IN THE SUPREME COURT OF QUEENSLAND No. 2040 of 1975

CIVIL JURISDICTION

BEFORE THE CHIEF JUSTICE

BRISBANE, 11 APRIL 1979

BETWEEN:

THE PUBLIC CURATOR OF QUEENSLAND Plaintiff

- and -

WM. McQUEEN & CO. PTY. LTD. First Defendant

- and -

THE COMMITTEE OF THE RESCUE STATION AT BCOVAL First Third Party

- and -

JACK TUNSTALL WOODS Second Third Party

JUDGMENT

HIS HONOUR: In this matter liability has been agreed amongst the defendant and the third parties, and only damages remained in issue. I assess the total loss of dependancy of the widow and the children at $110,000. I apportion the damages as follows: to the widow $80,000 and to each child $10,000. I give judgment for the plaintiff against the defendants for $110,000. I direct that the sum of $30,000 thereof be paid to the Public Trustee of Queensland in trust for each of the three children in proportion to the sum herein apportioned to each such child. I direct that from the total damages

there be paid to the Workers' Compensation Fund the sum of $14,000. $7,000 of that total refund is on account of the compensation paid in trust for the children. Therefore out of the children's apportionment of damages one third of $7,000 is to be refunded on account of each child. I grant liberty to the plaintiff to apply, and I order that the plaintiff's costs of the action including any reserved costs be taxed and paid by the defendants, I publish my reasons.

IN THE SUPREME COURT OF QUEENSLAND No. 2040 of 1975

BETWEEN:

THE PUBLIC TRUSTEE OF QUEENSLAND Plaintiff

AND:

Wm. McQUEEN & CO. PTY. LTD. Defendant

AND:

THE COMMITTEE OF THE RESCUE STATION AT BOOVAL First Third Party

AND:

JACK TUNSTALL WOODS (as a Nominal Defendant) Second Third Party

JUDGMENT - THE CHIEF JUSTICE

The plaintiff is the administrator with the will of one Mervyn Verrenkamp, deceased, and it brings this action for the benefit of his widow Florence Loraine Verrenkamp and three children, Michelle Leanne Verrenkamp, Tracey Ann Verrenkamp and Wayne Gavin Verrenkamp, the lawful children of the deceased man.

The defendant and the first and second Third Parties reached agreement before trial as to the apportionment of liability amongst themselves, leaving only the quantification of damages to be litigated between the

plaintiff and the first defendant. Pursuant to the agreement, the third parties were given leave to withdraw from the action after the terms of settlement were handed up to be filed, but not published.

The deceased man was a miner employed by the defendant at its Box Flat Colliery on the West Moreton Coalfield. Consequent upon an outbreak of fire in mines no. 5 and 7, the deceased and other miners were called in to endeavour to bring the fires under control. Whilst he and others were engaged in this work, a violent explosion occurred in the mine which caused his death and those of other members of the working party, on 31st July, 1972.

The deceased was 30 years of age at the time of his death and was in good health and condition. He came of a coal mining family, his father and three brothers also being employed in the same colliery. The three brothers are still so employed. He had, in two periods, completed about 13 years of service as a miner. His widow was two years younger than her husband. They were respectively aged 23 and 21 at the time of their marriage in 1965. The three children were born respectively in September 1967, December 1968 and August 1971. He was then a miner and continued in that calling until the end of 1965 when the mine in which he was employed closed down. They then came to live in Brisbane, where he was employed as a driver by the City Council. He later became a professional football coach in a country town where he supplemented his earnings by taking work as a barman and later as a salesman in a tyre retailing firm. His wife took the lease of the local swimming pool and conducted it in combination with giving swimming lessons to children. At the end of the year 1969 he returned to coal mining and commenced employment with the defendant company at the Box Flat Collieries. In March 1972 he sat for the examination under the Coal Mining Act 1925 - 1974 for Mine Deputy, but did not obtain a pass. There is evidence that it was his intention to undertake further studies and sit again, since it was his ambition to improve himself.

The evidence establishes that at the date of his death the award rate for his classification, i.e. machine man, provided him with $63 per week net after the payment of income tax. Such net award rate has progressively increased during the intervening years until it reached approximately $168 weekly in 1978. The award rate for a mine deputy at those dates respectively produced a net weekly payment of approximately $70 and $191. A calculation based upon the net take-home pay of a machine man, having the deceased's entitlement to tax concessions, from the date of his death to the end of June 1974, and that of a deputy on the same assumption from 1st July 1974 to the date of trial, would represent the sum of $46,533. If the assumption of promotion from machine man to mine deputy were not made, the figure would be approximately $41,000. It is conceded that the totals so reached to some extent depend upon estimates.

