ORIGINAL

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IN ~~THE~~ HIGH COURT OF AUSTRALIA

SKEWES & ANOR.

v.

THE PUBLIC CURATOR OF QUEENSLAND AND OTHERS

~~XX~~

BURNIE

v.

THE PUBLIC CURATOR OF QUEENSLAND & ORS.

REASONS FOR JUDGMENT

£1-7-0.

Judgment delivered at Sydney

on Monday, 6th September, 1954.

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

C.7163/51

SKEWES

v.

THE PUBLIC CURATOR OF QUEENSLAND

BURNIE

v.

THE PUBLIC CURATOR OF QUEENSLAND

JUDGMENT.

DIXON C.J.
McTIERNAN J.
WEBB J.
KITTO J.

SKEWES & SKEWES

v.

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ORDER

Appeals dismissed with costs.

SKEWES

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DIXON C.J.
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These two appeals call into question a judgment of the Supreme Court of Queensland (Sheehy J.) given in a consolidated action relating to a collision which occurred between two motor cars on the Blackall-Barcaldine road in the west of Queensland on 10th May 1951. One car was driven by Colin Archer Skewes, who had as his passengers Stanley Simonsen and Stanley John Simonsen in the front seat and R. C. McTaggart, D. M. Farrow and H. H. Monk in the back seat. The driver and Stanley Simonsen were killed, and the others all suffered injuries. The other car was driven by W. M. Burney, whose only passenger, one Felsman, was with him in the front seat. Both were injured.

Three actions were commenced in respect of the collision. One was brought by the Public Curator of Queensland as executor of Stanley Simonsen deceased against Burney, claiming damages for the benefit of the widow and three children for the death of the deceased, and damages for the benefit of the deceased's estate in respect of his

injuries and death. It was alleged in this action that Simonsen's injuries and death were caused by negligent driving on the part of Burney. The second action was brought by the Public Curator of Queensland in the same capacity, making similar claims against the widow of Skewes as the administratrix of his estate, and also against Skewes' brother on the footing that Skewes was the agent of his brother and himself. The allegation in this action was that the collision was caused by negligent driving on the part of Skewes. The third action was brought by the four surviving passengers in Skewes' car, claiming damages against Burney, or alternatively against Skewes' widow as his administratrix and his brother as his co-principal, alleging negligent driving on the part of Burney, or alternatively of Skewes.

These three actions having been consolidated, the statement of claim in the consolidated action alleged that the collision was caused by the joint negligence of Burney and Skewes, or alternatively by the negligence of one or other of them. That Skewes was the agent of his brother and himself was admitted on the pleadings. The trial took place before Sheehy J. without a jury. His Honour found that both Burney and Skewes had been guilty of negligence which was a material cause of the collision, and gave judgment for the plaintiffs against all the defendants for varying amounts of damages. From that judgment these appeals are brought, the one by the brother and the administratrix of Skewes and the other by Burney.

The collision occurred thirteen or fourteen miles from Blackall, on a straight stretch of road, nearly a mile in length, between two bends. The surface of the road varied a great deal from point to point. Beyond the second bend, towards Barcaldine, there was a strip of bitumen. The surface on the straight stretch was black soil at the

Barcaldine end, but for the rest of the distance it consisted of fine, floury dust. There had been no rain for four months, and the grader had been over the road a fortnight before the date of the accident. The width of the road was 39 feet, and in the vicinity of the place where the cars collided trees were growing up to the edge of the road. The whole surface of the road was trafficable, but, as often happens on country roads, the traffic in both directions had combined to beat a single set of wheel-tracks which, in this vicinity, was well over onto the left hand side as you go from Blackall, leaving a trafficable space of five feet between the near side wheel track and the line of the trees.

With his brother, Skewes owned a service car run between Blackall and Barcaldine, and, being the regular driver, he did a return trip between these two towns twice a week. On the day of the collision he left Blackall about 11 a.m., driving a Fiat sedan car in which he had collected his five passengers at various places in the town. As he approached the first of the two bends, a discussion took place which drew the attention of some of his passengers to the fact that he was travelling at a speed between 45 and 50 miles an hour.

Round the bend, Skewes' car came within sight of a Ford sedan car travelling fast in the opposite direction. It was driven by a man named Ashburn. Whether it was on its correct side at first is not clear, but if it was not it veered onto its correct side, and it passed Skewes' car at a lateral distance of several feet. In its wake there rose from the surface of the road a dense billowing cloud of fine dust, which tended, as the day was windless, to hang for a time over the tree-flanked road. One of the witnesses, Farrow, who was a technician's assistant in the Postmaster-General's Department, said at the trial that he could not

recall having got into as thick a dust cloud before; and there was a general consensus of opinion that it was unusually dense.

