed that bloodstain pattern analysis was "notoriously an inexact science". She agreed that experts in the field acknowledge "that there is a high rate of mistaken analysis", but said that a forensic pathologist and injury pattern specialist, as she was, uses other input than simply the patterns of bloodstains. In her case she had used her interpretation of the appellant's injuries in assessing the likelihood that the appellant's blood had made its way to the airbag by a direct contact.

[49] She agreed with the cross-examiner that it was *possible* that the blood had been deposited from something other than contact with the bleeding source. But she said that you would expect to see, for instance, fingerprints or other outlines of the hand and fingers on the airbag had the appellant's blood been placed there by a hand. She agreed that she had never been involved in a case of a blood pattern analysis concerning an airbag and had no understanding about how airbags deployed. She was asked about the relevance of the airbag being made from a synthetic material. She agreed that this was relevant, because "to some extent", the blood on such a material can spread before it soaks in. But she maintained her opinion that some traces, such as a hand print, would still be expected to be visible.

[50] A little further in the cross-examination, Dr Robertson said that "even given the nature of the material …, the pattern of the stains and the appearance of the staining suggests that a transfer from a person's hands was extremely unlikely to be the source of the blood staining."

[51] The witness was then asked whether it would surprise her to know that the section of the airbag which was bloodied on the left hand side was predominantly on that part of the airbag which would have been facing away from the driver. She conceded that she had not known that, but said that it was not inconsistent with her opinion because she had "not discounted that there could have been even quite small movement of the face following initial contact with the airbag."

[52] In re-examination, she said that she had not seen any scintilla of a suggestion of a swipe or wipe pattern on the airbag.

[53] In the appellant's case at the trial, an identical steering wheel and airbag assembly, together with photographs of a deploying and deployed airbag, were tendered to assist the court to interpret photographs of the subject airbag with its bloodstains. The trial judge accepted that bloodstains were not found in the area which would have been the centre of the inflated airbag, as it faced the driver, and that the stains "were heaviest towards the underside".[6] As was submitted for the appellant at the trial, it could be seen that the airbag had bloodstaining to the front left surface, the

---

6 Primary Reasons at [210].

top of its rear surface and to the right of its rear surface, described from the driver's position, and that the stains covered a very wide area.

[54] Dr Hallam, a forensic scientist, gave unchallenged evidence as to what could be made or not made of the DNA analysis of the airbag. She was critical of the process by which samples were taken without a record of the locations on the airbag from which they had come. But she agreed that it was the appellant's DNA which was found in the samples. Importantly, she said that it was not possible to determine how the appellant's blood was deposited on the airbag and that it was possible that it could have been "transferred during the handling of individuals injured in the crash as intermediaries re-entered the vehicle".

[55] There was also tendered a note from a conference between Dr Hallam and the appellant's lawyers, which was signed by Dr Hallam. She there said that if somebody had put their hand on the airbag in the vehicle, after touching the appellant and his blood, it was "completely possible" that only the appellant's DNA would be found on the airbag, and not the other person's DNA, because there is such a high concentration of DNA in blood.

The appellant's injuries and their relevance to the issue

[56] Dr Campbell, a neurosurgeon, examined the appellant and provided a report in 2014 and signed two notes of conferences held in October 2016. All three documents were tendered. In Dr Campbell's opinion, the injuries suffered by the appellant did not indicate whether he was the driver.

[57] Dr Campbell noted that the appellant suffered a fracture to C4, C6 and C7 with adjacent cord injury which had resulted in incomplete tetraplegia below C7. He also suffered a small right pneumothorax and dental injuries. In the conference recorded in the note of 4 October 2016, Dr Campbell said that the appellant's injuries indicated that it was a high impact collision between the vehicles and said that it was "equally likely for [the appellant] to have sustained those injuries as the driver or back seat passenger". He said that "if [the appellant] was found to be wearing a seatbelt or not, his injuries could have [been] sustained in any position in the car." He explained that if there were "rotational forces involved", then the appellant, as a rear seat passenger could have sustained facial and dental injuries by coming into contact with the side of the vehicle, another passenger or unsecured objects in the cabin. A driver, he explained, could sustain those types of injuries by contact with the steering wheel or the airbag in the steering wheel, although that was less likely with an effective and properly fitted seatbelt. He also said that he would expect to see friction burns to a person's face if the airbag deployment created sufficient force to cause dental injuries and a cervical spine injury. Similarly, in his second conference, he again said that the appellant's injuries were such that he could have been sitting in any seat of the vehicle and could have suffered the injuries irrespective of whether he was wearing a seatbelt. He said that if dental injuries had been suffered from an airbag, friction burns would be expected.

[58] Another neurosurgeon, Dr Weidmann, provided two reports. In the first of them, he said that it was more likely that the facial and teeth injuries to the appellant had resulted from the impact to his head of the driver's airbag, and that the spinal injury would be more likely if it was found that the plaintiff was not wearing a seatbelt, because the hyperextension of the cervical spine would be much more likely in that circumstance. In his second report, Dr Weidmann confirmed his opinion that the appellant had been the driver. He said that the important facts were that:

1. There was blood on the airbag, which was very likely to have come from the appellant because of his dental injuries rather than from his father, who did not have any similar injuries.

2. The appellant's DNA was identified on the airbag which made it "highly likely that he was in fact the driver".

3. The driver's seatbelt was shown on police photographs as still fastened, which suggested to Dr Weidmann that the driver had not been wearing it at the time. He said that it was well recognised that an airbag on its own without a seatbelt can increase the probability of a cervical spine injury.

[59] In cross-examination by the appellant's counsel, Dr Weidmann was referred to the literature which had been attached to his first report about the incidence of injuries from airbags, and he agreed that "most people suffer no injury and out of those who do suffer injury, almost all of them suffer very minor injuries from airbags". He was asked whether the neurological as well as the facial injuries could have been suffered by the appellant no matter in which seat in the vehicle he had been. He answered that this was possible, although he added, the spinal injury could have happened, if the appellant was in the rear seat, only if he was without a seatbelt and had been thrown forwards with his face hitting the rear of the driver's seat. Dr Weidmann conceded that the most important things affecting his opinion that the appellant had been the driver were the blood on the airbag and the presence of the plaintiff's DNA there, and that in describing them as the most important indications, Dr Weidmann was not expressing an opinion within his particular expertise.

