IN THE SUPREME COURT OF QUEENSLAND No. 38 of 1984

CIVIL JURISDICTION

BEFORE MR. JUSTICE THOMAS

CAIRNS, 21 FEBRUARY 1985

BETWEEN:

PETER TAIT Plaintiff

- and -

ANDREW JOHN MAZGAY Defendant

JUDGMENT

HIS HONOUR: Just before dusk on 19 May 1982 the plaintiff, then a 57-year-old man, was riding his motor cycle along Deep Creek Road via Atherton. He was on his way home from work when he was involved in a head-on collision with a car. The accident occurred at a bend in a road which the plaintiff describes as a mud bush track. The plaintiff was turning towards his right and the defendant, who was coming in the opposite direction, was turning towards his left. The track had thick scrub on both sides, so that there was very limited visibility to either driver approaching the bend. There was barely sufficient room for two vehicles to pass, and then only with care. There was probably about 12ft. of trafficable surface. The surface was also wet, slippery and badly pot-holed. There was drizzling rain, and it was getting dark.

It is obvious that anyone using this road needed to do so slowly and carefully, and at a speed which would enable him to pull over if another vehicle came into view. Both drivers were local people and were aware that the road was very little used. Probably neither of them had in mind the prospect of an approaching vehicle at the time in question.

The plaintiff says that the accident happened on his side of the road and the defendant says that it happened on his side of the road. There are difficulties in making primary findings of fact because I have reservations about the evidence of all three witnesses called on this issue.

The plaintiff, although he is a blunt, honest man, does not in my view have any accurate recollection of the events preceding the collision. His dominant impression was that there was a run-away car in front of him, an impression consistent with his seeing it at a very late stage. He was primarily intent on dodging pot-holes and describes himself as riding with his feet off the footrests so that he could steady the bike in case of a slip. Much of his evidence is not consistent with what he told the policeman at the hospital or with some of the observations made by the policeman at the scene. The policeman, who arrived at the scene some time later in somewhat unfavourable conditions, did not make accurate observations or record objective data. He largely contented himself with a broad-brush view that the collision had occurred on the wrong side of the road for the plaintiff. In the result I am not satisfied that any of his evidence regarding possible tyre marks is of any assistance to the Court. His measurement of 18 feet as the width of the road is contrary to the evidence of both plaintiff and defendant. It seems that he measured the width of dirt without regard to the trafficable portion which was reduced by the thick, overhanging verge, and that 12 feet is the true trafficable width at the relevant point.

I am satisfied that he did find a fresh gouge mark and that glass was scattered around it. He says that this was 6

feet in from the inside of the curve, which is the defendant's side of the road. In view of the error of his primary measurements as to the road width, no precise picture is possible, but I accept that he found this gouge mark and surrounding glass on the defendant's side of the road, and that these things were approximately one-third of the way across the road, that is to say, slightly on the defendant's side of the road. This is the best indication of the approximate point of impact. The point of collision on the defendant's vehicle itself was its passenger side headlight. I therefore infer that at the moment of collision the defendant's car was very much in the middle of the road and slightly onto the plaintiff's side.

One point upon which both drivers agree is that upon seeing the other driver each pulled to his right. These manoeuvres almost succeeded in avoiding a collision inasmuch as the plaintiff was hit by the passenger side headlight of the car.

The main difficulty is to assess where each driver had been driving before each took evasive movement to his right.

The defendant says he was driving 3 feet from the edge of the road and, as I interpret his evidence, he was probably travelling fairly much in the middle of the road. This is hardly surprising on such a road and is the place where one might expect most drivers to drive, at least until an approaching vehicle made movement to the extreme left necessary. The defendant on his own say-so was travelling at 60 km/h. Curiously enough, the plaintiff did not allege, either to the policeman or to the Court, that the defendant was travelling fast. In my view the speed of 60 km/h was a very excessive speed for a vehicle at that particular area in the circumstances described. The limited visibility, the difficult surface and the limited width would make it well nigh impossible to keep a vehicle in hand at such a speed if, as happened here, he confronted another road user at the bend.

I am also satisfied that the plaintiff was driving without particular regard to what part of the road he was using and that he was more intent upon keeping his balance and on negotiating difficulties in the surface, than upon keeping to the left. I do not think he was travelling anywhere near as fast as the defendant. Of course, his capacity to swerve on two wheels on a slippery surface would require that he travel considerably more slowly than the driver of a four-wheeled vehicle. I do not think that his statement to the policeman gave any reliable indication of his speed, especially in the circumstances prevailing when the interview was conducted. I am prepared to find that he was not travelling very fast, and do not find that his speed was negligent in the circumstances. Primarily it was his look-out in association with his position on the road that constitutes his negligence.