Into the obscurity of this dust cloud Skewes drove his car, following the single set of wheel-tracks. It seems reasonable to infer from his familiarity with the road that he was aware that the tracks he was following were the only beaten tracks along that part of the road; and even if he did not realise that fact, he certainly knew that on that road, as on many country roads, beaten tracks are likely to constitute a single course for traffic in both directions. He cannot have been unaware of the habit of drivers, when traversing difficult stretches on country roads, to use beaten tracks on whichever side of the road they may be, and to share them with oncoming traffic by moving to the left so that each vehicle has the use of one wheel-track. This habit not only is well known to users of country roads but was proved in relation to western Queensland by the evidence in this case. It is true that a driver approaching along the single set of tracks from the direction of Barcaldine would be committing a breach of reg. 6 of the Regulations made under the Traffic Act of 1949 (Q'ld), because he would not be keeping his vehicle as near as practicable to the left side of the carriage-way; for "carriage-way" is defined in the Act to mean a road or that portion of a road formed, prepared, or set aside for the use of vehicles, and the whole width of the road answered that description in the vicinity of the dust cloud which Skewes was entering. It is true, also, that such a driver would be guilty, not only of a breach of the regulations, but of a manifestly dangerous act in driving on his wrong side in conditions of seriously restricted visibility. But this being granted, it nevertheless remains impossible to deny that as Skewes was about to enter the dust cloud he was faced with a situation of potential danger

which called for prompt and decisive action on his part. It was a possibility which could not reasonably be dismissed from consideration that an approaching driver might be using one or both of the beaten wheel-tracks, either because he had lost his bearings while attempting to drive almost blind through the dust or because he had commenced to follow the tracks while the dust was comparatively thin and had been taken by surprise when its density increased to the extent of dangerously limiting his vision, or because he was taking a risk for the sake of the easier running or the guidance which the beaten tracks offered him. It was not a situation in which Skewes, with a due regard for his own safety and the safety of his passengers and others whom a collision might injure, could safely assume that a driver coming towards him would keep off the tracks which he himself was using. It has often been pointed out that the degree of care which is reasonable in given circumstances is proportionate to the seriousness of the risk involved; and the possibility of just such a tragedy as in fact occurred gives the measure of the care which Skewes was in duty bound to exercise.

There was, then, a reasonably apparent possibility that if Skewes pressed on into the dust cloud at any substantial speed, using both wheel-tracks, he would find himself unable to avert a collision in the dust-cloud or immediately after emerging from it. Several courses were open to him. He might stop his car at once. This would not eliminate all danger, for there would still be a possibility that a vehicle might be coming through the dust towards or behind him at a higher speed than the visibility warranted; but it would reduce very greatly the chances of an accident. Again, he might apply his brakes severely and proceed at a speed so reduced that he could stop instantly if the need should arise; and although some possibility of damage from another driver's recklessness would remain, a great part of the risk would thus be removed. A third course open to him was to veer at once to the left, at least to the

extent of placing his right-hand wheels in the left-hand track so as to eliminate all risk of a collision with a vehicle adopting the customary method of passing on a one-track section of the road. A reasonably careful driver in Skewes' position must have recoiled instantly and instinctively from the dangers which the dust might conceal, and taken some precautionary action. He would probably have brought his car to a walking pace and steered it as far as possible to the left.

So far as the evidence reveals, however, Skewes showed no consciousness of the danger, and did nothing calculated to avoid or lessen it. He did not even try to make his presence known by sounding his horn or switching on his headlights. It is by no means clear on the evidence that he reduced his speed at all. McTaggart certainly assented to a suggestion which was put to him in cross-examination that Skewes slackened speed considerably, but Farrow and Monk did not support him on the point: on the whole of the evidence it seems reasonable to accept the trial judge's finding that Skewes proceeded into the dust at a speed of 40 m.p.h. at least. He certainly maintained a speed which was unsafe in the circumstances, until Burney's car loomed up a few feet ahead and a collision was inevitable.

How long Skewes travelled through the dust it is impossible to know. All his passengers who survived were called as witnesses, but they had all lost consciousness in the collision and their recollections were necessarily of doubtful value. One of them, S. J. Simonsen, a fourteen year old boy, at one time said that they were in the dust for less than a minute; then he said he would not like to say how long it was, but assented to cross-examining counsel's suggestion that it was a very short time. Another passenger, Monk, fixed upon 10 seconds at the inquest, but he was unable

to adhere to this at the trial and said that he really had no idea. Farrow said it was a few seconds, and that he had just had time to realise how thick the dust was. Monk, Farrow and McTaggart all agreed that there was time for the thickness of the dust to elicit comment from someone in the car. But the time which has to be considered is that which elapsed between the moment when Skewes ought to have realised that he was going to run into a dense cloud of dust and the moment of the impact with Burney's car; and, while we should hesitate to accept the learned judge's finding that Skewes drove his car in the dust for probably more than 400 yards, we see no reason to doubt his Honour's conclusion that, "having had sufficient time to do so before entering or after entering the cloud of dust, he failed to slow down at all or sufficiently, to stop, to veer to the left, or to take other precautions to avoid the danger." The finding which is expressed in these words was criticised as not including a finding of any particular failure in due care which his Honour regarded as a cause of the collision; but its meaning is clear enough. The evidence amply warranted a conclusion that Skewes took none of the courses which might have averted the collision and which he had time to take, though the adoption of at least one of them was clearly demanded in the circumstances by considerations of reasonable prudence.