The widow gave evidence that her husband was in the habit of taking from his weekly pay packet approximately 1/4 for his own needs, leaving her 3/4 of the net amount to supply her own needs and those of the children. He was a non-smoker and had only an occasional social drink. She said that the family's needs absorbed the whole of his net earnings, and this evidence is supported by the fact that their joint current account was in debit about $4, whilst their joint savings bank account was in credit only about $9 at the date of his death. They were paying $720 per year in reduction of the mortgage on their jointly owned home, and this came wholly from his earnings.

The evidence of the President of the Colliery Employees' Union, who knew the deceased personally, established that a mine deputy has statutory duties under the Act in that there must be one deputy on duty in each shift in each area of work in a colliery, and that in the Box Flat Collieries there would be 6 or 7 areas of work, so that the requirement on the basis of the three shifts which were worked every day would be 18 deputies, and as well there would be one spare deputy in each shift, making a need for 21. At Box Flat the proportion of deputies to machine men would be of the order of at least

1 to about 10. Although the evidence is not altogether satisfactory, I conclude on the balance of probabilities that the deceased would have qualified for appointment as a mine deputy, and would have obtained promotion to that classification during his working life. Nevertheless, I am not able to make a finding as to the time when he would have attained this promotion. The same witness gave evidence, which I accept, that there are over-award payments to Box Flat miners at flat rates totalling $22 per week, and this figure must be kept in mind when findings are made as to the deceased's earning capacity. In addition his widow gave evidence that there were times when he brought home substantial overtime, but her evidence does not suffice to support even an estimate of its average weekly value.

Coal and oil shale mine workers are entitled to a statutory pension which is administered by a tribunal under the Coal and Oil Shale Mine Workers (Pensions) Acts. The registrar of that tribunal gave evidence that on 1st July in each year an actuary determines the rate of that pension in respect of the ensuing year, and the rate determined for the year commencing on 1st July 1972 was $25 per month per completed year of service. The current prevailing rate is $100 per month per completed year of service. The increase from $25 to $100 occurred progressively in 5 steps. From the same fund the widow received a payment of $4,500, being the minimum payment available for a widow of a deceased miner with the completed years of service of the deceased.

No evidence was called for the defence, and there was no significant dispute as to the accuracy of figures put forward in the plaintiff's case. Defence counsel contented himself with submissions for appropriate discounts, and contended for a shorter multiplier and moderation in any assumption as to the deceased's promotion. There also arose in addresses a conflict on the question whether any deduction should be made for acceleration of the widow's benefit from her husband's estate, having regard to the relatively small value of the estate.

It would be convenient to dispose of the last matter immediately. The deceased, by his will, gave the whole of his estate to his wife. Jointly owned assets, excluding as negligible two small balances in bank accounts, comprised the matrimonial home and its furniture. I disregard entirely for present purposes the value of the widow's accelerated succession to the deceased's interest in these assets, in accordance with the usual practice. The assets which were formerly the sole property of the deceased consisted of items of personalty valued in all at $3,979. It is my view that the benefit of items of these assets representing over $2,200 of the total, mainly comprising debts due to the deceased, or rights to be paid money on some other account, and his motor vehicles, would have been shared by the lady as his wife, as and when they came in, and as for the motor vehicles, presently. These can be ignored for present purposes. The remainder of this property consists of a life policy for $1,248 and a death benefit entitlement of $380, both of which fall within S. 15C of the Act, and so are not to be taken into account in assessing damages. This disposes entirely of the conflict in respect of the widow's accelerated benefits. It was not disputed on the trial that neither the $4,500 received by the widow from the statutory pension fund, nor the $4,000 received by her as a gratuity from the public Disaster Relief Fund, should be taken into account in the assessment.

The determination of the measure of dependency would be simplified if I were to assume arbitrarily that the deceased would not have attained the rank of deputy before the time of the trial, March 1979. On this assumption, the calculation of net loss of earning capacity for this period in Ex. 10, is about $41,000, as I have previously mentioned. But on the evidence an additional $22 per week gross must be taken into account, or in round figures $7,000 gross. As I am merely setting down a guide line I would take from that figure $2,000 for tax, leaving $5,000 net. Adding this on to the $41,000, the bottom line figure in Ex. 10, $46,000 is restored. I accept the evidence of the widow that she and the children enjoyed the support of three-fourths of the earnings. The net dependency to trial thus becomes

$34,500, from which the mortgage payments for the period must be deducted. These I calculate at $4,700, to arrive at the next stage of $29,800. That figure requires discounting for the usual contingencies. Using those guide lines I find that the net loss of dependency to trial is $28,000. I attribute $16,000 of it to the widow and divide the remainder equally among the 3 children, $4,000 each.

