IN THE HIGH COURT OF AUSTRALIA

ROACH

V.

A I R S.

DAVIS.

V.

A I R S.

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY.

on FRIDAY 19TH DECEMBER, 1952.

H. E. Daw, Gov. Print., Melb.

C. 12280/45

ROACH v. AIRS

DAVIS v. AIRS

O R D E R

Appeals dismissed with costs.

ROACH v. AIRS

DAVIS V. AIRS

JUDGMENT

DIXON C.J.
WILLIAMS J.
FULLAGAR J.
KITTO J.
TAYLOR J.

ROACH AND AIRS

DAVIS V. AIRS

DIXON C.J.
WILLIAMS J.
FULLAGAR J.
KITTO J.
TAYLOR J.

JUDGMENT

Appeals from orders dismissing motions for new trials.

The appellants each brought actions against the respondent to recover damages in respect of injuries and loss sustained by them respectively as the result of the respondent's negligence in the control and management of a motor car near Newcastle on the 14th September, 1949. Both appellants were passengers in a car of which the respondent was the owner and, at the relevant time, the driver.

The two actions were heard together and both appellants gave evidence of the circumstances in which their injuries were caused, and also of the circumstances in which they came to be passengers in the respondent's car. The respondent himself was not called as a witness at the trial and in the result the jury returned a verdict for the defendant in each action.

It was not contested on the hearing that the appellant's injuries were caused in the manner deposed to by them, but it was claimed on the respondent's behalf that at, and before the time, of the occurrence he was so affected by intoxicating liquor that he was incapable of managing a motor car, that his condition was known to both appellants and that they fully appreciated the risks involved at the time they accepted invitations to become passengers. In these circumstances, it was claimed, they were not entitled to succeed in their respective actions.

There has been some difference of opinion concerning the legal principle upon which the rights of a passenger in such circumstances should be determined (see the Insurance Commissioner v. Joyce, 77 C.L.R. 39, Roggenkamp v. Bennett, 80 C.L.R. 292 and Dann v. Hamilton, 1939, 1 K.B.509) but in these cases it is unnecessary to attempt to reconcile the divergent views and we should not attempt an enunciation of any general principle of law applicable to all cases of this kind for the test selected by the trial judge as appropriate in his directions to the jury was put before them without objection and no objection to these directions was taken either in the Full Court of the Supreme Court or in this Court. In substance, the learned trial judge told the jury that if the "defendant satisfied you on the balance of probabilities that .... he was through drink incapable of driving, that they (the appellants) knew it, fully appreciated it, and took the risk, then the plaintiff's claims fail altogether and there will be no damages". There can be no doubt that unless the jury saw fit to resolve this issue in favour of the respondent the appellants must have succeeded in their actions.

The evidence in the case shows that the appellant Davis met the respondent at a house in a suburb of Newcastle about 6.30 p.m. on the 14th September. After they had had a meal they went to the Great Northern Hotel for the purpose of having a drink. According to Davis they arrived at the Great Northern Hotel a little after 8 p.m. and remained there until approximately 9 p.m. when they left the Great Northern Hotel and went to the Esplanade Hotel for the purpose of attending a dance there. In his evidence Davis said that whilst at the Great Northern Hotel he and the respondent had a couple of drinks. After they arrived at the Esplanade

Hotel they met the appellant Mrs. Roach who was a member of a party attending the dance. Both appellants agree that they remained at the Esplanade and they and the respondent took part in the dancing which ended about midnight. Between 9 p.m. and midnight, it was said, the appellants and the respondent had six, or seven or, perhaps, eight small glasses of beer but both appellants maintained that at no time were they or the respondent in any degree affected thereby. At the end of the dancing the party stayed on at the Esplanade Hotel for approximately another hour but both appellants maintained that no drink was taken during this period. According to Davis the respondent, about 1 a.m., offered to drive him and Mrs. Roach home saying "I will drive Mrs. Roach home first before I drive you home". Having said this the respondent then said "We may as well go for a drive", and it was arranged that they would drive up to the waterfront for the purpose of looking at the view. When the three of them went out to the respondent's car, it was found that a fourth person, a man, was sitting in it waiting for the respondent to appear in the hope that the latter would drive him to his home at Wickham, a suburb of Newcastle. This the respondent agreed to do, and thereupon drove off in the direction of Wickham with three passengers in his single-seater car. At Wickham the first passenger was dropped and after he alighted from the car there was a conversation for some little time between him and the respondent. Thereafter the respondent with the two appellants as passengers resumed his interrupted drive towards the waterfront for the purpose of inspecting the view before driving the appellants home. They arrived at the waterfront safely, and according to Davis, they remained inspecting the view for ten minutes or so. Then the respondent turned his car round in a narrow road for the purpose of resuming the journey. Both appellants