It may be that long familiarity with the road had bred in Skewes a contempt for its dangers; but, whatever the explanation, the fact seems clear that Skewes took the risk of assuming that there would be no car approaching him in or behimd the dense portion of the dust; and that was a risk which it was his duty not to take. If he had slowed down or stopped it may be that Burney would still have collided with him; no one can say whether that would have happened or not; but what is certain is that the collision

which in fact occurred and produced such disastrous results would not have occurred. We find ourselves unable to doubt that Skewes' failure to take precautionary steps which the situation demanded as a matter of reasonable prudence was a real and substantial cause of the collision.

It is at least as clear that negligence on the part of Burney was also a material cause of the collision. Coming from the direction of Barcaldine in a Ford utility, he traversed the bitumen strip which has been mentioned, and proceeded at a speed of 40 m.p.h. along a beaten track on his left-hand side of the road to a point about 300 yards before the place where the collision occurred. Then the track he was following crossed to the right-hand side of the road, there merging with another track on that side. Ashburn's car had already passed him, and when it entered upon the stretch of floury dust the fact must have become at once obvious to Burney that his vision was about to become seriously restricted, and that it would continue to be restricted until either he himself should have passed the dusty section of the road or Ashburn should have got so far ahead of him that the dust would settle to a substantial extent before he reached it. He was, of course, committing a breach of the traffic regulations by driving on the wrong side of the road; but what is more important is that he was driving on the side of the road where any traffic proceeding in the opposite direction would almost certainly be found. Whether it is negligent to follow a single beaten track on a difficult country road when the track is on the right hand side of the road is a question which depends on the circumstances; but the fact that the law appoints that side for the use of opposing traffic makes the course one which obviously demands in any circumstances the utmost circumspection.

According to Burney's own evidence, when he commenced to drive on the left-hand side he had a visibility

of about 100 yards. He drove, he said, for 300 yards in the dust with his visibility progressively decreasing, and then it was suddenly very much cut down, so that he could see only six or eight feet ahead. His reactions to the worsening conditions he encountered were described in his evidence in these words: "When I got farther along, the dust became slightly thicker, and I took my foot off the accelerator; and then going a bit further the dust became a lot thicker and I immediately placed my foot on the brake pedal, and then without any time to do anything I crashed into the front of it." He had taken the precaution of driving with his right-hand wheels in the left-hand wheel-track, so as to allow any opposing vehicle to pass him in the customary manner; but he failed to allow for the very real possibility, which should have been evident to him as soon as he saw the amount and behaviour of the dust Ashburn's car was whipping up, that the driver of an opposing vehicle, prevented by the dust from realising that there was any passing to be done, would be using both wheel-tracks. He did not sound his horn or switch on his lights. How much he reduced his speed from the initial 40 m.p.h. before he caught his first glimpse of Skewes' car is a matter of some uncertainty, though he himself put his speed at that moment as high as 35 m.p.h.; but whatever it was, it was plainly imprudent to remain on his wrong side of the road once he perceived that the dust was likely to deny to him and to any Barcaldine-bound vehicle a reasonable opportunity of avoiding one another. It cannot avail him to say that it was folly on Skewes' part to come through the dust as fast as he did; the situation created by Burney's own election to follow the beaten track was such that consistently with reasonable prudence he could not put out of consideration the possibility

that someone would be guilty of just such folly. "I was", he said in a statement to the police, "in the act of stopping or slowing right down just before I saw the other vehicle, but it crashed into me before I had time to do anything." But, as he said in the same statement, Skewes' car was then only six or eight feet in front of him when he first saw it. The visibility being as poor as this indicates, he should already have left the beaten track altogether and got back onto his own side of the road.

His negligence was put beyond doubt at the trial by these questions and answers in his cross-examination:

> "So instead of pulling to the side of the road and stopping, if you did not know what was ahead, you chose to take the risk of driving on through this thick cloud of dust, although you knew that other traffic might be on the roadway ahead of you. Is that the position? ----- Yes. I had commenced to stop."
>
> "You took that deliberate risk, didn't you? ----- Yes."

In the result we are of opinion that the judgment of Sheehy J. was correct, and that each appeal should be dismissed with costs.

BURNIE

v.

THE PUBLIC CURATOR OF QUEENSLAND & ORS.

SKEWES & SKEWES

v.

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JUDGMENT. FULLAGAR J.

BURNIE

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SKEWES & SKEWES

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JUDGMENT. FULLAGAR J.

I agree that Burnie's appeal should be dismissed. In this case it appears to me that the decision of the learned trial judge was clearly right.

The appeal of Skewes should, in my opinion, be allowed. Since I am in a minority, and the matter depends entirely on the picture which the evidence presents to one's mind, I will only state my view very briefly.

It is obvious that Burnie was negligent. To drive blind on the wrong side of the road is about as gross negligence as one can imagine. Burnie must have been so driving for a period which allowed him time to realise the position and to take the two necessary steps of slowing down and going over to the correct side of the road. It is equally obvious that Burnie's negligence was a proximate cause of the collision.

I should myself have hesitated before finding Skewes guilty of negligence. It is easy to apply to a man in the position of Skewes too high a standard of care. Certainly he should have slowed down, but I have difficulty in feeling satisfied that he really had time to do so after the duty arose. Skewes, unlike Burnie, was driving throughout on his correct side of the road, he was guilty of no fault until he suddenly entered the cloud of dust,

and it is very doubtful to my mind whether he really had any time to do anything between entering it and meeting Burnie's car. It is possible that he had, but possibilities are not enough in these cases.