[60] Professor Monsour is an oral and maxillofacial surgeon. He described from the hospital reports the "facial injuries" sustained by the appellant as being "relatively superficial". They included a grazed left forehead, superficial facial abrasions and contusion/laceration to the upper lip, a nasal bleed and some broken teeth. He said that these injuries were "collectively suggestive of broad moderate force impact of an essentially blunt object or objects to the overall facial frontal injuries." He said that the facial injuries were "within the acknowledged scope of facial trauma which can be associated with facial impact from release of a frontal airbag".

[61] A file note of a conference with Professor Monsour was tendered, in which he was recorded as saying that the appellant's injuries were "entirely consistent with an airbag injury", with the possible exception that the chipped or fractured left maxillary first incisor was "more difficult to reconcile with the airbag injury alone". With respect to the chipped tooth, he speculated that there could be a number of explanations for it, such as some object or body part being in front of the appellant's face, or the injury being caused by some object which the person had been holding in his hand, such as a mobile phone, or perhaps spectacles being worn on the appellant's face. It was also possible, he added, that the appellant could have had a pre-existing weak tooth.

[62] In cross-examination by the appellant's counsel, he agreed that the facial injuries may have been "caused by all sorts of other means [than the release of an airbag]". He agreed that they could have been caused in a number of ways if he was sitting in the rear seat, such as coming into contact with the back or side of one of the seats in front of him or with the head of a passenger sitting next to him.

Engineering evidence

[63] Dr Grigg is a mechanical engineer with extensive experience in the investigation of motor vehicle accidents. He wrote two reports which were tendered into evidence in the appellant's case.

[64] He described the airbags and seatbelts within the Toyota. He was asked to explain the fact that both the driver's and the front passenger's seatbelts were not retracted after the collision. Dr Grigg said that each of the front seatbelts was equipped with pre-tensioners, which are activated by the airbag control module. When those pre-tensioners are fired, they tighten and lock the seatbelts to assist in preventing the occupants being thrown forward. He said that the failure of the front seatbelts to retract after the occupants moved out of the vehicle was probably due to the retractors being locked in the extended position in which they were after the pre-tensioners had been activated. That evidence was not challenged.

[65] Dr Grigg referred to the assessment of a 2008 Toyota Tarago in the Australasian New Car Assessment Program ("ANCAP"), in which a similar front end collision had been simulated. The safety for the driver's head and lower leg regions was there assessed as "good", that for the chest and left thigh area as "acceptable" and that for the right thigh as "weak". In Dr Grigg's opinion, the facial injuries were received by the appellant were inconsistent with what could be expected from the ANCAP assessment, if he was the driver. On the other hand, said Dr Grigg, the appellant's father's injuries were very similar to those to be expected for a driver from the ANCAP test.

[66] Dr Grigg was asked to comment upon the likelihood that a seatbelt buckle would jam during a collision such as this one. He said that it was possible, although it was uncommon, for this to happen.

[67] There was evidence from Mr Major, a vehicle inspection officer employed by the Queensland Police Service. He inspected the Toyota a week or so after the accident. He said that he had experienced no difficulty opening the driver's door. He did not test the driver's seatbelt clip. But he commented that "some slackness or limpness in a clipped seatbelt with a locked retractor can occur as a result of the seat being moved rearward or laid back after the crash". Like Dr Grigg, he said that the locking of the seatbelt retractor was due to activation of the pre-tensioner componentry. He said that he had never seen a case whereby a crash had caused a seatbelt clip to be locked in position so that it could not be released.

The appellant's evidence

[68] I have referred already to the some of the appellant's evidence. He was adamant that he was not the driver. He said that he did not hold a learner's permit or a driver's licence and in fact had not driven a car. But he had prepared for a written test for a learner's permit by accessing a departmental website. It was suggested that he moved to the driver's seat somewhere near Dunwich on the journey from Brown Lake, which he denied.

Evidence of the appellant's mother

[69] The appellant's mother described the usual travelling positions of the family in the Toyota. She said that when her husband was in Australia, he would always drive the car. She said that she routinely told her children to fasten their seatbelts as they entered the car.

[70] She described how they had first travelled in the wrong direction from Brown Lake, back towards Dunwich, before realising their mistake. She said that at that point, the car stopped, she got out of the car and retrieved a map from the boot before re-joining her husband and looking at the map with him. She said that no one changed their seating position and her husband continued to drive the car.

[71] She said that immediately after the collision, her husband was "very nervous" and left the car through the driver's door. As I have earlier noted, she recalled hearing her husband in the row of seats behind her, as he was getting the children out of the car.

[72] She noticed that her husband's hands had blood on them. She could not recall blood being on either of the front airbags.

[73] She agreed that she had encouraged the appellant to seek his learner's permit but was adamant that he was not allowed to drive until he had done so.

Evidence of the appellant's brothers

[74] The appellant's brother James recalled the family getting into the car to leave Brown Lake. His father was in the driver's seat. He said he fell asleep near the exit from Brown Lake and had no recall of anything between then and waking up in hospital. He said that he had never seen the plaintiff driving a car.

[75] The appellant's brother Adam gave evidence that he remembered nothing until after the accident.

The written statement by the appellant's father

[76] In January 2014, about four months after the collision, the appellant's father signed a statement after being interviewed by an investigator appointed by the respondent. By s 35 of the *Motor Accidents Insurance Act* 1994 (Qld), the respondent, as the relevant insurer, was able to require information about the accident from the driver, the person in charge or the owner of a vehicle involved, and by s 35(2), such a person was not to fail to comply with the request for information without reasonable excuse.

[77] The statement was tendered into evidence by the respondent's counsel. It was exhibited to an affidavit by Mr Koekemoer, a claims management officer employed by the respondent. The statement was part of a copy of the investigator's report to the respondent, the whole of which was exhibited to his affidavit. The respondent's counsel also tendered the original of the statement. The apparent purpose for the tender was to assist in the proof of the respondent's counter-claim that it had paid money on the faith of representations that the appellant's father had been the driver. The statement contained the following account of the collision and its aftermath.

[78] The appellant's father was driving and his wife was seated next to him. The appellant was seated behind him, next to Adam in the middle of the rear seat and James was sitting behind his mother. The father had his seatbelt fastened at the time of the accident. Each of the boys had their seatbelts on. He would always tell them to fasten their seatbelts and he recalled unbuckling all three belts after the accident.

