[HIGH COURT OF AUSTRALIA.]

THE INSURANCE COMMISSIONER . . APPELLANT;
DEFENDANT,

AND

JOYCE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *July* 22, 23.

MELBOURNE, *Aug.* 30.

Latham C.J., Rich and Dixon JJ.

Negligence—Accident—Gratuitous passenger in motor car—Claim against driver for injuries—Drunkenness of driver—Duty to passenger—Standard of care—Acceptance of risk—Volenti non fit injuria—Contributory negligence—Inferences from facts—Motor Vehicles Insurance Acts 1936 *to* 1945 (*Q.*) (1 *Edw.* 8 *No.* 31 —9 *Geo.* 6 *No.* 27).

In an action for damages for personal injuries sustained by the plaintiff in an accident to a motor car by a gratuitous passenger, it appeared that the accident was due to the intoxication of the driver, but neither the passenger nor the driver gave evidence, and it did not appear positively what had been the passenger's own condition and whether he had actually appreciated the driver's state of intoxication and the danger of driving with him.

Held by *Latham* C.J. and *Rich* J. (*Dixon* J. dissenting) that the passenger must fail in his action; by *Latham* C.J., on the ground that the facts proved were as consistent with (*a*) contributory negligence on the part of the passenger, or (*b*) voluntary acceptance by him of an obvious risk as with (*c*) negligence on the part of the driver causing the passenger's injuries, and it was for the passenger to establish his case; by *Rich* J. on the ground that the greater probability was that the passenger as well as the driver had enough consciousness to know of the driver's condition and the risks involved and that the passenger's failure to give evidence entitled the Court to act on that probability and hold that the passenger voluntarily assumed the risk.

Decision of the Supreme Court of Queensland (Full Court): *Joyce* v. *Kettle and the Insurance Commissioner*, (1948) Q.S.R. 139, reversed.

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APPEAL from the Supreme Court of Queensland.

Henry Joyce of Brisbane commenced an action in the Supreme Court of Queensland against William Kettle also of Brisbane claiming damages for injuries whilst a passenger in a motor car driven by Kettle along Bulimba Road, Bulimba, Brisbane, when the car collided with a stationary motor truck in the road. No appearance was entered by the defendant Kettle and the Insurance Commissioner under the provisions of *The Motor Vehicles Insurance Acts* 1936 *to* 1945 (Q.) elected to be joined as a defendant. The plaintiff delivered a statement of claim, to which the Insurance Commissioner raised by way of defence, *inter alia*, "that the defendant William Kettle was at the time of the said collision so affected by the consumption of intoxicating liquor as to render him physically and mentally incompetent to drive his car with proper care and the plaintiff with full knowledge of the facts and of the nature and extent of the risks then about to be incurred agreed to be driven by the said defendant, William Kettle and the collision was caused or contributed to by the said incompetency of the said defendant William Kettle." The defendant Kettle did not deliver a defence.

The case for the plaintiff was that while he was being driven in Kettle's car as a gratuitous passenger Kettle drove so negligently that the car first ran into a stationary truck and then into a fence and that in consequence he was seriously injured. The accident took place at a few minutes before 7 p.m. on 19th June 1945. On that day Kettle and the plaintiff left the latter's house at Morningside at about 5 p.m. with the intention of calling for Mrs. Kettle at Bulimba, bringing her to the plaintiff's house, and taking the party, including Mrs. Joyce, on to a wedding celebration at a friend's house at Morningside which was to take place at about 7 p.m. The plaintiff and Kettle were both sober when they left in the car at 5 p.m. The distance between the Joyce and Kettle homes was about two miles.

Just before 7 p.m. the motor car crashed into a fence in McConnell Street. The plaintiff was found unconscious in the left-hand seat of the vehicle. An ambulance man came, and the plaintiff was removed to hospital where a doctor observed that he smelt of alcohol.

An officer of police gave evidence that he was summoned from the Bulimba Police Station by a telephone message and went to the place where the accident had happened. It was a clear night. There was a motor truck on the left-hand side of the road with the tail light on. The truck faced in the same direction as that in

which Kettle's motor car had been travelling. The policeman found that the truck had been hit on the off-side rear mudguard and that Kettle's car had smashed through a gate in McConnell Street opposite the end of Bulimba Street. He searched for the driver of the car but could not find him. Ultimately, at about 9 p.m., he found Kettle asleep under lantana bushes on an adjoining allotment. He said that when he waked Kettle up and he gained his feet he was in a drunken condition, that he would not give any satisfactory answers to questions, and that he kept staggering around in a very drunken state. The officer arrested him and charged him with being drunk. He was taken to the police station and placed in a cell. Four hours later, that is about six hours after the accident, he was released on bail. He then said that he had been driving along Bulimba Street with Joyce as a passenger and that through misjudgment the near side of his car collided with a parked truck so that he lost control of the vehicle and that he could not stop it before it hit the fence in McConnell Street. He said that he saw that Joyce was injured, and that he went into a house and rang for the ambulance and had him taken away to hospital.

At the trial neither the plaintiff nor the defendant Kettle gave evidence. The trial judge (*Philp* J.) gave judgment for the Insurance Commissioner. The Full Court of the Supreme Court (*Macrossan* C.J. and *Stanley* J., *Mansfield* S.P.J. dissenting) entered judgment for the plaintiff: *Joyce* v. *Kettle and the Insurance Commissioner* (1).

From this decision the Insurance Commissioner appealed to the High Court.