So far, however, as negligence on the part of Skewes is concerned, whatever the inclination of my own opinion, I do not know that I should have felt justified in differing from the learned trial judge. What I feel satisfied about is that it is impossible to find the necessary causal connexion between any negligence of Skewes and the collision. I am myself, with all respect, unable to entertain the idea that Skewes ought to have switched on his headlights or sounded his horn. I do not believe that any normal driver would have thought of doing either. The case against him rests on his failing to reduce his speed or on nothing. I consider it impossible to say, even as a matter of probability, that if he had reduced his speed at the earliest reasonable moment, the collision either would have been avoided or would have had less serious consequences. It might have had either result, but to say that it <u>would</u> have had either result involves a nice estimation of times which cannot, in my opinion, be fairly made on the evidence. To say that it would have had either result does not seem to me to be more than guesswork. The plaintiffs' burden of proof is not sustained.

IN THE HIGH COURT OF AUSTRALIA

QUEENSLAND REGISTRY

APPEAL NO.31 OF1953

On Appeal from the Supreme Court of Queensland.

BETWEEN:

DOUGIAS ARTHUR SKEWES and FLORA HEATHER JESSIE SKEWES (widow) (Defendants)

APPELLANTS

and

THE PUBLIC CURATOR OF QUEENSIAND HERBERT HARLEY MONK, DEREK MYLES FARROW, ROBERT CHARLES McTAGGART and STANLEY JOHN SIMONSEN (an infant by his next friend FRANCES SIMONSEN) (Plaintiffs)

RESPONDENT

A N D

APPEAL NO.32 OF 19

BETWEEN:

WILLIAM McINROY BURNIE (Defendant)

APPELLANT

and

THE PUBLIC CURATOR OF QUEENSIAND (Plaintiff in actions numbered 26 and 41 of 1952) DOUGIAS ARTHUR SKEWES and FLORA HEATHER JESSIE SKEWES (Defendants in actions numbered 41 and 42 of 1952) and HERBERT HARLEY MONK DEREK MYLES FARROW ROBERT CHARLES McTAGGART and STANLEY JOHN SIMONSEN (an infant by Frances Simonsen his next friend) (Plaintiffs in action number 42 of 1952)

RESPONDENTS

J U D G M E N T

£1.10.0

McCULLOUGH & ROBERTSON,
SOLICITORS,
PRIMARY BUILDING,
99 CREEK STREET,
BRISBANE.

TOWN AGENTS FOR:
GRANT & SIMPSON,
SOLICITORS FOR THE RESPONDENTS,
114 EAST STREET,
ROCKHAMPTON.

QUEENSLAND REGISTRY APPEAL NO.31 OF 1953.

On Appeal from the Supreme Court of Queensland

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DOUGLAS ARTHUR SKEWES and FLORA HEATHER JESSIE SKEWES (widow) (Defendants) APPELLANTS.

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Appeals consolidated by order of The Honourable Mr. Justice Hanger dated the Twenty-fifth day of June 1954.

BEFORE THE FULL COURT CONSTITUTED BY:-
Their Honours The Chief Justice (Sir Owen Dixon) Mr. Justice McTiernan Mr. Justice Webb Mr. Justice Fullagar and Mr. Justice Kitto

SYDNEY THE SIXTH DAY OF SEPTEMBER 1954.

THE ABOVEMENTIONED ACTIONS having on the Twenty-ninth and Thirtieth days of July and the Second day of August 1954 come on for hearing at BRISBANE in the State of Queensland by way of Appeal from the Judgments of The Supreme Court of Queensland pronounced by the Honourable Mr. Justice Sheehy on the twenty-third day of October 1953 WHEREBY IT WAS ADJUDGED that the Plaintiffs (the respondents herein) do recover against the defendants WILLIAM McINROY BURNIE DOUGLAS ARTHUR SKEWES and FLORA HEATHER JESSIE SKEWES

(as Administratrix of Colin Archer Skewes deceased) and each and all of them as follows with costs in all actions to be taxed PROVIDED HOWEVER that the Plaintiffs and each of them shall not be entitled to recover more than one set of damages

THE PUBLIC CURATOR OF QUEENSLAND for the benefit of Frances Simonsen, Widow, and Stanley John Simonsen, Narelle Gloria Simonsen and Denise Frances Simonsen in respect of the death of Stanley Simonsen deceased - the sum of SIX THOUSAND AND NINETY THREE POUNDS (£6,093) to be apportioned:

as to Frances Simonsen (widow)	£3843: 0: 0	
as to Stanley John Simonsen	500: 0: 0	
as to Narelle Gloria Simonsen	750: 0: 0	
as to Denise Frances Simonsen	1000: 0: 0	£6093: 0: 0

THE PUBLIC CURATOR OF QUEENSLAND for the benefit of the estate of Stanley Simonsen deceased, in respect of the death of the said Stanley Simonsen deceased the sum of £200:0:0