[79] After leaving Brown Lake, he travelled in the wrong direction before stopping on

the side of the road about 20 minutes before the accident. His wife went to the back of the car and obtained a map before returning to the car where the two of them looked at it. He then drove towards Blue Lake. As he approached the other car, he believed that each car was travelling at about the same speed, which was approximately 60 kilometres per hour. As the cars got closer to each other, he could see that the other car was "slightly over towards our lane". He then "tried to steer … to the left but for some reason … was having trouble steering to the left." He could not explain this difficulty. The cars then collided, with the front passenger's side of the Toyota hitting the front passenger's side of the other vehicle.

[80] The driver's airbag and the front passenger's airbag each went off at the time of impact. As soon as the cars had stopped, he had tried to get out of the Toyota at which point the driver of the other car came to assist him. He said in the statement that "I could not get out as I could not remove my seatbelt as it was locked in place. I managed to move my seat backwards which then allowed me to get out of my seat and seatbelt." He said that the other driver was asking him if he was ok but he could not answer him. The appellant's father is not fluent in English. This statement was taken through an interpreter.

[81] His statement continued:

> "I got out of my seat and I went straight to the kids first to get them out. I got out of my door and went to my rear driver's door and opened it which was where [the appellant] was sitting.
>
> [The appellant] was conscious at the time but he had been asleep when the collision happened and was woken up by it.
>
> [The appellant] still had his seatbelt on when I got to him.
>
> I could not see any injuries or blood to [the appellant] at all so I pulled him out of the car and laid him flat on the ground just away from the car. I basically had to carry [the appellant] away from the car as he could not walk."

[82] He then went back to the car, first removing Adam and then James. He could see that James had hit the back of his mother's seat and his head had been cut. He then tried to get his wife out of the car but she said that she was suffering pain and wanted to be left there. Another car came by and its occupants said that she should remain where she was.

[83] The father described his injuries as a broken rib on his right side, bruising to both his hips from hitting the steering wheel and bruising on his left shoulder from hitting the dashboard. He said that two fingers on his left hand were bleeding as were three fingers on his right hand, "as they had hit the glass."

[84] His statement referred to the provision of DNA samples to the police. He said:

> "[The appellant] and I had to go to the Police Station to give DNA samples as the Police found blood on the driver's seat and they wanted to confirm if that was [the appellant's] blood or if it was my blood to confirm who was driving.
>
> I was definitely driving the car. [The appellant] was not driving the car at the time of the accident. [The appellant's] blood was not on the driver's seat as he was not bleeding. That would be my blood as

I was bleeding from my hands."

[85] The hospital records of the father's condition were in evidence. They recorded no lacerations to his fingers or hands. There were "minor cuts and bruises" recorded, more specifically a small cut to the bottom of a foot, abrasions to the thighs and legs and a contusion to the nose. His abdomen was tender but the records referred to no fracture. There was a record of a contusion to the chest wall.

Excluded evidence from Dr Lee

[86] In each of the appeals, there is a ground of appeal that the trial judge erred in refusing to admit evidence of Dr Lee that at the accident scene, the appellant's father said to Dr Lee words to the effect that there had been blood on his hands from trying to get his sons out of the car and that consequently, he had wiped his hands on the airbag. The judge upheld the respondent's objection to that evidence. Although any judgment for the plaintiff was to be given against the insurer, the appellant's father as the alleged tortfeasor was a necessary defendant against whom a right to damages for personal injury had to be proved.[7] The question then was whether that evidence was admissible in the plaintiff's case as a statement by the first defendant against his interest. The trial judge said that this statement was not against the father's interest, because "he's not saying anything as to how [the blood] got there which is suggestive that he was the driver" and that "nothing in what he said is consistent with an admission that he was the driver. It just says he wiped his hands on the airbag. He could have been a rear seat passenger in the furtherest set of seats and wiped his hands on the airbag."

[87] In my view the judge was correct to exclude this evidence. The self-serving statement of a party is usually inadmissible as evidence of its truth owing to the fear of fabrication of the statement.[8] Conversely, admissions are received as evidence against the party making them upon the basis that something which was said by a party against his own interest is likely to be reliable.[9] The reliability of a party's admission comes from the party's realisation that what he is representing to be the fact is adverse to his interest. In *R v Hardy*,[10] Lord Eyre CJ said:

> "[T]he presumption … is, that no man would declare any thing against himself, unless it were true; but that every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself."

As the trial judge effectively said, the statement attributed to the father by Dr Lee was not, in the circumstances in which it was made, adverse to the father's interest because it was neither an express nor implied assertion that the father had been the driver. It is only in the context of other evidence which subsequently emerged, in particular that of the presence of the appellant's DNA on the airbag, that the statement could be regarded as adverse to the father's interest as a defendant. It cannot be supposed that the emergence of that evidence could have been foreseen by the father at the time and that he was thereby aware that what he was saying was against his interest as a likely defendant.

---

7 *De Innocentis v Brisbane City Council* [2000] 2 Qd R 349 at 354 [19] – [21]; [1999] QCA 404.

8 *Cross on Evidence*, Aust Ed, January 2018, at [33420].

9 Ibid at [33440].

10 (1794) 24 St Tr 199 at 1093 – 1094 cited in *Cross on Evidence*, Aust Ed, January 2018, at [1005], and in *Constantinou v The Queen* [2015] VSCA 177 at [190].

The reasons of the trial judge

[88] After an extensive discussion of the evidence and a summary of the respective arguments, the trial judged reasoned as follows. He found that the collision occurred when the Toyota moved to the incorrect side of the road, into the path of Mr Hannan's car. He accepted Mr Hannan's evidence "in relation to the circumstances of the collision as accurate and reliable."[11]

[89] The judge accepted that "the blood found on the driver's deployed airbag … was the plaintiff's blood". For that finding he reasoned as follows:[12]

> "The likelihood of the blood being the plaintiff's is overwhelmingly high. Whilst neither of the plaintiff's siblings' blood was the subject of analysis, there is no evidence to suggest a basis for a conclusion that James' blood could have been the blood located on the deployed driver's airbag. Dr Hallam accepted it was probable the blood found on the airbag was the plaintiff's blood, even allowing for that possibility."