I therefore think that both defendant and plaintiff were guilty of negligence. Commonly, accidents that occur because both drivers have been driving substantially in the middle of the road are apportioned at 50/50 when an accident results. In the present case I consider that the defendant's negligence was greater than the plaintiff's because it included significantly greater speed. That speed was a relevant cause of the accident because the avoiding manoeuvres almost succeeded, and but for the speed may well have done so. It was, in my view, an excessive speed in the circumstances, and it played an important part in the accident.

I apportion two-thirds responsibility to the defendant and one-third to the plaintiff.

The plaintiff had pursued a variety of active occupations throughout his life. They included farming, drilling, transport work, and other forms of activity. At the time of his accident he was engaged in constructing heavy concrete tanks, which was an unusually heavy task for a 57 year old man.

During the three years before the accident he had not earned much at the higher rates which he had from time to time commanded during his working life. His average weekly earnings between July 1979 and May 1982 were between $120 and $130 per week. Immediately before that he had been earning at much higher rates. His average earnings during the period in which he had been fabricating tanks had been $145 net per week.

He had plans to run a business providing pack-horse tours and camping trips for tourists, and had put a deal of thought and preparation into the venture. Of course, the success or otherwise of such a business remained to be proved, but he was hopeful of it being a considerable success. I cannot predict its likely profitability. I have the impression that the plaintiff is not a person obsessed with earning money, and that the worst deprivation from his point of view is that he has lost the lifestyle that this may have allowed him to follow. I sense that he is particularly frustrated by not being able to give this venture a fair try.

His accident caused serious injuries to both legs. He was in hospital for two weeks, was re-admitted four months later for a bone graft to the right leg, and seven months later for an operation to his left knee. It is fair to describe him as convalescent until a few months ago. He has now made such recovery as he can make.

In the result he has been left with a permanent disability of the right leg, which has been assessed at 45 per cent loss of use, and a disability of 25 per cent in the use of the left leg. A patellectomy operation may well be required in about five years' time on the left leg. Furthermore, after ten years surgical procedures are thought to be likely to remove the pain and restore present mobility in each of his knees. In other words, the medical evidence suggests that he may yet have to confront three surgical procedures. Whether he will agree to all three or find all three necessary is somewhat problematical, but he

is faced with a probability of more than one operation rather late in his life.

The disabilities include some deformity in the right leg; sitting is uncomfortable; he has driving problems after about two hours; his riding ability has been considerably impaired; he can walk for a mile, but does so slowly, and has problems on uneven ground. He can run a horse-breeding business using some hired labour, but at present the market in this business is poor. It could, of course, improve. His income earning capacity has not been destroyed but what he has left may be described as slight.

This plaintiff was an active, 57 year old, outdoor man who has loot a great deal of his physical pursuits. He has unusual drive, and he was not likely to have ceased active work at the age when most people do. I expect he will still find useful things to do on his brother's farm even if the horse-breeding business remains impracticable. However, his lifestyle and flexible outdoor existence will be curtailed and this will frustrate him.

As I have mentioned, he has the unpleasant prospect of other operations around 65 and 70. I propose to assess damages for pain, suffering and loss of amenities of life at $30,000. He should be allowed a sum to cover the cost of future operations. The total cost if he underwent all three operations, discounted by 5% tables for the benefit of immediate receipt of money, would come to $7,230. Taking contingencies into account, I think the proper amount to allow as a present award for this item would be $5,000. In relation to economic loss, his actual earnings had tailed off somewhat in recent years. Whilst periods spent in between employment seem to have increased, this is hardly surprising. I am satisfied however that he is likely to have continued to earn in one way or another until aged 70, and possibly even beyond. Of course, that premise cannot support a continuous projection of his pre-accident earning capacity for ten years. I must take into account contingencies which include uncertainty of his economic

future and the possibility that he may in any event still earn some income. I shall assess economic loss to date at $20,000 and his future loss at $37,500.

The award may therefore be summarised as follows:

(a) Pain, suffering and loss of amenities	$30,000
(b) Economic loss to date	20,000
(c) Future economic loss	37,500
(d) Cost of future operations	5,000
(e) Fox v. Wood damages	$4,891.71
(f) Agreed special damages	3,359.49
(g) Property damage	2,000
(h) Interest	5,940
	$108,691.20

The interest which I have assessed consists of 6 per cent on $12,000 for two and three-quarter years, 6 per cent on $20,000 for the same period and 12 per cent on $2,000 for the same period.

The judgment, after taking into account reduction for contributory negligence, will be for $72,460.80, including interest.

I order the defendant to pay the plaintiff's costs of the action including reserved costs, if any, to be taxed.

I declare that $1,773.33 of the judgment is in respect of property damage and interest thereon.

I further declare that $46,663.49 of the judgment sum is repayable to the Workers' Compensation Board.

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HIS HONOUR: I further order that moneys in Court together with accretions thereon, if any, be paid out to the plaintiff's solicitor in part satisfaction of the judgment.