HERBERT HARLEY MONK		
Damage to property	£11:15: 3	
Damage for bodily injury	1353: 0:10	£1364:16: 1
DEREK MYLES FARROW		
Damage to property	£29:17: 0	
Damage for bodily injury	514:13:10	£ 544:10:10

ROBERT CHARLES McTAGGART for damages for bodily injury the sum of £210: 0: 0

STANLEY JOHN SIMONSEN for damages for bodily injury the sum of £ 508:12: 6

NOW UPON HEARING what was alleged by Mr. Stable of Counsel and with him Mr. Peter Connolly of Counsel for the appellants DOUGLAS ARTHUR SKEWES and FLORA JESSIE SKEWES Mr. A. L. Bennett Q.C. of Counsel and with him Mr. Draney of Counsel for the appellant WILLIAM McINROY BURNIE and Mr. Bradford of Counsel for the respondents THIS COURT DID ORDER that the said Appeals should stand for Judgment and these Appeals standing for Judgment this day in the paper at Sydney in the State of New South Wales in the presence of Counsel for all parties THIS COURT DOTH ORDER AND ADJUDGE that each of the said Appeals be and the same is hereby dismissed and that the respondents do recover against the appellants their costs of the Appeals to be taxed.

HIGH COURT OF AUSTRALIA · BRISBANE REGISTRY · OFFICE SEAL

BY THE COURT

DISTRICT REGISTRAR.

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18

IN THE HIGH COURT OF AUSTRALIA

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Three actions were commenced in respect of the collision. One was brought by the Public Curator of Queensland as executor of Stanley Simonsen deceased against Burney, claiming damages for the benefit of the widow and three children for the death of the deceased, and damages for the benefit of the deceased's estate in respect of his

injuries and death. It was alleged in this action that Simonsen's injuries and death were caused by negligent driving on the part of Burney. The second action was brought by the Public Curator of Queensland in the same capacity, making similar claims against the widow of Skewes as the administratrix of his estate, and also against Skewes' brother on the footing that Skewes was the agent of his brother and himself. The allegation in this action was that the collision was caused by negligent driving on the part of Skewes. The third action was brought by the four surviving passengers in Skewes' car, claiming damages against Burney, or alternatively against Skewes' widow as his administratrix and his brother as his co-principal, alleging negligent driving on the part of Burney, or alternatively of Skewes.

These three actions having been consolidated, the statement of claim in the consolidated action alleged that the collision was caused by the joint negligence of Burney and Skewes, or alternatively by the negligence of one or other of them. That Skewes was the agent of his brother and himself was admitted on the pleadings. The trial took place before Sheehy J. without a jury. His Honour found that both Burney and Skewes had been guilty of negligence which was a material cause of the collision, and gave judgment for the plaintiffs against all the defendants for varying amounts of damages. From that judgment these appeals are brought, the one by the brother and the administratrix of Skewes and the other by Burney.

The collision occurred thirteen or fourteen miles from Blackall, on a straight stretch of road, nearly a mile in length, between two bends. The surface of the road varied a great deal from point to point. Beyond the second bend, towards Barcaldine, there was a strip of bitumen. The surface on the straight stretch was black soil at the

Barcaldine end, but for the rest of the distance it consisted of fine, floury dust. There had been no rain for four months, and the grader had been over the road a fortnight before the date of the accident. The width of the road was 39 feet, and in the vicinity of the place where the cars collided trees were growing up to the edge of the road. The whole surface of the road was trafficable, but, as often happens on country roads, the traffic in both directions had combined to beat a single set of wheel-tracks which, in this vicinity, was well over onto the left hand side as you go from Blackall, leaving a trafficable space of five feet between the near side wheel track and the line of the trees.

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Round the bend, Skewes' car came within sight of a Ford sedan car travelling fast in the opposite direction. It was driven by a man named Ashburn. Whether it was on its correct side at first is not clear, but if it was not it veered onto its correct side, and it passed Skewes' car at a lateral distance of several feet. In its wake there rose from the surface of the road a dense billowing cloud of fine dust, which tended, as the day was windless, to hang for a time over the tree-flanked road. One of the witnesses, Farrow, who was a technician's assistant in the Postmaster-General's Department, said at the trial that he could not

recall having got into as thick a dust cloud before; and there was a general consensus of opinion that it was unusually dense.

Into the obscurity of this dust cloud Skewes drove his car, following the single set of wheel-tracks. It seems reasonable to infer from his familiarity with the road that he was aware that the tracks he was following were the only beaten tracks along that part of the road; and even if he did not realise that fact, he certainly knew that on that road, as on many country roads, beaten tracks are likely to constitute a single course for traffic in both directions. He cannot have been unaware of the habit of drivers, when traversing difficult stretches on country roads, to use beaten tracks on whichever side of the road they may be, and to share them with oncoming traffic by moving to the left so that each vehicle has the use of one wheel-track. This habit not only is well known to users of country roads but was proved in relation to western Queensland by the evidence in this case. It is true that a driver approaching along the single set of tracks from the direction of Barcaldine would be committing a breach of reg. 6 of the Regulations made under the Traffic Act of 1949 (Q'ld), because he would not be keeping his vehicle as near as practicable to the left side of the carriage-way; for "carriage-way" is defined in the Act to mean a road or that portion of a road formed, prepared, or set aside for the use of vehicles, and the whole width of the road answered that description in the vicinity of the dust cloud which Skewes was entering. It is true, also, that such a driver would be guilty, not only of a breach of the regulations, but of a manifestly dangerous act in driving on his wrong side in conditions of seriously restricted visibility. But this being granted, it nevertheless remains impossible to deny that as Skewes was about to enter the dust cloud he was faced with a situation of potential danger