[90] The judge said that the presence of the appellant's blood on the airbag required of two possibilities to be considered: the first being that it was deposited there by direct contact between the appellant's bleeding face and the airbag and the second being that the blood was deposited there by another source. He correctly observed that the first possibility was consistent only with the appellant having been the driver.[13]

[91] His Honour said that in determining whether the appellant had been the driver, he had not found the fact that the appellant was intending to obtain his learner's permit to be "itself of practical utility". Nor were the "circumstances of the collision itself" supportive of a conclusion that he had been the driver. His Honour said that "whilst an inexperienced driver is likely to react as the Tarago's driver did, turning further into the path of the [other vehicle], so may a very experienced driver, as a result of momentary inattention or other circumstances."[14]

[92] The judge then summarised the effect of the evidence of the appellant and his mother before then making these findings:[15]

> "[194] I did not find either the plaintiff or the second defendant reliable and credible witnesses. Both were evasive in giving evidence. The plaintiff was particularly guarded in his responses. Further, the second defendant's evidence as to the first defendant having exited from the Tarago through the driver's door immediately after the collision was inherently improbable having regard to the finding of the driver's seat belt being locked into position after the collision.
>
> [195] Significantly, neither the plaintiffs nor the second defendant's evidence provides an explanation for the presence of the plaintiff s blood on the deployed driver's airbag of the Tarago. Whilst the second defendant gave evidence that she observed

---

11 Primary Reasons at [188].
12 Ibid at [189].
13 Ibid at [191].
14 Ibid at [192].
15 Ibid at [194].

blood on the first defendant's hands, she did not observe any blood on the driver's airbag. Further, nowhere in her evidence did she suggest she had witnessed the first defendant wiping his bloodied hands on the deployed driver's airbag.

[196] I do not accept the evidence of the plaintiff or of the second defendant that the first defendant was driving the Tarago at the time of the collision. In making that assessment, I have given due regard to the language difficulties associated with both the plaintiff and the second defendant having to give evidence with the assistance of an interpreter. I have also had regard to the fact that their sworn evidence is consistent with evidence that there was an assertion made by the first defendant at the scene that he was the driver."

[93] As to that last paragraph, his Honour was mistaken in his recollection that the appellant had given evidence with the assistance of an interpreter. (His mother did so.)

[94] The judge said that he was not assisted by the evidence of the appellant's brothers. He said that it was not improbable that the appellant went into the driver's seat, after the vehicle had stopped as it approached Dunwich, without either of the brothers awakening.

[95] The judge then discussed the written statement of the appellant's father:

"[198] There is another source of direct evidence that the first defendant was driving the Tarago at the time of the collision. That comes from the first defendant's sworn statement to the third defendant's investigator. I do not, however, accept the contents of that statement are reliable or credible. The version given by the first defendant as to the circumstances of the collision is wholly inconsistent with Hannan's evidence and Major's findings on mechanical inspection.

[199] On the first defendant's version, the collision occurred because the Patrol came onto his side of the road, and the Tarago, for some unexplained reason, would not steer out of its path. That version is inconsistent with Hannan's evidence, which I accept, and with Major's finding that there was no mechanical problem with the Tarago's steering. I accept Major's evidence in relation to the results of that mechanical inspection.

[200] In any event, the first defendant's sworn statement to the third defendant's investigator does not provide any explanation for the presence of the plaintiff's blood on the deployed driver's airbag. In that statement, the first defendant asserted the blood observed on the driver's seat of the Tarago was his own blood, from cuts to his hands from glass in the collision. The first defendant did not assert he ever wiped his hands on the driver's airbag.

[201] If the first defendant's version in that statement is accepted as truthful, any wiping of blood from his hands onto the deployed airbag would have included his own blood. He expressly said his fingers on both hands were bleeding as a consequence of

> the collision. In those circumstances, the blood transferred to the deployed driver's airbag should have produced a DNA profile consistent with two contributors. No such result was achieved from the DNA sampling of the swab taken by Kee.
>
> [202] The lack of two contributors is not explained by evidence a transfer of blood can occur without the DNA of the person transferring that blood to a surface. As was observed in evidence, blood is a high contributor of DNA. The first defendant, on his version, was not merely transferring the blood of the plaintiff from his clean hands. He was transferring that blood in circumstances where he was himself bleeding from his hands.

[96] His Honour then returned to the question of how the appellant's blood on the airbag could be explained. He said that "the primary means would be by reason of the plaintiff being the driver". He noted that the appellant had sustained facial injuries "which resulted in significant bleeding initially." He regarded a direct contact between the airbag and the plaintiff's face as a "probable reason" for the presence of the appellant's blood on the airbag.[16]

[97] His Honour said that the only other possible explanation was that the blood was deposited there from another source. He observed that there was no "direct evidence" as to such a source. He referred to an argument for the appellant that the source could have been the appellant father's hands being wiped on the airbag, after being in contact with the (bleeding) appellant. But the judge said that that possibility did not arise from any direct evidence, meaning that no witness had given evidence of observing blood being wiped onto the airbag. His Honour rejected the submission that it was a "reasonable, rational inference" that the appellant's blood had been wiped onto the airbag in that way. He noted that the father had expressly stated that blood observed on the driver's seat had been his own, as a consequence of cuts to his hands by contact with glass following the collision.[17]

[98] The judge then discussed the evidence of Dr Robertson, which, as already noted, he found to be "highly persuasive" as to the probable explanation for the appellant's blood being on the airbag.[18] The judge found that Dr Robertson had given "cogent, compelling reasons why the blood patterning observed by her was not consistent with a swiping, wiping or transfer of blood".[19] His Honour said that he had considered the fact that Dr Robertson had not observed the scene nor the airbag itself as well as the general proposition that blood patterning to the surface of an airbag could have been affected by the fact that it was made of nylon. His Honour said that he had regard also to the positioning of the bloodstains on the airbag, noting that whilst they were not in its centre, and were heaviest towards "the underside", Dr Robertson had given "a reasoned rational explanation for those matters, namely, the position of the head on contact with the deployed airbag", which he accepted.[20]

[99] The judge also referred to the photographs showing the father's hands with blood on them after the collision and to Dr Lee's evidence of what he had seen of that. He