Turning to the loss of future earning capacity, I start by adopting a future earning rate based on the net weekly wage of a mine deputy. This period, having regard to my separate assessment of lost capacity up to trial, effectively starts in the seventh year after the death. I feel that it is more than probable that the deceased would have become a deputy by now. The net weekly figure starts at $191, to which must be added the over-award flat rate presently $22 per week gross. In the absence of precise evidence, I reduce it arbitrarily to a net of $15. Thus, without any allowance for overtime, the rate becomes $206 per week.

The deceased had the prospect of working as a miner for another 30 years, until he attained the age of 60. If he had remained a miner and lived until then, he would have been entitled to $51,600 calculated on the prevailing rate for 43 years completed service. Counsel for the plaintiff argued, and I think soundly, that the significance of this entitlement is that it notionally adds to the expected earnings the equivalent of three years wages beyond retiring age, thus enlarging the multiplier. I keep in mind also the contingency that the deceased, on retiring at 60, would have engaged in some other form of remunerative work for a few more years. I think it reasonable to assume a gross multiplier of 35 years from the date of death (cf. *Lulich v. Bell* (1967) 41 A.L.J.R. 268, where the High Court endorsed a 35 year multiplier). However, having regard to the nature of the miner's calling, sickness, accident, unemployment and industrial disputes are contingencies which cannot be overlooked, and so I consider that this figure should be discounted to 30 years. Because of the difference in the rate of weekly earning capacity applying to the period

before trial and that applicable in future, it would be convenient to divide that total multiplier into a six-year period and a twenty-four-year period. I find that the net loss of future earning capacity from trial to end of working life would be of the order of $125,000. The amount found as the net loss of earning capacity to trial, $46,000, must be added to $125,000 to find the total of lost earning capacity, $171,000.

The net loss of dependency now has to be ascertained. I am satisfied to assume that the widow's life expectancy would at least equal my net multiplier of 30 years, so that from trial it would run about 24 years. The children should respectively cease to be dependent in 6, 7 and 10 years from now. It would be convenient to average these periods to 8 years and apply that period to all three. During that period the joint cost of keeping and educating them would, in my opinion, exceed the needs of the widow, but since she has to provide their housing I will attribute to her needs half of the total dependency and divide the remainder equally among the three children. I am satisfied that during this period the proportion of the deceased's earnings needed to support his wife and family would have remained at three-fourths. I therefore take one third of $125,000 as the amount attributable to the lost capacity in the first eight years after trial, i.e. $41,666. Three-fourths of this is approximately $31,250, so that the widow's lost dependency is $15,625, and each child's is $5,208.

For the remainder of the 16 years of the widow's expectancy, I take the view that, with the children off his hands, the deceased would have been likely to enjoy personally a higher proportion of his earnings. Therefore, I assume that his wife's dependency would not have increased beyond half of his earnings totalling $137,667 in that period, so that her dependency would then be $68,833.

These calculations reveal a total loss of dependency of the widow, of $84,458, and of each child, of $9,208. All the figures I have used are merely guide lines. It remains to make a global assessment of loss of

dependency, having regard to the contingencies not yet mentioned. The first is the possibility of the widow's re-marriage, which on the evidence, I consider to be not a strong likelihood. However, some moderate discount must be made on this account. Any other contingencies of a depreciatory nature would, in my opinion, be offset by some favourable contingencies to which I have not yet referred. I think there would have been a real probability of the deceased's having applied a portion of his earnings to the acquisition of durable assets and the widow would have obtained the benefit of these assets. One of his assets consisted of a small cattle grazing business, the benefit of which I have not taken into account at all. If he had continued to apply his spare time in this direction, it seems likely that this business would have been productive of further assets for the use of the family. I therefore propose not to make any specific deductions for adverse contingencies.

I assess the total loss of dependency of the widow and children at $110,000. I apportion the damages as follows: to the widow, $80,000, and to each child, $10,000. I give judgment for the plaintiff against the defendants for $110,000. I direct that the sum of $30,000 thereof be paid to the Public Trustee of Queensland in trust for each of the three children in proportion to the sum herein apportioned to each such child. I direct that from the total damages there be paid to the Workers' Compensation Fund the sum of $14,000. One-third of $7,000 of that total refund is on account of the compensation paid in trust for the children. Therefore, out of the children's apportionment of damages, one-third of $7,000 is to be refunded on account of each child. I grant liberty to the plaintiff to apply and I order that the plaintiff's costs of the action, including any reserved costs, be taxed and paid by the defendants.

- - -