Townley, for the appellant. The questions involved in this appeal are primarily questions of fact. The matter depends upon whether the trial judge was correct in inferring from the facts directly deposed to that: (*a*) at the time of the accident which occasioned the plaintiff's injuries the driver was so much under the influence of alcohol as to appear to a reasonable observer incapable of exercising reasonable control over his vehicle; (*b*) his condition was similar when the plaintiff had the opportunity either of not re-entering the vehicle or of leaving it; (*c*) the driver's condition was a cause of the accident; and (*d*) at the time mentioned in (*b*) the plaintiff was aware of the driver's condition. As to (*d*) the plaintiff was present at the trial but did not give evidence at all. It is submitted that his awareness of the driver's condition was a matter peculiarly within his knowledge and slight evidence was

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necessary to discharge the burden cast upon the appellant to prove it. [He referred to *Blatch* v. *Archer* (1); *R.* v. *Kakelo* (2); *Stephen's Digest of Evidence*, Art. 96; *Hibbs* v. *Ross* (3).] The trial judge had to draw these inferences as matters of probability only. He had not to, nor is this Court to, approach the matter from the angle of speculation or possibility. If the trial judge was correct in his inferred findings of fact the correct result in law flowed from those findings. The driver of a vehicle owes two duties to a gratuitous passenger. So far as the actual driving of the vehicle is concerned his duty is to exercise reasonable care under the circumstances. As to the condition of the vehicle the relation between him and his passenger is that of licensor and licensee and he is only bound to warn the intending passenger of dangers in its condition of which he knows and which are not obvious (*Haseldine* v. *Daw & Son Ltd.* (4)). The case of a gratuitous passenger entering a motor car when he knows the driver is so affected by alcohol as to be probably incapable of exercising effective control is similar to the case of a person entering a vehicle when he knows the steering gear is ineffective. The same principles apply whether the driver says: "The condition of my vehicle is such that I am unable to control it when in motion" or "my condition is such that I am unable to control my vehicle when it is in motion." *Dann* v. *Hamilton* (5) was wrongly decided. See the criticism by Professor *Goodhart* in 55 *Law Quarterly Review* 184. [He also referred to *Finnie* v. *Carroll* (6); *Delaney* v. *City of Toronto* (7).] The defence of *volenti non fit injuria* is open and has been established. Alternatively, a person entering a vehicle then about to be driven by an obviously drunken driver is guilty of contributory negligence.

Moynihan, for the respondent. On the facts proved the collision was caused by the negligence of the driver. There was no evidence on which the trial judge could find that the driver was drunk at the time of the accident. If it could be inferred from the facts that he was drunk, then it could not be inferred that the plaintiff knew of his drunken condition. It becomes a matter of pure speculation at what time the plaintiff became aware of the fact that the driver's judgment was impaired by liquor and would involve the question of the last opportunity the plaintiff had of leaving the car (*Dann* v.

(1) (1774) 1 Cowp. 63; [98 E.R. 969.]
(2) (1923) 2 K.B. 793.
(3) (1866) L.R. 1 Q.B. 534, at pp. 541, 543.
(4) (1941) 2 K.B. 343, at pp. 373-4.
(5) (1939) 1 K.B. 509.
(6) (1927) 27 S.R. (N.S.W.) 459; 44 W.N. 182.
(7) (1921) 64 D.L.R. 122; 49 Ont. L.R. 245.

Hamilton (1) ; *Finnie* v. *Carroll* (2)). There is no evidence to show that the plaintiff agreed to ride at his own risk. In the absence of such evidence it will not be presumed that he accepted such risk (*Keane* v. *Knowles* (3)). This is not a case of the voluntary acceptance by a passenger of a ride at his own risk, with knowledge that the driver was in a state of intoxication.

Townley, in reply. Where a person is carried gratuitously as a passenger the driver is bound to use no more than ordinary or reasonable care (*Harris* v. *Perry & Co.* (4) ; *Karavias* v. *Collinicos* (5) ; *Moffatt* v. *Bateman* (6)). *Charlesworth's Law of Negligence* 2nd ed. (1947), at pp. 507, 508, deals with *Dann* v. *Hamilton* (1) and puts it on the footing of a case of contributory negligence.

Cur. adv. vult.

Aug. 30.

The following written judgments were delivered.

LATHAM C.J. In this action the plaintiff Henry Joyce claimed damages from the defendant William Kettle for injuries caused by the negligent driving of a motor car by the said defendant. The Insurance Commissioner, exercising a right under reg. 10 of the regulations made under *The Motor Vehicles Insurance Acts* 1936 *to* 1945 (Q.), elected to be joined as a defendant in the action. An order for substituted service on the defendant Kettle was made.

The case for the plaintiff was that while he was being driven in Kettle's car as a gratuitous passenger Kettle drove so negligently that the car first ran into a stationary truck and then into a fence and Joyce was seriously injured. The accident took place at a few minutes before 7 p.m. on 19th June 1945. The evidence of Mrs. Joyce, the wife of the plaintiff, is that on that day Kettle and her husband left Joyce's house at Morningside at about 5 p.m. with the intention of calling for Mrs. Kettle at Bulimba, bringing her to Joyce's house, and taking the party, including Mrs. Joyce, on to a wedding celebration at a friend's house at Morningside which was to take place at about 7 p.m. The evidence of Mrs. Joyce was that Joyce and Kettle were both sober when they left in the car at 5 p.m. The distance between the Joyce and Kettle homes is about two miles.

Just before 7 p.m. a resident of Merry Street, near the place where Bulimba Street runs into McConnell Street, heard a crash and found

(1) (1939) 1 K.B. 509.
(2) (1927) 27 S.R. (N.S.W.) 459 ; 44 W.N. 182.
(3) (1942) S.A.S.R. 13.
(4) (1903) 2 K.B. 219.
(5) (1917) W.N. 323.
(6) (1869) L.R. 3 P.C. 115.

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that a motor car, afterwards identified as belonging to Kettle, had crashed into a fence in McConnell Street, and that Joyce was unconscious in the left-hand seat of the vehicle. An ambulance man and other people came. Kettle was not to be seen. Joyce was removed to a hospital. The doctor observed that he smelt of alcohol.