---

16 Ibid at [203].
17 Ibid at [206].
18 Ibid at [208].
19 Ibid.
20 Ibid at [210].

said that this evidence did not support a finding that this blood was that of the appellant. In any event, his Honour said that evidence did not support a conclusion that blood had come to be on the airbag from the father's hands, saying that "such a scenario is implausible", because had the father been minded to wipe his hands, the father had "his own clothes or the seats of the Tarago [on which to wipe his hands]".[21] In those circumstances, his Honour said, "[a] suggestion he would use the strong nylon material of the deployed airbag defies logic."[22]

[100] His Honour then turned to an argument for the appellant that it was unlikely that there would have been such a rapid removal of a seriously injured person from the driver's seat to the rear seat, by the time that Mr Hannan arrived at the car. His Honour appeared to accept the evidence of Mr Hannan that he had taken no more than 90 seconds from the collision to be at the side of the Toyota, by which time "no person was in the driver's seat" and that "the first defendant and the plaintiff were both in the rear compartment."[23] But his Honour dismissed the argument, saying:[24]

> "If the [father] could extricate himself from the driver's seat in that time so could the [father] extricate the injured plaintiff into the back seat. It does not follow his intention in doing so was to prevent anyone from seeing the plaintiff in the driver's seat. It may well be his intention was to extricate the plaintiff from the Tarago as quickly as possible."

[101] The judge said that he had had regard to the absence of large amounts of blood on the floor directly below the airbag. But he said that the "[presence of] large stains on the airbag suggests the blood remained on the airbag, explaining any lack of blood on the floor below."[25] He added that any blood in the rear compartment was explained "by the removal of the plaintiff into that area after the collision or the removal of a bleeding James through that area."[26]

[102] The judge said that his findings were also supported by a consideration of the injuries sustained by the appellant. He referred to Dr Weidmann's opinion that the spine injury was more likely to have been sustained by contact at force with a deployed airbag and that it was unlikely the injury would be sustained by a passenger striking the headrest of the seat in front.[27] Dr Weidmann, as I have noted earlier, was of the opinion that the probability of the spinal injury was higher if the appellant was driving and not wearing a seatbelt. As to that, the judge said that it was "significant that … the driver's seatbelt … was found to be still in its latched position" and said that "[t]hat finding could be consistent with the seatbelt having been connected so as to disengage any warning signal whilst the plaintiff drover the vehicle without the benefit of a restraining seatbelt.[28]" The judge referred to Mr Major's evidence, which he said he accepted, as supporting a conclusion that the seatbelt had been prevented from being unlatched as a result of the collision.[29]

---

21 Ibid at [211].
22 Ibid at [211].
23 Ibid at [212].
24 Ibid.
25 Ibid at [213].
26 Ibid.
27 Ibid at [215].
28 Ibid at [217].
29 Ibid at [218].

[103] His Honour accepted Professor Monsour's evidence, that the appellant's facial injuries "were consistent with contact between the plaintiff's face and a cushioned surface at force, such as a deployed airbag."[30] The judge said that he did not accept Dr Campbell's evidence that all of the appellant's injuries could have been sustained by a passenger in the rear seat. He said that "[t]he type of cervical injury sustained by the plaintiff is, for the reasons advanced by Dr Weidmann, more consistent with the plaintiff being located in the driver's seat at the time of the collision."[31]

[104] The judge did not accept Dr Grigg's evidence to the extent that it was inconsistent with that of Professor Monsour. He noted a concession by Dr Grigg that he had assumed that references in relevant literature, in relation to the incidence of head and neck injuries suffered by drivers of vehicles containing airbags, included facial injuries. The judge said that the assumption was "a poor substitute for the experience which forms the basis for Dr Monsour's evidence."[32]

[105] The judge referred to submissions by each side that the other's failure to call the appellant's father as a witness gave rise to a *Jones v Dunkel*[33] inference that the evidence would not have assisted that party. His Honour said that there was a reasonable explanation for the respondent's failure to call the father, in that the respondent had reasonable grounds to believe that the father had given an untruthful account to its investigator. The judge accepted that the respondent would have been entitled to cross-examine the witness.[34]

[106] As to the appellant's calling his father as a witness, the judge noted that "the first defendant could give relevant evidence" and that the father had been present in court each day and lived with the appellant. He said that there was no satisfactory explanation for the failure of the appellant to call his father as a witness.[35] His Honour noted that the appellant's mother had testified in his case.[36] However, the judge declined to draw any "adverse inference against the plaintiff" from the father not being called and he said that his conclusion that the appellant had been the driver had been reached without any reliance upon the absence of evidence from the father.[37]

[107] His Honour then turned to the counter-claims and concluded that upon his finding that the appellant was the driver, the respondent was entitled to succeed in its counter-claim because all three defendants to it must have known that the appellant was driving. He accepted that the respondent would not have paid the monies had it known of the truth.[38]

The appellant's arguments

[108] For the appellant, it is acknowledged that ordinarily, a trial judge is in a better position than an appellate court to assess the credibility of witnesses. That is one of

---

30 Ibid at [219].
31 Ibid at [220].
32 Ibid at [221].
33 (1959) 101 CLR 298; [1959] HCA 8.
34 *Motor Accident Insurance Act* 1994 (Qld), s 53.
35 Primary Reasons at [225].
36 Ibid at [226].
37 Ibid at [227].
38 Ibid at [232].

the "natural limitations" that exists in the case of any appellate court proceeding wholly or substantially on the record.[39] But it is argued, citing *Goodrich Aerospace Pty Ltd v Arsic*,[40] that "great care must be exercised in making demeanour findings … where a witness is from a different cultural and ethnic background to that with which the judge is familiar." Further, it is said that the judge's difficulty in assessing the credibility of the appellant's mother was increased by the fact that she gave evidence through an interpreter.[41] The appellant also refers to the judge's error in saying that the appellant's evidence was given through an interpreter, which is said to affect the weight of his Honour's finding that the appellant was evasive and particularly guarded in his responses.[42]

[109] The appellant argues that the judge erred in several respects in considering the evidence of the blood on the airbag. Firstly, it is said that his Honour found that all of the blood on the airbag was that of the appellant, when Sergeant Kee had sampled blood from only a few places on the airbag and the DNA analysis thereby said nothing of the origin of other blood.

[110] Secondly, it is argued that there is an inconsistency between the judge's finding that the blood was deposited by direct contact of the plaintiff's face with the airbag "on deployment at the time of collision"[43] and his acceptance of Dr Robertson's evidence that the position of bloodstains on parts of the airbag, which would not have been facing the appellant on impact, could be explained by the blood being left there *after* deployment of the airbag.[44] Next, it is said that his Honour overlooked the evidence of Dr Robertson that it could have been several minutes during which this blood was left on the airbag. The apparent significance of that evidence in the appellant's argument, is that it suggested that this was not the explanation for the blood being on the airbag when it is known that the appellant was found in the rear of the vehicle within a minute or so of the collision.

