IN THE SUPREME COURT OF QUEENSLAND No. 2287 of 1977

CIVIL JURISDICTION

BEFORE THE CHIEF JUSTICE

BRISBANE, 2 APRIL 1979

BETWEEN:

GWEN MAY ROSE Plaintiff

- and -

ROBERT JAMES HILL Defendant

JUDGMENT

HIS HONOUR: I hold that the defendant was negligent in driving his vehicle as he did, i.e. partly on his wrong side through a crest on a curve on which he knew there was no visibility. I hold that he was wholly responsible for the collision and its consequences. As to the particulars of contributory negligence pleaded, I find that the deceased's speed was not excessive, that the allegation of inadequate look-out has not been proved, that the evidence of the deceased's passenger establishes that he was keeping as far as possible to his left and was not on the wrong side of the road. I find that contributory negligence has not been established.

I assess damages globally at $56,000. I apportion that as to the widowed plaintiff $41,500, and to the children as follows: Robert Bernard $3,000, Ron William 83.000, Richard Stanley $3,500 and Ruth May 15,000.

I give judgment for the plaintiff against the defendant for S56,000. I direct that the sum of $14,500

thereof be paid to the Public Trustee of Queensland in trust for each of the said children in proportion to the sum herein apportioned to each such child. There will be liberty to the plaintiff, as well as the Public Trustee, to apply.

I order that the plaintiff's costs of the action, including any reserved costs, he taxed and paid by the defendant.

I publish my reasons.

IN THE SUPREME COURT OF QUEENSLAND No. 2287 of 1977

BETWEEN:

GWEN MAY ROSE Plaintiff

AND:

ROBERT JAMES HILL Defendant

JUDGMENT - THE CHIEF JUSTICE

The plaintiff is the lawful widow of Robert Lesley Rose who died on 25th January 1977 as a result of injuries sustained that day in a collision on a country road in the Mary Valley, when the vehicle he was driving, a small Datsun station wagon, and a Ford truck driven by the defendant, came into collision.

The plaintiff brings her claim pursuant to the provisions of Section 15A of the Common Law Practice Act 1867 as amended, and she sues on behalf of herself as lawful widow of the deceased and on behalf of the four infant children of the marriage, three sons born respectively in October 1969, January 1971 and June 1974, and one daughter born on the day before the collision and the death of her father.

The deceased man was driving south whilst the defendant was northbound. The vehicles met almost at the top of a blind crest on a curve to the left southbound,

or to the right northbound. At the time, approximately midday, the weather conditions were fine and clear. The road is relatively narrow, winding, and unsealed, running north-south at the place of the collision. On the eastern side at the place of collision there was a fairly deep stormwater drain, whilst on the western side there was a wide water table for the purpose of channelling the water off the road down the slope on the northerly side of the crest. The measurements taken by Sergeant Buckley, who was stationed at a nearby police station at the time, established that the width of the road from its eastern side to the nearer side of the water table on the west was 450 centimetres, or 17.7 feet. The sergeant also established that on the day of the accident there was a wash-out in close proximity to the apparent point of impact but somewhat on the northern side of it, encroaching on the trafficable portion of the road for about 70 centimetres (27 1/2 inches) from the storm drain on the eastern side, so as to constitute an impediment in the course of the southbound vehicle driven by the deceased. He also gave evidence that on the following day when driving south in his police car, a Falcon, he made a test to determine, having regard to the wash-out, how far it was possible for him to keep on his correct side, which demonstrated that approaching the curve and crest, his offside wheels were about the middle of the road. It is also obvious from photographs taken on the day of the collision by a police photographer, that, both north and south of the crest, wheel tracks made by traffic are only three in number, from which it plainly appears that the traffic on this country road normally travels either way with the vehicles' offside wheels approximately in the middle of the trafficable portion of the surface. Sergeant Buckley also said that on the actual crest there were only two sets of wheel tracks, from which it may be inferred that it was habitual for northbound drivers to cut the curve on the crest. In this situation, two vehicles meeting on or about the crest could not safely negotiate it. The explanation for this apparently dangerous practice appears to be the presence on the western or outer are of the curve of what was described by one witness as a “windrow” of gravel lying between the westerly of the two tracks on the crest and the eastern