Sergeant A. W. Cochrane gave evidence that he was summoned from the Bulimba Police Station by a telephone message and went to the place where the accident had happened. It was a clear night. There was a motor truck on the left-hand side of the road with the tail light on. The truck faced in the same direction as that in which Kettle's motor car had been travelling. Sergeant Cochrane found that the truck had been hit on the off-side rear mudguard and that Kettle's car had smashed through a gate in McConnell Street opposite the end of Bulimba Street. He searched for the driver of the car, but could not find him. Ultimately, at about 9 p.m., he found Kettle asleep under lantana bushes on an adjoining allotment. He said that when he waked Kettle up and he gained his feet he was in a drunken condition, that he would not give any satisfactory answers to questions, and that he kept staggering around in a very drunken state. The sergeant arrested him and charged him with being drunk. He was taken to the police station and placed in a cell. Four hours later, that is about six hours after the accident, he was released on bail. He then said to Cochrane that he had been driving along Bulimba Street with Joyce as a passenger and that through a misjudgment the near side of his car collided with a parked truck so that he lost control of the vehicle and that he could not stop it before it hit the fence in McConnell Street. He said that he saw that Joyce was injured, and that he went into a house and rang for the ambulance and had him taken away to hospital. (No evidence was given as to what person had in fact telephoned for the ambulance, but the ambulance did arrive, though Kettle was not there when it came.)

Neither the plaintiff Joyce nor the defendant Kettle gave evidence.

There is no evidence as to what happened between 5 p.m. and 7 p.m. At the beginning of that period of two hours the two men were sober. At the end of that period Joyce was found unconscious and smelling of liquor. Kettle was not found until two hours later, when, in the opinion of the sergeant, he was very drunk.

The two men had had two hours for drinking, but there is no evidence as to where they obtained the liquor, as to how many times they got out of the car, or as to when and where they started

the final section of the journey which ended against the fence in McConnell Street.

The facts which have been stated are not disputed, but it is contended for the plaintiff that the learned trial judge drew wrong inferences from the facts. His Honour Mr. Justice *Philp*, who tried the case, held that upon the evidence the plaintiff knew of the danger arising from Kettle's drunken condition and voluntarily accepted the risks attendant on it. Accordingly, his Honour held that the plaintiff failed, not on the ground of contributory negligence as was suggested, but " for lack of proof of breach of duty owed by Kettle to him." His Honour gave illustrations of the application of the principle which he applied— " . . . it seems to me that if I ask a blacksmith to repair my watch I cannot complain if he injures it through lack of skill. Again, if I ask a watchmaker who is obviously drunk to repair my watch immediately, I cannot complain if he injures it because of his drunken condition." Accordingly his Honour gave judgment for the defendants.

Upon appeal to the Full Court, his Honour the Chief Justice was of opinion that the fact that the Sergeant of Police thought that Kettle was drunk at 9 p.m. was not sufficient to justify an inference that Kettle was so much under the influence of liquor when Joyce became his passenger in the motor car on the journey which ended in McConnell Street that to drive with him was a dangerous adventure. Further, his Honour was of opinion that if the contrary were held on this point, there was still not any sufficient evidence that Joyce knew or ought to have known of the condition of Kettle at any material time. *Mansfield* S.P.J. agreed with *Philp* J., saying that in his opinion " it would be contrary to reason to infer that a passenger sitting next to the driver would not be aware that the driver was under the influence of liquor. I think it is reasonable in the circumstances to draw the inference—and I accordingly draw it—that the plaintiff knew that Kettle was drunk, that he knew of the risks incidental to Kettle's drunkenness and that he voluntarily accepted those risks " (1). *Stanley* J. agreed with the judgment of the Chief Justice. The Full Court set aside the judgment for the defendants and, fixing the damages at £700, gave judgment for that amount.

Several views have been expressed with respect to the legal position of a person who allows himself to be driven in a motor car by an obviously drunken driver as a " guest passenger." First, it is argued that such a person is entitled to expect only the degree of care which can be achieved by a drunken driver, and that if he

(1) (1948) Q.S.R. 139, at p. 152.

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is injured as a result of the drunkenness of the driver he has no cause for complaint because there has been no breach of duty to him.

Secondly, it is suggested that such a case falls within the category of contributory negligence—that there is contributory negligence in such a case in substantially the same way as if a person were to place himself in the path of an approaching motor car which he could see was being wildly driven by a drunken driver. In the latter circumstances the appropriate legal category would be held to be that of contributory negligence.

Thirdly, the maxim *volenti non fit injuria* is said to apply. The case supposed affords a clear example of a person knowing a risk and voluntarily encountering that risk: *Letang* v. *Ottawa Electric Railway Co.* (1).

If a person deliberately agrees to allow a blacksmith to mend his watch, it may well be said that he agrees to accept a low standard of skill. But even in such a case, the blacksmith is bound to act sensibly, though he is not subject to the responsibilities of a skilled watchmaker. In the case of the drunken driver, all standards of care are ignored. The drunken driver cannot even be expected to act sensibly. The other person simply "chances it." Accordingly, the case may be described as involving a dispensation from all standards of care, so that, as the learned trial judge decided, on the facts as found by him, there was no breach of duty by the defendant Kettle. But the facts of the case supposed will, if the passenger is in possession of his faculties, and the drunken state of the driver is obvious, also establish contributory negligence. There would be a lack of ordinary care for the plaintiff's own safety which brought about his injury. The same facts would also show that the plaintiff voluntarily encountered the risk which was obviously associated with the drunken condition of the driver. The maxim *volenti non fit injuria* would apply.

Thus the three categories should not be regarded as mutually exclusive. The same evidence may establish a defence under each heading.

In the present case, in order to enable the plaintiff to succeed, it is necessary for him to show that he was injured owing to negligent driving by Kettle. He seeks to do this by alleging that Kettle was drunk at about 7 p.m., when the accident happened. The proposition that he was drunk at 7 p.m. rests upon the evidence of the Sergeant of Police that he was very drunk at 9 p.m. There was no challenge of this evidence. In my opinion it is a fair

(1) (1926) A.C. 725, at p. 730.

inference from Kettle's state at 9 p.m. as described by the Sergeant of Police that he was very drunk at 7 p.m. Further, however, the plaintiff must show, in order to make a case, that the accident was due to Kettle's drunkenness when driving the car. In my opinion this inference is more doubtful than that already mentioned. Joyce and Kettle had been drinking together during a period of two hours and it would be quite consistent with all the evidence that Joyce was as drunk as Kettle. If Joyce were drunk he might have interfered with the driving and himself brought about the accident. However, let it be assumed in favour of the plaintiff that he made out a prima-facie case of negligence against Kettle.