[111] The appellant's argument is critical of his Honour's reference to Dr Robertson saying that there was not a "scintilla of a suggestion of swipe or wipe patterns on the airbag"[45] without his Honour putting that comment in context. It is said that those words were used in response to a leading question put to her in re-examination, namely "Did you see any scintilla of a suggestion of such a swipe or wipe patterns on this airbag?" Dr Robertson's answer was:

> "Not in the photos that I saw, no. But I must emphasise I did not personally examine the airbag."

[112] For the appellant it is argued that Dr Robertson's evidence was inconsistent with the unchallenged evidence of Dr Grigg, who explained the location of bloodstaining on the airbag being predominantly on the windscreen side of the airbag (when inflated) and on both the left and right sides.

[113] The appellant's submissions were critical of the judge's reliance upon Dr Weidmann's evidence of a greater likelihood of the hyperextension injury occurring if the

---

39 *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23] per Gleeson CJ, Gummow and Kirby JJ.
40 (2006) 66 NSWLR 186 at [21] per Ipp JA (with whom Mason P and Tobias JA agreed).
41 *Ren v Jiang* [2014] NSWCA 1 at [13].
42 Primary Reasons at [194].
43 Ibid at [214].
44 Ibid at [210].
45 Ibid at [146].

appellant had not been wearing a seatbelt.[46] It is pointed out that the respondent did not pursue that argument in its final address at the trial or in the cross-examination of the appellant or his mother. It is said that his Honour wrongly recorded in his judgment that the respondent had submitted that the appellant as the driver was unrestrained by a seatbelt, when the respondent's submission at the trial was that the appellant was wearing the seatbelt. That criticism appears to be well founded.[47] It is argued that if the appellant had been driving and wearing a seatbelt, it was not possible for the appellant's mouth to have left blood on the airbag during the fraction of a second in which his face would have been in contact with it.

[114] It is argued that his Honour's reasoning that the suggestion the father wiped his bloodied hands on the inflated airbag lacked plausibility and defied logic, was unsustainable reasoning.

[115] It is submitted that the father's statement that he exited through the driver's door and entered the rear compartment through the rear sliding door was consistent with the earlier statements by Mr Hannan, given closer to the event, that he was uncertain about whether the door or doors were open when he arrived at the Toyota.[48]

[116] It is strongly argued that his Honour was wrong to have thought that the father could have extricated the appellant from the driver's seat to the rear seat as quickly as the father could have taken himself from the driver's seat to be standing in the well of the rear seat.

[117] The appellant argues that the judge misused the evidence of the appellant's injuries, pointing out that Dr Weidmann conceded that it was possible the neck injury could have been suffered by a sleeping, seat belted passenger. It is said that the judge failed to recognise that Dr Weidmann's expertise did not extend to the doctor's comments about DNA on the airbag and the position of the seatbelt. It is argued that the judge misinterpreted Professor Monsour's evidence, which established no more than that the appellant's facial injuries *could* have been suffered by an impact with the driver's airbag.

[118] It is said that the judge overlooked the evidence of Dr Grigg that it was possible that the seatbelt had become jammed as a result of the collision. It is also submitted that his Honour did not deal with an alternative submission, namely that the father's difficulty with undoing the seatbelt may have been induced by panic.

[119] It is said that the judge ought not to have relied upon the absence in the father's written statement of any reference of the father to wiping his hands on the airbag, in the circumstances in which the statement was provided are considered. The investigator who took the statement explained the means by which he did so: with the aid of an interpreter, the investigator asked questions and received answers which were then converted to the form of the father's statement.

The respondent's arguments

[120] The respondent cites this passage from the judgment of the High Court (French CJ, Bell, Keane, Nettle and Gordon JJ) in *Robinson Helicopter Company Incorporated*

---

46 Ibid at [217].

47 Paragraphs 91 and 92 of the written submissions for the respondent at the trial.

48 See above at [25].

v McDermott:[49]

> "A court of appeal conducting an appeal by way of rehearing is bound to conduct a "real review" of the evidence given at first instance and of the judge's reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings. But a court of appeal should not interfere with a judge's findings of fact unless they are demonstrated to be wrong by "incontrovertible facts or uncontested testimony", or they are "glaringly improbable" or "contrary to compelling inferences". In this case, they were not. The judge's findings of fact accorded to the weight of lay and expert evidence and to the range of permissible inferences. The majority of the Court of Appeal should not have overturned them." (Footnotes omitted.)

[121] In that passage, the court there cited several passages from the judgment of Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy*.[50] There is no departure in that more recent judgment in *Robinson's Helicopters* from that earlier judgment. It remains the duty of courts conducting an appeal by way of a re-hearing to "conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons" and to perform the task of "weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect."[51] Having conducting the appeal by way of re-hearing, and having made proper allowance for the advantages of the trial judge, appellate courts are authorised and obliged to discharge their appellate duties if they conclude that an error has been shown.[52] The joint judgment in *Fox v Percy* explains not only the limitations of appellate courts, but also the limitations on the weight to be given to expressions by trial judges about witness credibility upon the basis of appearances.[53]

[122] The respondent's submissions otherwise address, in some detail, at least most of the appellant's arguments, suggesting at times that the appellant's argument had misstated the effect of the trial judge's reasoning. For the most part, the respondent's arguments support the reasoning of the judge.

[123] Some things should be noted at this point. The first is that the respondent's submissions in this Court advance no positive case that the driver of the Toyota was not wearing his seatbelt and it is conceded that the respondent did not do so at the trial. But it is said that the judge's misstatement of the respondent's submission in that respect had no consequence for the outcome.

[124] The second matter to be noted here is that the respondent filed a notice of contention, supported by its written submissions, that a *Jones v Dunkel* inference should be drawn against the appellant and his co-defendants on the counter-claim.