which called for prompt and decisive action on his part. It was a possibility which could not reasonably be dismissed from consideration that an approaching driver might be using one or both of the beaten wheel-tracks, either because he had lost his bearings while attempting to drive almost blind through the dust or because he had commenced to follow the tracks while the dust was comparatively thin and had been taken by surprise when its density increased to the extent of dangerously limiting his vision, or because he was taking a risk for the sake of the easier running or the guidance which the beaten tracks offered him. It was not a situation in which Skewes, with a due regard for his own safety and the safety of his passengers and others whom a collision might injure, could safely assume that a driver coming towards him would keep off the tracks which he himself was using. It has often been pointed out that the degree of care which is reasonable in given circumstances is proportionate to the seriousness of the risk involved; and the possibility of just such a tragedy as in fact occurred gives the measure of the care which Skewes was in duty bound to exercise.

There was, then, a reasonably apparent possibility that if Skewes pressed on into the dust cloud at any substantial speed, using both wheel-tracks, he would find himself unable to avert a collision in the dust-cloud or immediately after emerging from it. Several courses were open to him. He might stop his car at once. This would not eliminate all danger, for there would still be a possibility that a vehicle might be coming through the dust towards or behind him at a higher speed than the visibility warranted; but it would reduce very greatly the chances of an accident. Again, he might apply his brakes severely and proceed at a speed so reduced that he could stop instantly if the need should arise; and although some possibility of damage from another driver's recklessness would remain, a great part of the risk would thus be removed. A third course open to him was to veer at once to the left, at least to the

extent of placing his right-hand wheels in the left-hand track so as to eliminate all risk of a collision with a vehicle adopting the customary method of passing on a one-track section of the road. A reasonably careful driver in Skewes' position must have recoiled instantly and instinctively from the dangers which the dust might conceal, and taken some precautionary action. He would probably have brought his car to a walking pace and steered it as far as possible to the left.

So far as the evidence reveals, however, Skewes showed no consciousness of the danger, and did nothing calculated to avoid or lessen it. He did not even try to make his presence known by sounding his horn or switching on his headlights. It is by no means clear on the evidence that he reduced his speed at all. McTaggart certainly assented to a suggestion which was put to him in cross-examination that Skewes slackened speed considerably, but Farrow and Monk did not support him on the point: on the whole of the evidence it seems reasonable to accept the trial judge's finding that Skewes proceeded into the dust at a speed of 40 m.p.h. at least. He certainly maintained a speed which was unsafe in the circumstances, until Burney's car loomed up a few feet ahead and a collision was inevitable.

How long Skewes travelled through the dust it is impossible to know. All his passengers who survived were called as witnesses, but they had all lost consciousness in the collision and their recollections were necessarily of doubtful value. One of them, S. J. Simonsen, a fourteen year old boy, at one time said that they were in the dust for less than a minute; then he said he would not like to say how long it was, but assented to cross-examining counsel's suggestion that it was a very short time. Another passenger, Monk, fixed upon 10 seconds at the inquest, but he was unable

to adhere to this at the trial and said that he really had no idea. Farrow said it was a few seconds, and that he had just had time to realise how thick the dust was. Monk, Farrow and McTaggart all agreed that there was time for the thickness of the dust to elicit comment from someone in the car. But the time which has to be considered is that which elapsed between the moment when Skewes ought to have realised that he was going to run into a dense cloud of dust and the moment of the impact with Burney's car; and, while we should hesitate to accept the learned judge's finding that Skewes drove his car in the dust for probably more than 400 yards, we see no reason to doubt his Honour's conclusion that, "having had sufficient time to do so before entering or after entering the cloud of dust, he failed to slow down at all or sufficiently, to stop, to veer to the left, or to take other precautions to avoid the danger." The finding which is expressed in these words was criticised as not including a finding of any particular failure in due care which his Honour regarded as a cause of the collision; but its meaning is clear enough. The evidence amply warranted a conclusion that Skewes took none of the courses which might have averted the collision and which he had time to take, though the adoption of at least one of them was clearly demanded in the circumstances by considerations of reasonable prudence.

It may be that long familiarity with the road had bred in Skewes a contempt for its dangers; but, whatever the explanation, the fact seems clear that Skewes took the risk of assuming that there would be no car approaching him in or behimd the dense portion of the dust; and that was a risk which it was his duty not to take. If he had slowed down or stopped it may be that Burney would still have collided with him; no one can say whether that would have happened or not; but what is certain is that the collision

which in fact occurred and produced such disastrous results would not have occurred. We find ourselves unable to doubt that Skewes' failure to take precautionary steps which the situation demanded as a matter of reasonable prudence was a real and substantial cause of the collision.