It is now necessary to consider the defence upon which the defendants rely. If in the last stage of the journey the plaintiff was sober enough to know and understand the danger of driving with Kettle in a drunken condition, he was guilty of contributory negligence, and he also voluntarily encountered an obvious risk and his action should fail.

But if he was not sober enough to know and understand such a danger, then there is no reason to believe that his inability to appreciate the danger was other than self-induced. If he drank himself into a condition of stupidity or worse, he thereby disabled himself from avoiding the consequences of negligent driving by Kettle, and his action fails on the ground of contributory negligence.

But the drunken condition of Kettle just before the accident may not have been obvious, so that Joyce, even if he were sober, would not perceive, and could not be expected to perceive, that it would be dangerous for Kettle to drive the car. That this was the case is a possibility upon the evidence, but there is no ground for drawing this inference to the exclusion of the other possible inferences mentioned. Other possibilities as to what might be called the relative drunkenness of Joyce and Kettle could be suggested.

The onus is upon the plaintiff to establish his case. The plaintiff was present at the trial, but did not give evidence. The facts proved are as consistent with (*a*) contributory negligence of the plaintiff, (*b*) voluntary acceptance of obvious risk by the plaintiff as with (*c*) negligence of Kettle causing the plaintiff's injuries. The principle of law which is applicable in such circumstances is established by the leading case of *Wakelin* v. *London & South-western Railway Co.* (1) : and see *Mersey Docks & Harbour Board* v. *Procter* (2). In *Wakelin's Case* (3) the injured person was the husband of the plaintiff who sued for damages for negligence causing

(1) (1886) 12 App. Cas. 41.
(2) (1923) A.C. 253.
(3) (1886) 12 App. Cas. 41.

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his death. Lord *Halsbury* L.C., after pointing out that it was incumbent upon the plaintiff to establish that her husband's death had been caused by some negligence of the defendants, so that if that fact were not proved the plaintiff failed, continued: "If the simple proposition with which I started is accurate, it is manifest that the plaintiff, who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by—in this sense that it could not have occurred without—her husband's own negligence as by the negligence of the defendants, does not prove that it was caused by the defendants' negligence. She may indeed establish that the event has occurred through the joint negligence of both, but if that is the state of the evidence the plaintiff fails, because '*in pari delicto potior est conditio defendentis*'. It is true that the onus of proof may shift from time to time as matter of evidence, but still the question must ultimately arise whether the person who is bound to prove the affirmative of the issue, i.e., in this case the negligent act done, has discharged herself of that burden" (1). In my opinion these observations apply to the present case. The plaintiff's case depends upon his affirmatively establishing the proposition that his injuries were caused by the negligence of the defendant Kettle. This conclusion, however, rests upon inference from all the proved facts, and the other inferences mentioned, namely contributory negligence on the part of the plaintiff and voluntary acceptance of an obvious risk, are equally consistent with those facts. Accordingly, it should be held that the plaintiff's claim has not been established. The appeal should be allowed and the judgment for the defendant should be restored.

RICH J. From a legal point of view this case is somewhat out of the ordinary. So far as the facts are concerned, however, I imagine that it is not without precedent. Nevertheless the facts are of such a nature that they are better summarized in reverse chronological order. Beginning at the end or close to it we find the plaintiff seriously injured huddled up in a motor car which has penetrated a fence of a front garden facing the end of a road. He is sitting in the passenger's seat and smells of drink. The defendant Kettle has been the driver but he is not to be found. The hour is 7 o'clock. The ambulance arrives summoned, it is said, by the defendant Kettle. Next is his story told on the following day to the police who had on the previous night found him asleep but, as they assert,

(1) (1886) 12 App. Cas., at p. 44.

on a neighbouring allotment. Neither of these worthies gives evidence and their movements during the preceding two hours are not accounted for. Their journey commenced only two or three miles from the plaintiff's house. His wife says that they left in the defendant Kettle's car to pick up somebody and then proceed to the final stages of a wedding festivities. The ceremony had been performed in the morning. The police say that their investigations showed that before running through the fence the car had hit a standing truck. The on-side of the car had hit the off-side of the truck which was parked on its correct side. It will be seen that the facts so far are significant. To *Philp* J. they signify that the parties had been on a carousal and that the defendant Kettle while drunk had guided the car into a truck and thence to the fence at right angles with the street. He therefore found that a prima-facie case of negligence had been made out. The question remains whether a plea of *volenti non fit injuria* had also been made out. Obviously the question was one to be decided on circumstances. But when circumstances are proved indicating a conclusion and the only party who can give direct evidence of the matter prefers the well of the court to the witness box a court is entitled to be bold. This is what *Philp* J. said :—" Whether the plaintiff was also drunk and whether he was so drunk as to be unaware of Kettle's drunkenness are matters upon which, of course, the plaintiff has failed to give evidence. All I know is that he smelt of alcohol after the accident. Upon the evidence I hold that the plaintiff knew of the risks incident to Kettle's state of drunkenness and voluntarily took those risks." I think his Honour sitting as a jury was entitled to draw this conclusion. Common sense tells us that the probability is that the passenger quite well knew that the driver was unfit for his task. All sorts of hypotheses may be suggested. It may be conceded that the plaintiff was more drunk than the defendant Kettle ; that the defendant Kettle got worse when exposed to the evening air ; that they might have got drunk separately and not in combination so that the plaintiff had insufficient time to realize his driver's state. But this is not a criminal case in which we are called upon to allow our imagination to play upon the facts and find reasonable hypotheses consistent with innocence. A balance of probability is enough. And when the greater probability is that both had enough consciousness to be aware of what they had been doing, although not enough judgment and discretion to drive, why should a judge hestitate to find accordingly against a plaintiff who gives no evidence. The appeal should be allowed.