---

49 [2016] HCA 22 at [43]; (2016) 90 ALJR 679 at 686 [43] ("*Robinson Helicopters*").
50 (2003) 214 CLR 118 at 126 [25], 128 [28] and [29].
51 Ibid at 126 – 127 [25] citing *Dearman v Dearman* (1908) 7 CLR 549 at 564; [1908] HCA 84.
52 *Fox v Percy* (2003) 214 CLR 118 at 127 – 128 [27].
53 (2003) 214 CLR 118 especially at 129 [31].

The case for the appellant's mother

[125] Neither of the appellant's parents was represented at the trial or made submissions in respect of the counter-claim. In this Court, counsel appeared for the appellant's mother and largely adopted the submissions for the appellant. However Mr Grant-Taylor QC for the appellant's mother made his own submission as to why a *Jones v Dunkel* inference should not be drawn against his client, for her failure to call her husband as a witness in defence of the counter-claim. He submitted that an inference as to what the appellant's father would have said, if called as a witness, was not to be drawn when the Court had the father's account already, in the form of the written statement which he gave to the insurer and which the respondent tendered into evidence. Further, he submitted that it was relevant that the statement had been obtained under a legal compulsion, so that on the authority of *The Chairman, National Crime Authority & Anor v Flack*,[54] the case for a *Jones v Dunkel* inference was yet weaker.

Consideration

[126] I begin by considering the criticisms of the judge's findings about the credibility of the appellant and his mother.

[127] I accept that the demeanour of the appellant's mother was to be given less weight for the fact that she gave her evidence through an interpreter. The judge was mistaken in referring to the appellant's evidence also being given through an interpreter, but that is not to say that the judge had not been justifiably influenced by the way in which his evidence was given. The matters raised by the appellant's submissions, in total, do not justify a disregard of the trial judge's impression of the credibility of each of these witnesses. Demeanour can be not only unhelpful but sometimes misleading. Nevertheless a judge's adverse impression of a witness from the way in which he or she has given evidence may be fairly based, and the appellate court which is asked to disregard that impression has the disadvantage of not having seen the features of the testimony from which that impression was formed.

[128] There were many areas of uncertainty in this case, which were of central relevance to the ultimate question. One of them was how the appellant's blood came to be upon the driver's airbag, there being no issue that his DNA was within blood found on the airbag. Another question was whether the driver was wearing his seatbelt. Another area of uncertainty was what I would describe as the mechanics of the causation of the appellant's injuries.

[129] Nevertheless, some things were sufficiently clear. Most importantly, on the evidence of Mr Hannan, the appellant was in the rear seat at the time in which he arrived at the Toyota. There seemed to be no challenge to his evidence that when he first arrived at the Toyota, no one was in the driver's seat and no one was outside the car. He was uncertain as to whether he assisted in the removal of two or three of the boys. But he was certain that none of them was already outside the car when he reached it. Between his pre-trial statements and his oral testimony, his estimates of the time which passed between the collision and his reaching the side of the car varied from 30 to 90 seconds. It is not unlikely that the period was a little longer, but having regard to what he did after he left his car, it would not have been much

---

54 (1998) 86 FCR 16 at 28 – 29 per Heerey J.

longer. In other words, it is sufficiently known that within no more than a minute or so he was alongside the Toyota.

[130] Consequently, the respondent had to explain the presence of the appellant in the rear seat so shortly after the collision. Its explanation, which the judge accepted, was that the appellant's father moved him from the driver's seat to that seat, by lowering the back of the driver's seat and pulling him until he was seated effectively where the father had been seated at the time of the collision.

[131] That movement of the appellant would not have been easy. The appellant weighed a little over 50 kilograms but he was unable to move himself at all. Several photographs of the car show that after the collision, its front was somewhat lower than its rear side, so that the appellant would have been pulled up a slight grade. The space between the driver's seat and the passenger's seat immediately behind it would have been taken up by the back of the driver's seat if that had been fully reclined. The father would then have had to pull the appellant back into the rear seat, whilst standing to the side of it and in front of the other injured boys.

[132] The trial judge said that if the father could extricate himself from the driver's seat by the time Mr Hannan arrived, so too could the father have extricated the appellant within that time. But in my view, the removal of the appellant from the driver's seat would have been a much more difficult exercise. Even the exercise of lowering the back of the driver's seat would have been more difficult if done from behind it. The photographs depict the lever for the seat as being on the side of the seat next to the driver's door.

[133] The question of whether the driver was wearing his seatbelt was potentially decisive. If the driver was not wearing the seatbelt, there being no impediment to opening the driver's door, it is highly unlikely that the appellant would have been moved to the rear seat as the judge found. If the father had meant to remove the appellant from the car, the more obvious and easier way to do so would have been through the driver's door. There is no real possibility that in the stress of the situation and within the short amount of time before Mr Hannan arrived, the father would have been so concerned to make it look as if he had been the driver, that he would not only remove the appellant from the driver's seat, through the driver's door, but then place him on the rear seat. It follows that if the driver had not been wearing a seatbelt, there is no real prospect that the driver was the appellant.

[134] Was the driver wearing his seatbelt? There was no evidence from the appellant on the question. The appellant's mother said that the father, as the driver, was wearing it. The appellant's father said in his statement that he was wearing it. No person said that the driver was not wearing it. And there was little support for an inference that the belt was not worn by the driver. There is a theoretical possibility that the belt was kept fastened, so that when the driver sat on top of it, he would not be bothered by an alarm. But no witness said anything to support that possibility. In my view, it was more probable than not that the driver was wearing the seatbelt.

[135] If the seatbelt was worn by the driver, why was it fastened as shown in the photographs? One possibility is that it became jammed in consequence of the collision. Another is that the appellant's father, in the stress of the moment, could not unfasten it and immediately took another course to extricate himself (or the appellant) from the driver's seat, leaving the belt fastened. A third possibility is that the belt was unfastened immediately after the collision, but that the ambulance officers both

reclined the back of the driver's seat and re-fastened the seatbelt in order to keep it out of the way. No witness could explain how that first possibility was particularly likely. It was no more than speculation on Dr Grigg's part. That second possibility, although not unrealistic, is not especially probable. The third is a realistic possibility, which is not inconsistent with the evidence of the ambulance officers although it has no particular support from that evidence. Because none of the three possibilities is markedly more probable than the others, I would not reason on the premise of one of them being correct. Consequently, the ultimate question is to be answered upon the basis only that it is possible that the driver's seatbelt was unfastened immediately after the collision. Of course the father said in his signed statement that the seatbelt was locked in place. But the judge was not bound to accept that statement.