edge of the water table on the western side. The grader driver who has been responsible for maintaining this section of the roadway for over 20 years before the accident, gave evidence that this windrow soon builds up after each time that he eliminates it by grading the surface of the road. As I understand his evidence, the accumulation of gravel is caused by centrifugal force exerted by the wheels of vehicles towards the outer side of the curve as they pass through it. Although the word “windrow” in my understanding is usually applied to the line of mown grass or other crop thrown out by moving mowing machines, the grader driver's application of the term to the situation on this curve is not inaccurate and it does convey a correct impression of the effect of wheels running round it. It seems that the presence of this windrow on the crest and the approaches to it, in the curve, contributes to the tendency of drivers to steer a course which will keep them clear of the accumulated loose gravel on the outer side of the curve. It seems also that this, in a short time, becomes a reason for northbound drivers' practice of cutting the curve.

The evidence of Sergeant Buckley is that there is no visibility over the crest or round the curve available either to a southbound or to a northbound driver, and he readily accepted the description I put to him that he would regard it as a blind crest.

Sergeant Buckley agreed both in examination-in-chief and in cross-examination to suggestions put to him by counsel that having regard to the shape of the water table - it is a relatively wide and shallow saucer in cross section - it would be possible for a northbound vehicle to negotiate the curve and crest with its nearside wheels running in the water table and the outside wheels straddling the windrow and running on the graded surface of the road. In answer to a question put to him by myself, he said a vehicle travelling north could breast the crest on its correct side by adopting that procedure. The contemporaneous photographs show that the height of the windrow is such as to afford clearance to the average car.

The defendant in evidence accepted the possibility of using this manoeuvre to improve safety on the blind crest. The following extract from the transcript of his evidence is, in my opinion, of crucial importance on the question of liability:

> *"BY MR. STEELE: How many wheel tracks were there? We have heard that there are two or three, but we may as well hear from you?-- On the actual corner there was only two.*
>
> *You have driven along this road a number of times you say?*
>
> *Yes.*
>
> *You have passed vehicles on that corner before?-- No.*
>
> *You have passed vehicles on that stretch of roadway before between Kenilworth and Brooloo?-- Yes.*
>
> *You heard in Court the description of the windrow described by Mr. Preston. Did you recognise the windrow from that particular day?-- Yes, that's why I reckon there is only the two tracks going around that corner, the natural lie of the corner.*
>
> *Do you recall there being a windrow there that particular day? Did you understand what he meant by 'windrow'?-- That's what I call wheel tracks.*
>
> *HIS HONOUR: He was talking about the loose gravel which tends to be thrown up by a vehicle towards the outside of the curve as it is going around. That is what I understood him to say.*
>
> *MR. STEELE: Yes. I was asking Mr. Hill what he understood it to mean.*
>
> *BY MR. STEELE: Did you understand what Mr. Preston meant?-- Yes.*
>
> *And you did not attempt to cross the windrow so that your near and offside wheels would have been straddling that windrow, did you?-- No.*
>
> *That was one avenue open to you as you came into that corner, is that not so? That was one approach you could have adopted as you came into that corner?-- Yeah.*

And you heard also the description given of a water table further again to the left of that corner. Do you recall the water table being there on this day?-- Yeah.

Is it not possible also to move further to the left and straddle the water table with your near side wheels?— With a fair bit of difficulty, yes.

You would have to reduce speed, I would suggest, and move the vehicle on to the water table gradually; would that not be the situation?— Yeah.

And if you had taken either of those courses of action, Mr. Hill, I suggest to you there would have been ample room for a vehicle travelling in the opposite direction to have passed you without this accident having occurred, is that not so?— Oh, there's still a bit of doubt. If I went out into the scrub I could have seen him or I could have missed him altogether.

No one is asking you to go into the scrub but if you had moved into the left and straddled over the windrow, or further, to the left and straddled the water table, I suggest there would have been ample space left for a vehicle travelling in the opposite direction to have passed you with safety?-— The next time I went through that particular corner the grader had been through and there was then--:------

What was?-- The ditches had been filled in. The water table had gone.