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DIXON J. This appeal is by the Insurance Commissioner against whom judgment has been pronounced by the Full Court of the Supreme Court of Queensland pursuant to reg. 10 of the regulations made under *The Motor Vehicles Insurance Acts* 1936 *to* 1945 (Q.). (See p. 534 of vol. 9 of the *Queensland Public Acts*.)

The regulations purport in effect to authorize the Commissioner to enter an appearance and take over the defence in an action brought against a person he has insured against such a liability as the plaintiff seeks to enforce in the action. In the present case the plaintiff, who is the respondent upon the appeal, brought an action of negligence against one Kettle for damages for personal injuries which he sustained while riding by invitation as a passenger in a single seater car driven by Kettle. It would seem as a result of the amendment of s. 3 of the Act that it is now compulsory in Queensland to insure against liability to gratuitous passengers. At all events we were informed that the defendant Kettle was covered in respect of this risk by his insurance with the Commissioner. The Commissioner accordingly had elected to be joined as a defendant and had taken over the defence.

In his statement of claim the plaintiff alleged that, on 19th June 1945, he was lawfully riding in Kettle's car when Kettle so negligently and unskilfully drove, managed and controlled the car that it came into collision with a stationary motor truck, as a result of which the plaintiff suffered severe injuries to his head and left eye. The items of negligence assigned were that the plaintiff failed to keep a proper lookout, failed to avoid the collision by stopping the car or changing its course so as to clear the truck and failed to take reasonable precautions to prevent the car from colliding with the truck.

The defence which the Insurance Commissioner pleaded consisted in a denial of negligence and two affirmative allegations. The first was that the plaintiff and Kettle were at the time of the injury engaged in a joint enterprise and that Kettle was the agent of the plaintiff to drive the motor car. The second was that Kettle was at the time of the collision so affected by the consumption of intoxicating liquor as to be physically and mentally incompetent to drive the car with proper care and that the plaintiff with full knowledge of the facts and of the nature and extent of the risks about to be incurred agreed to be driven by Kettle and that Kettle's incompetency caused or contributed to the collision.

The first of these allegations may have been meant as a plea that the grievances complained of arose from the pursuit by the plaintiff and the defendant Kettle of a joint enterprise that was

unlawful, namely the driving of a car whilst under the influence of liquor. But as it stands it seems to have no legal significance.

The second allegation appears to be a plea of leave and licence or voluntary assumption of risk. It is not, at all events in terms, a plea of contributory negligence.

The action was tried by *Philp* J. without a jury. His Honour found that the plaintiff's injuries were caused by the defendant Kettle's negligent driving which arose from the fact that Kettle was in a drunken condition and that the plaintiff knew of the risks incident to Kettle's state of drunkenness and voluntarily took those risks. Upon these findings his Honour held that the plaintiff had accepted a gratuitous service involving obvious dangers and could complain of no breach of duty on the part of Kettle. He therefore entered judgment for the defendants. From this decision the plaintiff appealed successfully to the Full Court. *Macrossan* C.J. considered that there was no sufficient evidence that the defendant Kettle was so much under the influence of liquor when the plaintiff became his passenger on the journey ending in the accident that to travel with him was a dangerous adventure and, alternatively, that there was no sufficient evidence that the plaintiff knew or ought to have known that he was in such a condition. *Stanley* J., who agreed in the conclusion of the Chief Justice that the appeal to the Full Court should be allowed, was of opinion that there was enough evidence to support the finding that the defendant Kettle was drunk at the time of the collision but considered that there was no evidence establishing either that the plaintiff, when he allowed himself to be driven by Kettle, knew that he was drunk or that the plaintiff was himself so drunk as to be incapable of discerning Kettle's condition, an incapability on which reliance was placed as amounting to guilt of contributory negligence. *Mansfield* S.P.J. dissented on the ground that it was open to the learned judge at the trial to draw the inferences he did and that his findings were correct.

For an action of negligence for damages for personal injuries the case is singular because neither of the parties was called as a witness. The plaintiff was in court but his counsel did not tender him as a witness. Nothing was said as to Kettle's whereabouts, but personal service of the writ upon him could not be effected. Interrogatories do not seem to have been administered by either side. The whole case depends upon circumstantial evidence, and the circumstances proved are in a small compass.

It appeared that the plaintiff, a man then in his fifty-fourth year, lived at Morningside, Brisbane. On the day of the accident at

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eleven in the morning a marriage was celebrated at a church in Bulimba, which is not far distant. His nephew was the bridegroom and the plaintiff attended the ceremony. The plaintiff and his wife and the defendant Kettle and his wife, or mother, were bidden to the wedding feast, which was to be held in the evening. The women do not appear to have gone to the church. The plaintiff arrived home at four in the afternoon, driven by Kettle, both, according to the plaintiff's wife, quite sober and with no sign of drink upon them that she knew of. At five o'clock they left in the car to drive to Kettle's house in Bulimba for the purpose of picking up Kettle's wife or perhaps his mother and returning to the plaintiff's house. The plaintiff's wife in the meantime was to get herself ready for the party, to which they were all to drive in Kettle's car. They were asked for seven o'clock or thereabouts. The distance between the plaintiff's house and Kettle's place of residence is said not to be more than two miles. Nothing is known of what they did until a few minutes to seven, when the accident occurred in the vicinity of Kettle's home.

As a piece of topographical information it was stated that the Bulimba Hotel was not out of their way, and that at that time it held a " session " of an hour which closed or began to close at half past six. Kettle lived in a street running at right angles to Bulimba Street, which there came to an end, so that the two streets formed as it were a capital T, Bulimba Street corresponding to the perpendicular stroke.

A few minutes before seven o'clock, a neighbour, who himself was recovering from a broken leg, heard the sound of an impact or collision. He proceeded, doubtless somewhat slowly on his crutches, to the end of Bulimba Street, where he found Kettle's car with its bonnet through the fence of the dwelling opposite Bulimba Street fronting the cross street in which Kettle lived.