[136] The appellant's injuries did not provide any clear indication that he was the driver. But nor did they particularly indicate that he was a passenger, notwithstanding Dr Grigg's opinion. The weakness in his opinion was that Dr Grigg's expertise is in engineering and not in medical science. His evidence did provide some support for the appellant's case, in his descriptions of the mechanics of the airbag and the driver's seatbelt and the likelihood of particular injuries if both were activated. But because of that limitation upon the weight of his opinion, his evidence did not provide clear proof that the driver was the father.

[137] Dr Weidmann's evidence had two significant limitations. The first was that it was apparently influenced by his belief that the driver was not wearing his seatbelt. He was well qualified to explain how the operation of an airbag without a seatbelt could increase the probability of an injury of the kind which the appellant suffered. But in my view he was unable to reliably conclude that the driver was not wearing a seatbelt. And he fairly conceded that it was possible that the appellant could have suffered his injuries although not the driver. The other limitation upon the weight of his evidence was in his reliance upon the DNA evidence. The relevance of the DNA evidence was obvious, but its impact on the overall question of whether the appellant was the driver was not a matter for Dr Weidmann's professional expertise.

[138] Professor Monsour said that with one qualification, the appellant's facial injuries were within the acknowledged scope of facial trauma which can be associated with the release of an airbag. The qualification was the chipped or fractured tooth. There were other possibilities, as he suggested, which could have explained that injury. But overall, the effect of his evidence was that the facial injuries showed a possibility, rather than a probability, that they were caused by the airbag.

[139] Dr Campbell's evidence was that it was equally likely for the appellant to have sustained his injuries as the driver or backseat passenger.

[140] Consequently, none of these medical witnesses provided strong support for either case.

[141] I agree with the trial judge that the fact that the appellant was intending to obtain his learner's permit was, of itself, insignificant. I agree also with his Honour's comment that the negligence of the driver of the Toyota did not indicate that the driver was inexperienced. In particular, the reaction of the appellant's father may well have been to swerve to the right, given that most of his driving experience had been in Taiwan.

[142] It is contended for the respondent that the trial judge ought to have inferred that the

appellant's father, if called as a witness, would have given evidence which would not have assisted the appellant's case. I agree with the trial judge that although the appellant's father was a defendant, in the circumstances here it would be expected that the appellant would have called his father as a witness, had it been thought that his evidence would be helpful. But the present question is whether it should be inferred that the father's evidence would have been unhelpful to the appellant's case. As it happened the trial judge had in evidence the statement of the appellant's father. Rather than inferring that his oral evidence would have been unhelpful to the appellant on the critical question, I consider that it is at least as likely that he would have given evidence which was consistent with his statement, at least in being adamant that he had been the driver. However, an inference is open that the father would not have given evidence that he wiped his hands on the airbag. That inference would not require a finding that the father did not do so; instead, the father may simply have no memory of doing so.

[143] Of the evidence which I have discussed thus far, I would hold that it was much more likely that the appellant was not the driver, mainly because of the difficulties in the relocation of the appellant from the driver's seat to the rear seat in the short time before Mr Hannan arrived.

[144] However, I have not yet discussed the DNA evidence, which was particularly influential in the reasoning of the trial judge.

[145] As I have said, undoubtedly it was the appellant's blood sampled from the airbag. The appellant had facial injuries and injuries to his teeth which were likely sources of blood on an airbag, had he been the driver.

[146] Importantly, no blood appeared on the section of the airbag which would have been immediately in front of the driver as it inflated. But that fact did not prove that the blood on the airbag had not come from the driver. Dr Robertson's explanation for how the blood could have come from the driver to those other parts of the airbag could not be readily rejected.

[147] Dr Robertson rejected the hypothesis that the blood was transferred to the airbag by the hands of the appellant's father. She did so because of the absence of any sign of swipe or wipe patterns in the blood on the airbag. But Dr Robertson disavowed experience as an analyst of blood spatter patterns. And she agreed that the science of blood stain pattern analysis was "notoriously" inexact.

[148] The written statement by the appellant's father provided no support for the hypothesis which was argued by the appellant. But that statement did not address the presence of blood *on the airbag*. He said that blood on the driver's seat could not have been that of the appellant, because the appellant was not bleeding, and that it would have been the father's blood, as the father was bleeding from his hands. In two respects that statement was incorrect: the appellant did have injuries from which he was bleeding and which could have resulted in blood stains on the airbags had he been the driver, and the father was not bleeding from his hands, although he did have blood on his hands.

[149] Given the nature of the appellant's facial and teeth injuries, it was inherently probable that his blood would be on the airbag if he was the driver. That probability is not negated, in my view, by the particular locations on the airbag of the blood stains. If the appellant was in the driver's seat, the bleeding would have continued

after the split second in which the airbag had been fully inflated. The hypothesis in favour of the respondent's case is therefore quite probable.

[150] The same cannot be said of the alternative hypothesis, namely that the appellant's blood was transferred to the airbag on the hands of the appellant's father. There is nothing about the bloodstains that suggests such a probability. It is possible that the appellant's DNA could have been transferred without the father's DNA being detected on the few samples which were taken for analysis. It is also possible that much or all of the blood which was not sampled came from someone else, the appellant's brother in particular. But the question for the trial judge was which of the two hypotheses is the more probable.

[151] Consequently, when consideration is given also to the DNA evidence, the appellant's case overall was substantially weaker. Like the trial judge, I find the respondent's argument about the significance of the DNA evidence as persuasive. In my opinion, his Honour was not unduly influenced by it.

[152] This factually complex case was very closely balanced. The task of this Court is to rehear the case, but not without regard to the decision of the trial judge. Although there were limitations upon the use which the judge could make of the way in which the appellant and his mother gave their evidence, it is not demonstrated that the trial judge misused the advantage which he had from hearing and seeing this evidence as it was being given. The decision of the trial judge was neither "glaringly improbable" nor "contrary to compelling inferences". The appellant's careful and sometimes forceful arguments do not demonstrate that the decision of the trial judge was erroneous.

Conclusion and orders

[153] The principal appeal, which is that by the plaintiff in the proceeding, should be dismissed with costs. It follows that the appeals by the plaintiff's father and mother must each be dismissed with costs. I would order that in each of the appeals numbered 3976/17, 4378/17 and 4400/17, the appeal be dismissed with costs.