It is at least as clear that negligence on the part of Burney was also a material cause of the collision. Coming from the direction of Barcaldine in a Ford utility, he traversed the bitumen strip which has been mentioned, and proceeded at a speed of 40 m.p.h. along a beaten track on his left-hand side of the road to a point about 300 yards before the place where the collision occurred. Then the track he was following crossed to the right-hand side of the road, there merging with another track on that side. Ashburn's car had already passed him, and when it entered upon the stretch of floury dust the fact must have become at once obvious to Burney that his vision was about to become seriously restricted, and that it would continue to be restricted until either he himself should have passed the dusty section of the road or Ashburn should have got so far ahead of him that the dust would settle to a substantial extent before he reached it. He was, of course, committing a breach of the traffic regulations by driving on the wrong side of the road; but what is more important is that he was driving on the side of the road where any traffic proceeding in the opposite direction would almost certainly be found. Whether it is negligent to follow a single beaten track on a difficult country road when the track is on the right hand side of the road is a question which depends on the circumstances; but the fact that the law appoints that side for the use of opposing traffic makes the course one which obviously demands in any circumstances the utmost circumspection.

According to Burney's own evidence, when he commenced to drive on the left-hand side he had a visibility

of about 100 yards. He drove, he said, for 300 yards in the dust with his visibility progressively decreasing, and then it was suddenly very much cut down, so that he could see only six or eight feet ahead. His reactions to the worsening conditions he encountered were described in his evidence in these words: "When I got farther along, the dust became slightly thicker, and I took my foot off the accelerator; and then going a bit further the dust became a lot thicker and I immediately placed my foot on the brake pedal, and then without any time to do anything I crashed into the front of it." He had taken the precaution of driving with his right-hand wheels in the left-hand wheel-track, so as to allow any opposing vehicle to pass him in the customary manner; but he failed to allow for the very real possibility, which should have been evident to him as soon as he saw the amount and behaviour of the dust Ashburn's car was whipping up, that the driver of an opposing vehicle, prevented by the dust from realising that there was any passing to be done, would be using both wheel-tracks. He did not sound his horn or switch on his lights. How much he reduced his speed from the initial 40 m.p.h. before he caught his first glimpse of Skewes' car is a matter of some uncertainty, though he himself put his speed at that moment as high as 35 m.p.h.; but whatever it was, it was plainly imprudent to remain on his wrong side of the road once he perceived that the dust was likely to deny to him and to any Barcaldine-bound vehicle a reasonable opportunity of avoiding one another. It cannot avail him to say that it was folly on Skewes' part to come through the dust as fast as he did; the situation created by Burney's own election to follow the beaten track was such that consistently with reasonable prudence he could not put out of consideration the possibility

that someone would be guilty of just such folly. "I was", he said in a statement to the police, "in the act of stopping or slowing right down just before I saw the other vehicle, but it crashed into me before I had time to do anything." But, as he said in the same statement, Skewes' car was then only six or eight feet in front of him when he first saw it. The visibility being as poor as this indicates, he should already have left the beaten track altogether and got back onto his own side of the road.

His negligence was put beyond doubt at the trial by these questions and answers in his cross-examination:

> "So instead of pulling to the side of the road and stopping, if you did not know what was ahead, you chose to take the risk of driving on through this thick cloud of dust, although you knew that other traffic might be on the roadway ahead of you. Is that the position? ----- Yes. I had commenced to stop."
>
> "You took that deliberate risk, didn't you? ----- Yes."

In the result we are of opinion that the judgment of Sheehy J. was correct, and that each appeal should be dismissed with costs.

BURNIE

v.

THE PUBLIC CURATOR OF QUEENSLAND & ORS.

SKEWES & SKEWES

v.

THE PUBLIC CURATOR OF QUEENSLAND & ORS.

JUDGMENT. FULLAGAR J.

BURNIE

v.

THE PUBLIC CURATOR OF QUEENSLAND & ORS.

SKEWES & SKEWES

v.

THE PUBLIC CURATOR OF QUEENSLAND & ORS.

JUDGMENT. FULLAGAR J.

I agree that Burnie's appeal should be dismissed. In this case it appears to me that the decision of the learned trial judge was clearly right.

The appeal of Skewes should, in my opinion, be allowed. Since I am in a minority, and the matter depends entirely on the picture which the evidence presents to one's mind, I will only state my view very briefly.

It is obvious that Burnie was negligent. To drive blind on the wrong side of the road is about as gross negligence as one can imagine. Burnie must have been so driving for a period which allowed him time to realise the position and to take the two necessary steps of slowing down and going over to the correct side of the road. It is equally obvious that Burnie's negligence was a proximate cause of the collision.

I should myself have hesitated before finding Skewes guilty of negligence. It is easy to apply to a man in the position of Skewes too high a standard of care. Certainly he should have slowed down, but I have difficulty in feeling satisfied that he really had time to do so after the duty arose. Skewes, unlike Burnie, was driving throughout on his correct side of the road, he was guilty of no fault until he suddenly entered the cloud of dust,

and it is very doubtful to my mind whether he really had any time to do anything between entering it and meeting Burnie's car. It is possible that he had, but possibilities are not enough in these cases.