The driver's seat was empty and Kettle was nowhere to be seen. But in the seat beside the drivers' sat the plaintiff, slumped forward and unconscious, suffering from grave head injuries. An ambulance soon arrived and he was taken to the hospital where he was found to have sustained a compound fracture of the skull and serious injuries to the left orbital area. His breath smelt of liquor, but of course no other indications bearing upon his sobriety could be observed in his then insensible and injured condition. The ambulance had been summoned by a telephone message received at 6.56 p.m. and arrived ten to fifteen minutes afterwards.

Someone telephoned to the police station at about half past seven and a police constable came to the scene. He examined a

motor truck standing with its left-hand wheels in the channel of Bulimba Street on its proper side and facing the end of the street where Kettle's car stood half way through the fence. The truck had a tail light burning, but the off-side rear mudguard was damaged and the off-side rear part of the body showed scratchings. The damage seemed fresh. Kettle's car was very badly damaged. It was partly upon the footpath and partly in the premises fronting the street, where the impact had thrown down a high double gate. The distance from the parked motor truck was about eighty yards. The police constable next began a search for the driver of the car. Shortly before nine o'clock he found Kettle upon a neighbouring allotment, lying asleep under some lantana bushes. He says that he woke Kettle up and found that when he gained his feet he was in a drunken condition. He took Kettle to the damaged car and asked him if he were the owner. Kettle said yes, but upon being asked if he were driving at the time of the accident he said that he refused to answer that question. The constable said that he asked Kettle other questions but could not get any satisfaction from him and that "he staggered around in a very drunken state." The constable then took him to the station and locked him up on a charge of drunkenness. About five hours later Kettle was released on bail.

The police constable then asked him if he could remember what happened at the time of the accident. Kettle replied that he could and said that about seven o'clock he was driving along Bulimba Street in his car with the plaintiff as a passenger and through a misjudgment the near-side of his car collided with a truck parked in Bulimba Street. He said that he lost control of the vehicle then and could not stop it until it hit the fence in the cross street. The constable asked Kettle whether he remembered hitting the fence, to which he answered that he did and that when he found that the plaintiff was injured he went into a house and rang the ambulance and had him taken away. In reply to a further question Kettle said that he could not account for being on the neighbouring premises, that he was very stunned and must have gone there to have a rest.

All that was proved concerning the accident is, I believe, contained in the foregoing narrative.

In dealing with the case it is necessary to bear steadily in mind that the question to be decided is one between the plaintiff and Kettle. He and not the Insurance Commissioner is the defendant in the action against whom the plaintiff claims. The Insurance Commissioner comes into the proceedings to take up Kettle's

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defence by a form of statutory subrogation to that side of the record as a party litigant. The plaintiff is entitled to have the evidence considered just as if Kettle were the only defendant. So considering it full effect should be given to the conversation deposed to by the police constable consisting, as it does, of admissions explaining the accident. We should, for instance, take it to be the fact that Kettle's car hit the standing truck in the manner he describes and that afterwards he was able to summon the ambulance from a neighbour's telephone. Indeed no other explanation of the arrival of the ambulance is open upon the evidence.

In the next place it is necessary to remember where the law places the burden of proof in respect of the issues raised. Upon the plaintiff the onus rests of showing by circumstances, in the absence of direct testimony, to the reasonable satisfaction of the court that his injuries were caused by the negligent or unskilful driving, management or control of the car by the defendant Kettle. If he has done that the plaintiff is entitled to succeed unless the defence is made out. Upon the issue of leave and licence or voluntary assumption of risk, the burden of proof is upon the defendants. If there be an issue of contributory negligence, the burden of proving it is likewise upon the defendants. Circumstances must be proved to the reasonable satisfaction of the court which give rise to an inference of the correctness of which the court is satisfied that the plaintiff with adequate knowledge took upon himself the particular risk of which he now complains or, in the case of contributory negligence, that he was guilty of some want of common caution by which he would have avoided the injury. Otherwise these defences are not made out and the plaintiff succeeds.

The issues ought not to be mixed up but should be decided by a proper application of the evidence to each of them.

The view adopted by *Philp* J. that the plaintiff accepted the gratuitous services of a drunken driver whose condition was apparent, does, it is true, go to the existence of the duty, but it does not for that reason involve the plaintiff in the burden of disproving the circumstances that disable him according to that view from recovery. For prima facie the duty of due care arises from the simple fact that the defendant Kettle gratuitously received the plaintiff into his car and drove him along the highway. It is for the defendant to establish the special facts which are considered to displace that prima-facie duty.

No one doubts that the plaintiff must make out his case but his case consists in the allegation of negligent driving and resulting

injury. That case he has, in my opinion, clearly established according to the ordinary principles governing proof by circumstantial evidence. That Kettle was the driver and the plaintiff the passenger admits of no doubt. That the car driven by Kettle struck the parked motor truck side to side and then proceeded about eighty yards into the fence at the end of the road is proved circumstantially and by admissions. Such a thing unexplained implied negligence. There may be causes which would account for a driver colliding with the rear of a stationary vehicle exhibiting a tail light and then after travelling a considerable distance driving over the footway of a transverse street and into a front garden. But they are not easy to imagine. The defendant Kettle accounted for it by an error of judgment and loss of control. The police constable's evidence adds the illuminating and confirmatory detail that the defendant an hour and a half to two hours later was very drunk. The probability that the accident was caused by the negligent and unskilful driving of the defendant Kettle is so high that, in my opinion, no other inference could be drawn.

The driver of a vehicle who takes a passenger, although gratuitously, is under a prima-facie duty to exercise common care and skill in the management of the vehicle and is liable to the passenger if he is injured through a failure on the driver's part to do so.

In the course of the argument in *Lygo* v. *Newbold* (1), *Parke* B. remarked that a person who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care. The remark has been adopted and applied in *Harris* v. *Perry & Co.* (2) and *Pratt* v. *Patrick* (3): see also *Karavias* v. *Callinicos* (4). There is a statement by Lord *Chelmsford* in *Moffatt* v. *Bateman* (5) that a person offering another a seat in a carriage which he is driving certainly, if liable at all for an accident afterwards occurring, could only be so for negligence of a gross description. The accident in that case arose from a defect in the vehicle and, whatever may be the application of his Lordship's statement, it cannot be treated as applying to the personal negligence of the driver in the management of the vehicle. The duty of such a driver is to exercise the ordinary care which is expected of one responsible for the proper management and control of a moving vehicle because the safety of the occupants of the vehicle, as well as of others, depends upon his skill and care.