“But you are not answering my question. My question is that if you had taken the trouble or bother to have left the wheel tracks and to have straddled the windrow or further, gone to the left and straddled the water table there would have been ample opportunity for a vehicle, or ample space for a vehicle travelling in the opposite direction to have passed you?-- Most possible, yes.

You know the roadway fairly well; you have travelled it on many occasions, isn't that the case?-- Yes.

On the other side of the road, on the side nearest the blue car travelling in the opposite direction, wasn't there a stormwater drain and then a bank?-- Yes.

There was no windrow there, was there?-- Not right on the edge, no.

Nor was there any water table there?-- Not on that side of the road.

So there was really nowhere for the other vehicle to go, whereas there were places to which your vehicle could have been directed and for the two vehicles to have passed in safety; isn't that the situation?-- That's the way it reads, yes."

This evidence takes, on greater significance in relation to the question of the defendant's negligence in light of the fact that he was familiar with the scene because he had travelled over it "quite often", a minimum of 9 times a year over the 9 years before the accident, in the course of his regular run as a van salesman for a firm of wholesale suppliers servicing butcher shops from Brisbane to Gympie.

The grader driver to whom I have already referred, also gave evidence in effect similar to that of the defendant in regard to the possibility of safely negotiating this crest and curve. He said:

"*The windrow is of no danger to any traffic?-— No, they can straddle the windrow if they don't cut corners.*"

The witness went on to elaborate as follows:

"*Could a vehicle with its left-hand wheels between the windrow and water table travel north and still remain on its correct side of the road?-- Yes, definitely.*

Would that enable vehicles travelling south to pass safely between it and the other side of the road?-- Yes.

"*If it were necessary for a vehicle to straddle the water table-------?-- It could not straddle the water table. The water table is too far out. It was the windrow they had to straddle, not the water table.*

How many tracks were worn on to the roadway at that spot?-- Actual car tracks, I would actually say there

is one car track right around there used as one lane, and it happens on all corners.

How do you say a vehicle could have passed travelling southbound - or safely passed a vehicle travelling southbound when a vehicle was travelling towards Brooloo?-- Come again?

A vehicle travelling towards Kenilworth you said would safely pass a vehicle travelling towards Brooloo?-- Yes.

If the Brooloo-bound vehicle had its near-side wheels between the windrow and the water table. Isn't that what you said before?-- Yes. There's enough room. Like if you straddle the windrow there's still enough room. If you cut corners, well, no.

A vehicle travelling to Brooloo would have to move off these car tracks and straddle the windrow?-- Yes.

And if he did that there would be enough room for a vehicle to pass travelling towards Kenilworth?-- Plenty of room there was. There was no danger in the road at all."

The maximum speed permitted on this stretch of road was 100 kilometres per hour at the time of the accident. The defendant estimated his speed at 60 kilometres an hour shortly before reaching the crest, and he did not deny the evidence given by Sergeant Buckley that when questioned at the scene, he answered that his approaching speed was 70 kilometres per hour. The only evidence concerning the deceased man's speed was that of his brother-in-law who was riding in the front passenger seat. He said that they were travelling about 45-50 miles per hour, but he admitted that in his statement to the police he gave an estimate of 50 miles per hour as the speed of the vehicle driven by the deceased, whilst on reflection he thinks he should have said 45-50 miles per hour. In my view neither estimate of speed may be considered precise, but in any event I think that the question of speed is irrelevant to the issue of liability in all the circumstances. The respective speeds are in any event approximately equal when converted to a common measure. In my opinion, speed was not a cause of this collisiori.