swore that at this stage there was nothing unusual in the respondent's driving and he appeared to be driving quite safely. The turn was safely negotiated and thereafter the car proceeded along the road, but some fifty yards or so after making the turn the car suddenly veered over to the right of the road and passed down the embankment. It was in this manner that the appellant's injuries were caused. The evidence of the appellant Mrs. Roach, is substantially similar to that of Davis but when asked as to the time when the accident happened she said she was unable to say exactly what time it was but said it would have been about half past one. After the accident it took the appellant Davis some little time to extricate himself from the car and he made his way to a house and telephoned for the ambulance. Mrs. Roach was pinned under the car and after the arrival of the ambulance both she and Davis were taken to the hospital. The respondent apparently was missing when the ambulance arrived and he was next seen when he arrived at the Newcastle Police Station about 3.20 a.m. and reported the accident. The Station Sergeant said in evidence that he had some conversation with the respondent and noticed that "his voice was very thick, his gait was unsteady" and "his breath smelt strongly of intoxicating liquor". The respondent was sent to the Newcastle Hospital in charge of a constable and subsequently returned to the Police Station. The Station Sergeant said that on both occasions when he saw the respondent he was "under the influence of liquor to a marked degree". In cross examination the Sergeant said that apart from the smell of liquor the other symptoms which the respondent exhibited were consistent with shock and concussion. The respondent was also seen that night by Sergeant Kerr and Constable Winney at the Newcastle Hospital. The former says that the respondent was walking up and down the hallway and he was unsteady on his feet.

According to this witness the respondent kept talking to himself and he smelt strongly of intoxicating liquor and he was "very thick in his speech". Constable Winney also said that he appeared to be very unsteady on his feet, that his breath smelt very strongly of intoxicating liquor and his speech was very thick and incoherent.

Counsel for the appellants contended that it was not open to the jury on this evidence to find that at the time when the appellants accepted the respondent's offer to take them as passengers the latter was, as the result of liquor, incapable of managing his car. He did not, however, assert that the jury would not have been entitled to infer that this was the position at 3.20 a.m. when the respondent reported the accident at the Police Station. But he contended there was no evidence which legally justified a finding that the respondent was in this condition at any earlier material time. For the appellants it was urged that the whole of the evidence concerning the respondent's condition at any such earlier time was that given by the appellants who, though they admitted that the respondent had been drinking in the manner detailed by them, consistently maintained that he did not show any signs of being under the influence of liquor at the time of leaving the Esplanade Hotel and that he drove his car in a normal fashion until just before the accident. We think, however, that this argument attaches too much importance to Mrs. Roach's evidence that the accident happened about 1.30 a.m. and too little importance to the evidence concerning the respondent's condition when he was first seen after the accident. Mrs. Roach was not by any means sure of the time of the accident, and it was open to the jury, particularly in view of Roach's evidence, to find that it happened later. But even if a period of two

hours elapsed before the respondent made his way to the Police Station, we can see no reason why, if he was then markedly under the influence of liquor, it was not open to the jury to infer that he was at least in the same condition at the time of the accident. Apparently, nobody saw him at the scene of the accident when the ambulance arrived though it may be that he stayed there for some little time thereafter. It would have taken him some little time to make his way to the Police Station and at that time of the morning it is unlikely that liquor would be readily available to him in the course of his journey. Further, the nature of the accident itself was a material factor for the consideration of the jury. The appellants' injuries were caused when the respondent's car for no apparent reason swerved to the right and ran off the road on the right hand side. In our opinion it was open to the jury to have regard to this factor when considering what the respondent's condition was at and about this time. In all the circumstances, we are of the opinion that there was evidence which justified the jury in finding that the respondent was "through drink incapable of driving and that the appellants knew it, fully appreciated it and took the risk".

For these reasons we are of the opinion that both appeals should be dismissed.