13

IN THE HIGH COURT OF AUSTRALIA

Appeal 25/54

Dun

V.

Johnson

REASONS FOR JUDGMENT

11/—

Judgment delivered at Brisbane

on 4/8/55

J. J. Gourley, Govt. Print., Melb.

C.7163/51

DUX v. JOHNSON

ORDER

Appeal allowed with costs. Discharge order of Full Court except so far as it dismissed the plaintiff's cross appeal with costs. Order that defendant's appeal to that Court from judgment of Hanger J. be dismissed with costs.

DUX v. JOHNSON

JUDGMENT

DIXON C.J.
WEBB J.
FULLAGAR J.
KITTO J.
TAYLOR J.

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JUDGMENT

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This is an appeal from a judgment of the Supreme Court of Queensland (Full Court) which reversed a judgment of Hanger J. The plaintiff Dux brought an action for damages for personal injuries suffered by him while riding as a passenger in a motor vehicle driven by the defendant Johnson. Hanger J. found that the vehicle had been negligently driven by the defendant and gave judgment for the plaintiff for damages in the amount of £1946. The defendant appealed to the Full Court, and there was a cross appeal by the plaintiff on the ground that the damages awarded were inadequate. The Full Court held that, while there might have been an error of judgment on the part of the defendant in his management of his vehicle, there was insufficient evidence to warrant a finding that he had been negligent. The judgment in favour of the plaintiff was accordingly set aside. From this judgment of the Full Court the plaintiff now appeals, seeking to have the judgment of Hanger J. restored on the question of liability, but asserting by his notice of appeal that the damages awarded were inadequate.

The circumstances of the accident were of a somewhat unusual character. The plaintiff with two other young men, named respectively Charles and Jeffery, set out to walk from Nambour to Caboolture, but after they had walked about two miles they were picked up by the defendant, who was driving his vehicle in the same direction. The vehicle was a Morris truck consisting of a driving cabin with a "table top" about ten feet long and six feet six inches wide behind. The plaintiff sat on a box placed about in the centre of the table top, and the other two men sat at the rear with their backs to the driving cabin and their legs dangling below the table

top. The defendant, at any rate after leaving Landsborough, knew how his passengers were seated at the rear of the driving cabin. The accident occurred about the middle of a straight stretch of level road approximately a mile in length and running approximately north and south. The defendant's vehicle was travelling south.

At the part of the road where the accident occurred maintenance operations were in progress, which consisted of spreading tar and screenings on the surface of the road and then rolling. In those operations two vehicles were engaged, a red motor truck, which was spreading screenings, and a motor-driven roller. At the material time both vehicles were in motion. The red truck was facing north but moving south (i.e. in reverse gear) on the east side of the road, and the roller was moving north on the west side of the road. The two vehicles were thus converging, the truck being the nearer of the two to the defendant's approaching vehicle. The truck was moving at about ten to fifteen miles per hour and the roller at about three miles per hour. At the critical moment there was probably a space of some thirty to forty yards between them.

The defendant approached the scene of these operations at about forty miles per hour (a speed not in itself excessive) but had slowed down somewhat before he actually reached it. He said there was a sedan car coming in the opposite direction (i.e. travelling north) but the learned judge, who was not impressed by the defendant as a witness, doubted the existence of this vehicle. His Honour's view of what happened was that the defendant swung sharply to the right to pass the red truck, that he then appreciated for the first time that the truck and the roller were converging and, doubting his ability to get through the narrowing gap, swung his vehicle sharply to the left and at the same time applied his brakes and stopped the vehicle with considerable suddenness. The result of what he did was to throw the plaintiff off the table top to the ground, with the consequence that he sustained severe injuries to his left leg. The other two

passengers on the table top were thrown back towards the front of the defendant's vehicle, and came to rest against the back of the driving cabin.

On this view of the primary facts the learned trial Judge held that negligence on the part of the defendant had been established. He said: "If these facts are substantially correct, the defendant could have stopped his truck in a leisurely way, without being under any necessity for making a swing to the left; that is, he could have met the circumstances that faced him without placing the men in the rear of the truck in any jeopardy at all." The judgment of the Full Court on appeal was delivered by Mansfield S.P.J. It was held that the facts found by the learned Judge did not establish negligence. The view taken is summed up in the following passage: "It appears that the defendant swung to his incorrect side of the road for the purpose of passing the red truck which was on his correct side of the road. After he had swung out, he apparently saw the roller and considered that the distance between the red truck and the roller was not sufficient to enable him safely to pass through, and he then swung sharply to his left. It was then that the plaintiff was thrown from the truck. The findings of the learned Judge establish that he had another course open to him which would not have required a sharp turn to the left, namely, to stop without haste on either side of the road. But it is not negligence if a driver does not take the course which would have avoided injury, if he does something which is reasonable in the circumstances."

We are of opinion that Hanger J. was right in finding that negligence had been proved, and we think that the appeal to the Full Court should have been dismissed. We are not disposed to take precisely the same view as that taken by the learned trial Judge, because we think that that view may attach insufficient importance to, if it does not indeed leave out of account, the element of the sudden stoppage of the truck. The swerve to the left only, sharp though it may have been, would seem

to us hardly to account both for the throwing out of the plaintiff and for the simultaneous throwing of his fellow passengers forward in the direction in which the truck was travelling. Obviously considerable violence would be needed to produce the results which were in fact produced, and it seems to us that the sharp braking of the truck, which accompanied or immediately followed the swerve to the left, was probably a very important element in the whole situation. We think that the most probable explanation of everything is that it was the sudden swerve, acting in combination with the sudden stoppage, that produced those results.

The view which we would take on the primary facts found by his Honour at the trial is this. The defendant approaching the scene of the road operations had a clear view of those operations, and must have seen the two vehicles engaged in those operations a quite substantial time before he actually reached the scene. The duty of care which he owed to any passenger required him to slow down very considerably, and to approach the scene with caution and at such a speed and in such a manner as to enable him to negotiate the area in which the two vehicles were working without having to resort to any abnormal measures or manoeuvres. He did not do this. If he did not himself alone create, at least he was a party to creating, the emergency which necessitated, or seemed to him to necessitate, the sharp swerve and the sudden stop. These may be regarded as emergency measures. But those measures were clearly likely to cause the results which they did cause, and the defendant if he had been driving with reasonable care, would never, in our opinion, have found himself in a position in which any such emergency measures were required. The defendant appears to have attempted to explain the position in which he found himself by reference to the sedan car above mentioned, which he said was travelling on its wrong side of the road in the opposite direction. Whether the presence and behaviour of that car could have sufficed to explain or justify the defendant's conduct need not be considered, because the learned Judge was not satisfied that any

such car played any relevant part in the drama or was even present on the stage.

The appeal should, in our opinion, be allowed with costs and the judgment of Hanger J. restored. No substantial argument was directed to maintaining the proposition that the amount of damages awarded at the trial was inadequate. The inclusion of this ground in the notice of appeal has not, we think, materially increased the costs of the appeal to this Court, and we do not think that any special order as to costs should be made with respect to it.