I find that the collision occurred on the defendant's wrong side of the road. I find that the two vehicles collided at the offside front corner of each, headlight to headlight. The defendant's evidence makes it abundantly clear that the course he was steering had to put him into collision with any vehicle approaching on its correct side. The deceased's vehicle was not as wide as the police Falcon, which, as Sergeant Buckley's test demonstrated, could negotiate the curve, southbound, with its offside wheels in the middle of the road whilst also avoiding the washout. I do not accept the defendant's assertion in evidence that the deceased's vehicle was “in the centre of the road”, meaning that it was straddling the imaginary mid-line. He told Sergeant Buckley at the scene that he thought “they were both towards the middle of the road”. The other evidence, including the defendant's own account of his course, and the absence of initial impact damage to the front of either vehicle except at its front offside corner, is more consistent with the deceased's offside being not beyond the mid-line.

I hold that the defendant was negligent in driving his vehicle as he did, i.e. partly on his wrong side through a crest on a curve on which he knew there was no visibility. If he had thought about it at all, he must have realised that he was creating extreme danger for a vehicle travelling in the curve in the opposite direction, which as he well knew would have no possibility of avoiding him by steering further to its left-hand side, because of the barrier of the storm drain. It was between 1 and 2 feet deep. I hold that the defendant was wholly responsible for the collision and its consequences. Contributory negligence on the part of the deceased driver has been pleaded by the defendant. As to the particulars pleaded I find that the deceased's speed was not excessive, that the allegation of inadequate look-out has not been proved, that the evidence of the deceased's passenger establishes that he was keeping as far as possible to his left and was not on the wrong side of the road. I find that contributory negligence has not been established.

The deceased was aged 33, and within two months of his 34th birthday, at the time of the accident. His wife was 4 years younger, and they had been married almost 8 1/2 years. I have already listed the dates of birth of the four children of the marriage. From the date of death their expectations of dependency were respectively about 11, 12, 15 and 18 years. The deceased had been, for the 4 years up to his death, a self-employed timber snigger working on contract for a saw-milling company. The plaintiff had never been employed for remuneration since the marriage. His working plant consisted of a tractor, a Land Rover and a chain saw, all of which when sold by his widow brought in $1,900 nett after discharging a bill of sale over the tractor. It is common ground that the nett profit from this modest business, plus depreciation entered in the accounts but in fact all consumed in supporting his family, established a total dependency averaged out at $75 at the time of the death. They had no savings and no insurance; they rented for $8 per week an old farm house; they possessed and owned jointly little more than the essential articles of furniture. In short, counsel for the defence conceded that the value of the widow's succession to whatever assets she derived from her husband's death is so small as to be negligible for present purposes, and he did not seek any set-off on that account in the assessment of damages.

Both the deceased and the plaintiff were in good health and neither smoked. They had only an occasional social drink. Although they lived frugally it was a happy marriage. The plaintiff considered that her husband was a good provider. The evidence does not permit of a finding that the deceased had any real prospect of improving his income or the family's support beyond subsistence level. There is no evidence that the plaintiff has any qualifications for employment. She is described on the marriage certificate as “hospital domestic”. I find it unlikely that she would have ceased to be totally dependent on her husband.

I take $75 per week as the measure of dependency at the time of death, and by reckoning on 10% inflation in the next year and 8% in the current year, as defence

counsel invited me to do, I arrive at the figure of $90 per week as the nett dependency, now. That is a nett figure because it is such as would leave the deceased below the minimum taxable income, after allowing his deductions for dependants. In that figure allowance has been made for the cost of maintenance of the deceased at $19 per week, including generously half of the rent.

I adopt with respect, and apply to the calculation of damages, the appropriate observations of Gibbs J. in *Jacobs v. Varley* (1976) 50 A.L.J.R. 519. It is my view that this hard-working and responsible husband and father would have continued to apply approximately four-fifths of his earnings for the benefit of his dependants until the youngest child, born the day before his death, became independent. Thereafter it may reasonably be assumed that he and his wife would have shared equally his meagre income. It would still be meagre, in my view, because of the improbability of his bettering his position Because the family purse was so thin, this is not a case where a tapering off of the financial benefits of dependants, in favour of an increase in the deceased's share, should be assumed as each of the boys ceased to be dependent. I therefore proceed on the basis that the plaintiff and remaining dependent children, or child, would have got the benefit of four-fifths of the deceased's earnings throughout the first 18 years from his death. Thereafter, during his lifetime, the plaintiff would, I find, have received the benefit of about half of his income. It is very doubtful, in my view, whether the deceased would have been able to devote any of his half-share to the acquisition of durable assets which would enure for the benefit of the plaintiff. At most, as he had just begun to do by way of hire-purchase, he would, I think, have been able to afford only the kind of basic household appliances which depreciate heavily. The plaintiff said in evidence:

> *"My husband had decided to go into hire-purchase for three items for me, a freezer, a fan, and a vacuum cleaner, and we hadn't started paying that off yet, so we had to pay that off after his death, and that was about all we had."*

In total they were worth about $360.

It is necessary to consider, as a depreciating contingency in the assessment of future dependency, the prospect of the plaintiff's re-marrying, or, as it is more accurately expressed, the value to her of her freedom to marry. Defence counsel referred me to statistics recording percentage rates of remarriage of widows, showing that 67% re-marry, and 48% do so within 10 years. He suggested that a seven-year prospect of widowhood would be a reasonable assumption in this case. With respect, I share the view of Barwick C.J. in *Jones v. Schiffmann* (1971) 124 C.L.R. 303, at p. 306, that such statistics are irrelevant. I feel that the only relevant consideration is the value, in her circumstances, of this widow's freedom to marry. She is still only 31 years old, is in good health, and of attractive appearance. However, she has heavy obligations to four young children. When asked in cross-examination about her attitude to re-marrying, she answered with commendable frankness -

> *"You do not dismiss the thought that you may remarry some day?-- I am inclined to, but I am not silly enough to say that I would never remarry, but I have no leanings towards it because I feel I have enough to cope with.*
>
> *When the children get a bit older and some man did present himself -----? It doesn't please me to think about it to be quite honest.*
>
> *You have not considered it?-- That's right.*
>
> *You do not dismiss the prospect that it may occur in the future?— J couldn't, could I?"*

I was favourably impressed by her frankness and honesty throughout her evidence. It is my view that, in all the circumstances of the case, this widow's prospect of marrying upon which depends the evaluation of her freedom to marry, does not warrant being given much consequence, in the phrase of Menzies J. at p. 309 of the report just cited. I think any discount for this contingency should be moderate.

I have kept in mind all the other usual contingencies in assessing damages in cases like this, although I think it unnecessary to discuss any that I have not already mentioned.

I am of opinion that the plaintiff and her late husband, immediately before his fatal accident, had a long joint expectation of life. He was not engaged in the notoriously hazardous occupation of tree-felling, but in snigging out the fallen logs. It is a case which justifies a finding of joint expectancy of 30 years. I so find.

The figures put before me by way of guide lines for assessing total dependency show that the present value of $90 per week taken over 30 years on the 7% tables would amount to $60,269.

I assess damages globally at $56,000. By an oversight there was no claim for funeral expenses, nor any evidence on which I could find an amount and treat the claim as amended.

The plaintiff, with prudence, sees the need to invest sufficient of her award in a home in order to provide security for herself and her young family, and intends to do so. She has in mind a modest new home, with low maintenance in the region of Caloundra where her parents live. I would regard her acquisition of such a house as conferring a benefit on the children. With this in mind I intend to apportion the award in such a way as to make the plaintiff's purchase of a home possible, even though the apportionment may leave for setting aside on trust for the children a smaller proportion than is customary. I consider, after seeing and hearing the plaintiff, that it is unnecessary to complicate her management of their welfare by creating for the children any formal beneficial interest in the property. I apportion the damages as follows:—

To the plaintiff	$41,500
To Robert Bernard	$ 3,000
To Ron William	$ 3,000
To Richard Stanley	$ 3,500

To Ruth May $ 5,000

I give judgment for the plaintiff against the defendant for $56,000. I direct that the sum of $14,500 thereof be paid to the Public Trustee of Queensland in trust for each of the said children in proportion to the sum herein apportioned to each such child. Liberty to the plaintiff, as well as the Public Trustee, to apply.

I order that the plaintiff's costs of the action, including any reserved costs, be taxed, and paid by the defendant.