(1) (1854) 9 Ex. 302, at p. 305; [156 E.R. 129, at p. 130.]
(2) (1903) 2 K.B. 219.
(3) (1924) 1 K.B. 488.
(4) (1917) W.N. 323.
(5) (1869) L.R. 3 P.C. 115, at pp. 121-2.

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The case of a passenger in a car differs from that of a pedestrian not in the kind or degree of danger which may come from any want of care or skill in driving but in the fact that the former has come into a more particular relation with the driver of the car. It is because that relation may vary that the standard of duty or of care is not necessarily the same in every case. At one extreme is the trespasser and at the other the passenger who has made an express contract containing terms regulating his rights in case of injury. But prima facie a gratuitous passenger is entitled to the ordinary care for his safety which may reasonably be expected in the management of the kind of conveyance in which he accepts a place. A man who obtains permission to ride upon a timber jinker is not entitled to any more care on his behalf than is included in the proper management of such a vehicle. But in a car intended as a conveyance, the gratuitous passenger may expect prima facie the same care and skill on the part of the driver as is ordinarily demanded in the management of a car. Unusual conditions may exist which are apparent to him or of which he may be informed and they may affect the application of the standard of care that is due. If a man accepts a lift from a car driver whom he knows to have lost a limb or an eye or to be deaf he cannot complain if he does not exhibit the skill and competence of a driver who suffers from no defect. It is perhaps not often of much practical importance whether the passenger is regarded as voluntarily assuming the risks which are involved and so absolving the car driver from a standard of duty to which otherwise he would be subject, or the passenger is considered primarily to be entitled only to that standard of duty or of care which arises from the relation that he has established, namely a passenger in a car driven by a defective driver. It would seem to be clear that in either case the burden of proving the special facts or unusual conditions would be upon the defendant. When it is said that the law of negligence assumes the principle of *volenti non fit injuria* not to be applicable, as it was said by Sir *Frederick Pollock* in a passage adopted by *Asquith* J. in *Dann* v. *Hamilton* (1), no more is meant than that the duty of care persists beyond or outside the specific conduct or state of things which is not the subject of consent. A party may be disabled from complaining that a state of things or specific conduct implies actionable negligence, though otherwise he might have done so.

In the case of a driver whose ability to manage and control a car or whose judgment and discretion in doing so is impaired by drink, the position of the voluntary passenger has been variously

(1) (1939) 1 K.B. 509, at p. 517.

determined by the application of three different principles. In the first place, he has been regarded as depending upon a relation which by accepting a place in the conveyance he sets up between himself and the person responsible for its management. For those who believe that negligence is not a general tort but depends on a duty arising from relations, juxtapositions, situations or conduct or activities, the duty of care thus arises. For those who take the contrary view, the standard of care is thus determined. But whatever be the theory, the principle applied to the case of the drunken driver's passenger is that the care he may expect corresponds with the relation he establishes. If he knowingly accepts the voluntary services of a driver affected by drink, he cannot complain of improper driving caused by his condition, because it involves no breach of duty.

This is the view adopted by *Philp* J. and it is, I think, that which the Supreme Court of New South Wales applied in *Finnie* v. *Carroll* (1) though the assimilation there of the case to invitor and invitee is not very satisfactory. It is a view which seems to require some degree of actual knowledge on the part of the passenger of the alcoholic conditions he is accepting. It is not easy to see how the principle can be applied when no higher finding can be made than that he ought to have known.

The second principle that has been applied is that referred in English law to the title *volenti non fit injuria*, under which is placed the voluntary assumption of risk which in the United States seems to exist as a separate rule. Here, too, some actual notice of the state of the driver must be necessary. But of course knowledge of what is apparent may readily be inferred. The result of the application of this principle, it may be thought, should not differ from the result brought about by the first. But under modern authority consent or voluntary assumption of risk is not to be implied where, notwithstanding knowledge, the person concerned has exposed himself to the danger only because of the exigency of the situation in which he stands. If he has no real or practical choice he does not voluntarily consent. This is a consideration which may differentiate the results in some instances of applying the two principles. It is to be borne in mind also that if the passenger has a legal or moral claim to his place in the car, the improper conduct of the driver in reducing by intoxication his competence to discharge his functions will not put the passenger in the dilemma of either relinquishing his claim or consenting to take the consequences of the risk. A legal claim must, no doubt, arise as an incident,

(1) (1927) 27 S.R. (N.S.W.) 495; 44 W.N. 182.

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either of property or of contract, but a moral claim might form an incident of domestic relationship or arise from fortuitous circumstances.

In the third place the principles of contributory negligence have been invoked to disable the passenger from recovery from a driver evidently intoxicated who has given him a lift. This is the ground upon which in America the passenger is disentitled. The principle is that for a man to expose himself unreasonably to a danger produced by the negligence of another, if he knows or ought to know of the danger, amounts to contributory negligence. "A common form of the type of contributory negligence . . . consists of the plaintiff's entrusting his safety to a third person whom he knows to be incompetent, customarily negligent or ill equipped. Thus, if a plaintiff rides in an automobile knowing that the driver is drunk, ignorant of driving or habitually reckless or careless or that the machine has insufficient brakes or headlights, he can ordinarily not recover against the defendant through whose negligence an accident occurs, if the drunkenness, incompetence or carelessness of the driver or the bad condition of the vehicle is a contributory factor in bringing about the accident. However, special circumstances may make such conduct reasonable and so prevent it from being contributory negligence, as when he cannot otherwise preserve some interest of sufficient value to justify the risk which his conduct entails. Thus it is not contributory negligence to accept or solicit a ride from a driver who is known to be incompetent if there is no other way of getting one's seriously injured child to hospital" (*American Restatement of the Law of Tort, Negligence*, ch. 17, par. 466, p. 1233).