So far, however, as negligence on the part of Skewes is concerned, whatever the inclination of my own opinion, I do not know that I should have felt justified in differing from the learned trial judge. What I feel satisfied about is that it is impossible to find the necessary causal connexion between any negligence of Skewes and the collision. I am myself, with all respect, unable to entertain the idea that Skewes ought to have switched on his headlights or sounded his horn. I do not believe that any normal driver would have thought of doing either. The case against him rests on his failing to reduce his speed or on nothing. I consider it impossible to say, even as a matter of probability, that if he had reduced his speed at the earliest reasonable moment, the collision either would have been avoided or would have had less serious consequences. It might have had either result, but to say that it <u>would</u> have had either result involves a nice estimation of times which cannot, in my opinion, be fairly made on the evidence. To say that it would have had either result does not seem to me to be more than guesswork. The plaintiffs' burden of proof is not sustained.

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APPEAL No. 31 of 1953

IN THE HIGH COURT
OF AUSTRALIA

QUEENSLAND REGISTRY

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND

BETWEEN:

DOUGLAS ARTHUR SKEWES AND
FLORA HEATHER JESSIE SKEWES (WIDOW)

APPELLANTS

AND

THE PUBLIC CURATOR OF QUEENSLAND
HERBERT HARLEY MONK, DEREK MYLES
FARROW, ROBERT CHARLES McTAGGART
and STANLEY JOHN SIMONSEN (AN
INFANT BY HIS NEXT FRIEND FRANCES
SIMONSEN)

RESPONDENTS.

CONSENT ORDER.

10/-
1/-
5/-
7/6

34.5.54

CANNAN & PETERSON,

SOLICITORS,

BRISBANE.

TOWN AGENTS FOR:

REES R. & SYDNEY JONES,

SOLICITORS FOR APPELLANTS,

ROCKHAMPTON

IN THE HIGH COURT OF AUSTRALIA:

APPEAL No. 31 of 1953.

QUEENSLAND REGISTRY.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND:

BETWEEN:

DOUGLAS ARTHUR SKEWES AND
FLORA HEATHER JESSIE SKEWES (WIDOW)

APPELLANTS

AND

THE PUBLIC CURATOR OF QUEENSLAND, HERBERT HARLEY MONK, DEREK MYLES FARROW, ROBERT CHARLES McTAGGART and STANLEY JOHN SIMONSEN (AN INFANT BY HIS NEXT FRIEND FRANCES SIMONSEN)

RESPONDENTS.

BY CONSENT I DO ORDER that the sum of FIFTY POUNDS which was paid into Court as security in this Appeal be paid out to Cannan & Peterson of 319-325 Queen Street Brisbane Solicitors the Town Agents for Rees R. & Sydney Jones of 178 Quay Street Rockhampton the Solicitors for Appellants.

DATED this 7th day of October, 1957.

District Registrar.

Left Ricol with Mr. ... 10/20/57.

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APPEAL NO. 31 OF 1953

IN THE HIGH COURT
OF AUSTRALIA
QUEENSLAND REGISTRY

ON APPEAL FROM THE SUPREME COURT
OF QUEENSLAND.

BETWEEN:

DOUGLAS ARTHUR SKEWES and
FLORA HEATHER JESSIE SKEWES
(Widow)

APPELLANTS

AND

THE PUBLIC CURATOR OF QUEENSLAND,
HERBERT HARLEY MONK, DEREK MYLES
FARROW, ROBERT CHARLES McTAGGART
and STANLEY JOHN SIMONSEN (an
infant by his next friend FRANCES
SIMONSEN)

RESPONDENTS

C O N S E N T.

FILED
10 OCT. 1957
BRISBANE REGISTRY

2/6
340554

CANNAN & PETERSON,
SOLICITORS,
BRISBANE

TOWN AGENTS FOR:

REES R. & SYDNEY JONES,
SOLICITORS FOR APPELLANTS,
ROCKHAMPTON.

IN THE HIGH COURT
OF AUSTRALIA
QUEENSLAND REGISTRY.

APPEAL NO. 31 OF 1953

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

BETWEEN:

DOUGLAS ARTHUR SKEWES and
FLORA HEATHER JESSIE SKEWES (Widow)

APPELLANTS

AND

THE PUBLIC CURATOR OF QUEENSLAND,
HERBERT HARLEY MONK, DEREK MYLES FARROW,
ROBERT CHARLES McTAGGART and STANLEY
JOHN SIMONSEN (an infant by his next
friend FRANCES SIMONSEN)

RESPONDENTS

WE HEREBY CONSENT to an Order that the amount which was paid into Court as the prescribed security to be given in this appeal be paid out to Cannan & Peterson of 319-325 Queen Street Brisbane Solicitors.

DATED this ninth day of October 1957

McCullough Robertson

Solicitors Primary Building Creek Street, Brisbane

Town Agents for Grant & Simpson of 114 East Street Rockhampton, Solicitors for the abovenamed Respondents.

Cannan & Peterson

Solicitors, 319-325 Queen Street Brisbane

Town Agents for Rees R. & Sydney Jones of 178 Quay Street, Rockhampton, Solicitors for Appellants