IN THE HIGH COURT OF AUSTRALIA

EDWARDS

V.

CHRISTENSEN

REASONS FOR JUDGMENT

Oral *Judgment delivered at* Sydney

on Friday, 13th May 1960

W. M. Houston, Govt. Print., Melb.

EDWARDS

v.

CHRISTENSEN

JUDGMENT
(ORAL)

JUDGMENT OF THE COURT
DELIVERED BY DIXON C.J.

CORAM: DIXON C.J.
McTIERNAN J.
KITTO J.
TAYLOR J.
WINDEYER J.

We think this appeal should be dismissed.

The circumstances, no doubt, are unusual. The view I take, in which I think my brethren concur, is that it is the circumstances that determine the measure as distinguished from the existence of the duty.

The parties were engaged in photographing emus and, as I think, both parties by the time the accident happened contemplated photographing them from a moving vehicle; naturally enough, the emus they were photographing would be moving too. The plaintiff, who was not a young man, was perched in a very insecure position. For the driver perhaps there were two opposing considerations. One was the plaintiff's safety, and the other was enabling him to get a good photograph of the emus. In these circumstances, the defendant was under a duty to take reasonable care, having regard to the circumstances, for the plaintiff's safety, taking into account the fact that, as the defendant knew, the plaintiff was in an insecure position but knew what the enterprise was.

When you look at the evidence, you find that the crucial episode or event is described by the plaintiff in these words: "All of a sudden, I was following the emu, and I got the emu and the ornament" (that is, the ornament on the bonnet) "and the emu together and all of a sudden I felt a terrific swing, something forcing me out to the right of the car." In cross-examination the plaintiff gave this evidence: "Q. By that I take it you meant some impetus moving you to the right; something impelled you to go to the right? A. Yes. A sort of an irresistible force, forcing me to the right. Q. I think your counsel used the word 'pressure'; you felt some pressure

impelling you to the right? A. Yes, what appeared to me something like a centrifugal force, forcing me out. Q. That is what you meant to convey is it? A. Yes. Q. Then I think you went on to say that you don't remember any more; you fell out of the truck? I think that is what was said? A. Yes. I got the emu; I can distinctly remember getting the ornament on the ear, but I do not remember anything after that."

The jury were entitled to accept that evidence, and if they did accept it, they might reasonably take the view that the defendant had taken a course, forgetful of the plaintiff's position or unmindful of it, which was negligent. The jury must be taken to have negatived contributory negligence.

As to the defence of volenti non fit, in my view, that does not arise as an answer to the negligence I have described. No doubt the plaintiff assumed the ordinary risks arising out of the general circumstances of the expedition and the topic might be discussed to that extent. The plaintiff complained that a safe road or track was not taken. But in the situation they occupied the duty of care arising in the circumstances was that which I have attempted to describe.

For those reasons I think the appeal should be dismissed.

The appeal is therefore dismissed, with costs.