Much of this seems out of accord with the conceptions which prevail in England because it transfers the question from an inquiry into the quality of the conduct of the plaintiff and defendant one to another to a consideration of the motives and purposes to which the plaintiff's situation gave rise. Contributory negligence certainly includes failure to adopt reasonable precautions or a reasonable course of action to avoid the consequences or risks which the defendant's negligence sets up. Professor *Goodhart* has suggested that *Dann* v. *Hamilton* (1) should have been decided as a case of contributory negligence falling under this head: *Law Quarterly Review*, vol. 55, p. 184. But notwithstanding the weight which should be given to American doctrine and opinion in a matter which has been so thoroughly worked out in that country, I cannot help thinking that the question concerns rather what the passenger

(1) (1939) 1 K.B. 509.

is entitled to expect in such a situation than the culpability of the passenger as an answer to what otherwise would be the actionable culpability of the driver.

In *Dann* v. *Hamilton* (1) *Asquith* J. dealt with the matter as depending upon the existence of an implied consent on the part of the plaintiff. But as to the last stage of her journey the plaintiff in the case before him had full notice of the unfitness of the defendant to drive and a free choice which she exercised in favour of taking the risk, to which she adverted and which in the event was the cause of her injuries. Nevertheless *Asquith* J. decided in her favour for reasons which are embodied in the following passage :— "I find it difficult to believe, although I know of no authority directly in point, that a person who voluntarily travels as a passenger in a vehicle driven by a driver who is known by the passenger to have driven negligently in the past is *volens* as to future negligent acts of such driver, even though he could have chosen some other form of transport if he had wished. Then, to take the last step, suppose that such a driver is likely to drive negligently on the material occasion, not because he is known to the plaintiff to have driven negligently in the past, but because he is known to the plaintiff to be under the influence of drink. That is the present case. Ought the result to be any different ? After much debate I have come to the conclusion that it should not, and that the plaintiff by embarking in the car, or re-entering it, with knowledge that through drink the driver had materially reduced his capacity for driving safely, did not impliedly consent to, or absolve the driver from liability for any subsequent negligence on his part whereby she might suffer harm " (2).

No doubt the issue his Lordship propounded for decision was one of fact but, with all respect, I cannot but think that the plaintiff should have been precluded. Every element was present to form a conscious and intentional assumption of the very risk for which she suffered.

Of the three forms I have set out in which the driver may state his defence, for my own part I prefer the first. It appears to me that the circumstances in which the defendant accepts the plaintiff as a passenger and in which the plaintiff accepts the accommodation in the conveyance should determine the measure of duty and that it is a more satisfactory manner of ascertaining their respective rights than by opposing to a fixed measure of duty exculpatory considerations, such as the voluntary assumption of risk or contributory negligence. No doubt as a sufficient degree of knowledge

(1) (1939) 1 K.B. 509.

(2) (1939) 1 K.B., at p. 518.

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or appreciation of the conditions giving rise to the danger is necessary under the first as well as under the second principle and as the burden of proving knowledge is upon the defendant, little difference will be seen in the forensic application of the two.

In the present appeal I am of opinion that there is no evidence that the plaintiff had sufficient knowledge or appreciation of the fact that Kettle had so far impaired his competence to drive the car that it was dangerous to proceed as his passenger. It is all speculation or guesswork. There is nothing upon which a rational inference may be affirmatively based so as satisfactorily to discharge the burden of establishing the issue, a burden very definitely resting upon the defendants.

The occasion upon which the plaintiff might last have elected whether he would or would not proceed with Kettle as the driver was when last he embarked as a passenger in the car. We know nothing about that occasion. We may surmise that the men were both drinking at some hotel at which they delayed, but it is entirely surmise. For all we know Kettle may have dropped the plaintiff and later picked him up again. If in the same hotel they may have been separated. We do not know their relative degrees of sobriety when they boarded the car for the last time. We do not know where or when or in what sequence they took their seats. For all we know the defendant Kettle may have been sitting in the car waiting for the plaintiff who may have had no opportunity of judging his condition before they drove off. A contrary hypothesis is that the plaintiff was in the car waiting for the defendant Kettle. He might have had no time to appreciate the facts or decide. Again he may have been too fuddled with drink himself to know. I cannot accept the view that a man who is unable through drink to know and accept the risk is to be taken as accepting it or is disqualified from denying that he accepted it. That leaves out of account the defendant's position, who surely cannot excuse himself on the ground that the plaintiff was in no condition to exonerate him from his prima-facie duty.

There is no issue of contributory negligence upon the pleadings and I doubt if, on the facts, one could be raised. But for the plaintiff, who was not driving the car, to drink until he was too stupid to observe the defendant's condition can hardly be considered contributory negligence of which the accident was a reasonable or natural consequence.

In any case it must be remembered that after all the defendant Kettle was able to go into a house after the accident and ring up

an ambulance. We cannot reject in his own favour his admission that he did so.

A score of hypotheses may be put forward consistent with the known facts. But the only point in mentioning any of them is to make it clear that nothing whatever is known of the facts except that two sober men set out in a car and two hours afterwards had an accident attributable or possibly attributable to the insobriety of the driver while the passenger also smelt of drink.

It is proper that a court should regard the failure of the plaintiff to give evidence as a matter calling for close scrutiny of the facts upon which he relies and as confirmatory of any inferences which may be drawn against him. But it does not authorize the court to substitute suspicion for inference or to reverse the burden of proof or to use intuition instead of ratiocination. After all it is better that the due application of the law relating to evidence and burden of proof should produce an automatic result between the two not very innocent parties, the plaintiff and the defendant Kettle, even at the cost of the Insurance Commissioner, than that the court should hazard an attempt at divination in getting at the facts.

In my opinion, the appeal should be dismissed.

Appeal allowed with costs. Judgment of Full Court set aside. Judgment of Philp J. restored. Plaintiff to pay defendant's costs of appeal in Supreme Court.

Solicitors for the appellant: *E. E. Quinlan & Miller.*
Solicitor for the respondent: *L. B. Moynihan.*

B. J. J.