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WHERE DOES THE DUTY OF CARE OF A DRIVER OWED TO A PASSENGER BEGIN AND END?

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The Court of Appeal dismissed an appeal against a decision which held that the respondent driver was not negligent in failing to apply the brakes when she observed that the appellant passenger was about to leap from the moving vehicle.

IN ISSUE

Did the driver owe her passenger a duty of care to prevent the passenger from leaping from the car and injuring himself? If the driver did owe a duty, did she breach this duty in the "emergency" situation she faced?

THE BACKGROUND

The appellant husband and respondent driver wife were driving home from dinner with their two children and were arguing. The respondent attempted to grab the appellant when he opened the door of the car and told him "to stop being silly". The appellant sustained catastrophic injuries when he "leapt from" a vehicle which was travelling at 50kph.

THE DECISION AT TRIAL

The trial judge found that the respondent was not liable in negligence for injuries sustained by the appellant. The trial judge found that although a duty of care was owed to the appellant, to take reasonable care to avoid foreseeable and not insignificant risks of harm, the scope of the duty did not extend to protecting the appellant from causing harm to himself. In any event, the appellant did not prove on the balance of probabilities, that the respondent had breached her duty of care.

THE ISSUES ON APPEAL

The issues on appeal included whether the trial judge erred in not finding that the respondent had breached her duty of care, and in not finding that the respondent, acting as a reasonable person, should have applied the vehicle's brakes so as to prevent or reduce harm to the appellant.

THE DECISION ON APPEAL

The Court of Appeal held that the scope of the duty owed by a driver to a passenger could include a duty to minimise harm to a passenger resulting from the passenger's own deliberate

actions.

In this case, the respondent did not breach such a duty because she acted reasonably (grabbing the appellant, telling him not to be silly) when confronted with the sudden emergency of the appellant attempting to leave the vehicle while it was still moving.

Further, breach of duty was not made out because there was no evidence that the respondent had any idea prior to the appellant opening the door that he would do something so dangerous as leaping from a moving vehicle. The fact that the respondent had an alternative response (braking) to the emergency situation, did not, of itself, result in negligence when that alternative response was not adopted. The test was whether the response actually undertaken was unreasonable. In this case, in all the circumstances, it was not unreasonable and the respondent was not in breach of duty.

IMPLICATIONS FOR YOU

A driver of a motor vehicle owes a duty of care to a passenger who deliberately attempts to harm himself/herself. Whether that duty has been breached will depend on the individual circumstances – in this case, the question was: faced with an emergency situation, did the driver respond as a reasonable driver ought to have?

The above will also apply to the *Motor Accident Injuries Act 2017* (NSW). The appellant could be entitled to statutory benefits irrespective of fault but on application of sections 3.11 and 3.28, those benefits would cease after 26 weeks if it was held that the passenger (the appellant) was most at fault.

Lim v Cho [2018] NSWCA 145

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