IN THE HIGH COURT OF AUSTRALIA

HEADLAM

V.

HOWELL

£2 12 6

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Monday, 13th August 1956.

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

TEADLAM v. HOWELL

ORDER

Appeal allowed.

Order of the Supreme Court of Tasmania to be varied by ordering that judgment be entered for the plaintiff in the sum of £8,829.0.4 in lieu of the sum of £4,414.10.2.

Respondent to pay appellant's costs of this appeal.

CJ
Kitto
Webb
Taylor

HEADLAM v. HOWELL

JUDGMENT

DIXON C.J.

HEADLAM v. HOWELL

This is an appeal by a plaintiff in an action to recover damages for personal injuries caused by the negligence of the defendant. The appeal comes from the Supreme Court of Tasmania, where judgment passed for the plaintiff. The damages sustained by the plaintiff were assessed at £8,829, but under the provisions of the Contributory Negligence Act of Tasmania the amount recoverable was reduced to £4,414:10:0 on the ground of the plaintiff's contributory negligence. The appeal is concerned only with the finding of contributory negligence and the apportionment of damages.

The action was tried at Launceston by Green J. without a jury. The injuries of which the plaintiff complained were severe and arose out of a collision between a Holden car which she was driving and a Wolseley car driven by the defendant. The collision occurred at about the hour of midnight on 3rd September 1954 at the intersection of two streets in Launceston. The two streets were Abbott Street, which runs roughly north and south, and David Street, which runs roughly east and west. The plaintiff was driving in a southerly direction along Abbott Street accompanied by her niece, a girl of about thirteen or fourteen years of age, who was sitting beside her. The defendant was driving his mother's Wolseley car in an easterly direction. He was a young man about twenty-one years of age and was driving some girls home from a dance. At the intersection the plaintiff's Holden struck the Wolseley on its left-hand side and inflicted damage extending from about the forward part of the mudguard to the door. The Holden seems to have been carried into David Street to the east and there to have turned round until it almost faced in the opposite direction. The Wolseley went on for some considerable distance over to the right-hand side of David Street and drew up. Abbott Street carries a greater quantity of traffic than David Street and is a bus route, but it is not what is called a "right of way street".

See Traffic Regulations, cl.123(). Notwithstanding this fact, there stood on each side of Abbott Street in David Street a sign consisting of the words "give way" inscribed in black on a yellow disc mounted on a pole. These signs faced the traffic coming from each direction in David Street. Further down David Street west of Abbott Street, a distance of 169 feet from the corner, was a triangular sign on a pole. It was dilapidated but it represented a triangle which is prescribed by the Traffic Regulations, cl. 132(1), as a danger sign. The regulation also prescribes a sign consisting of a yellow disc with black letters saying "Right of way street give way", the words "right of way street" being along the circumference and the words "give way" in larger letters in the middle. That sign is called Road Sign No. 5. Reg. 132 says that the road signs in question shall be used to indicate to drivers and riders of vehicles and horses the conditions and precautions respectively indicated in the words set opposite such sign. Road Sign No. 5 imposes the requirement that vehicular traffic in the street approaching the sign from the direction in which it faces shall enter the intersection or junction immediately beyond the sign as slowly as practicable and shall give way to traffic in the intersection or junction street. It would seem that the discs in David Street where Abbott Street intersects it were intended to serve this purpose. They were erected in May 1952 by the Public Works Department under instructions from the Transport Commission; but in fact, because of the omission of the words "right of way street" they are treated in the admissions made between the parties as not constituting a prescribed sign.

The plaintiff in her evidence stated that she was fifty-three years of age and had been driving a car since she was eighteen years of age except for a short period and had been driving the Holden car regularly. She had been at a house in the vicinity which she left between fifteen minutes and five / minutes

to twelve midnight. She said she drove down Abbott Street towards David Street at about twenty to twenty-five miles per hour. She slowed down as she approached the intersection and looked to the left and the right and saw no traffic coming from either way. When she came to the intersection she did not increase speed. When she was half way across she saw two lights coming very fast on her right, like a train coming at her. She had no time to do anything and she remembered nothing further. She knew there was a give way sign facing up David Street and down David Street. She was careful whether there were signs or not. She said that at the scene of the accident there was a house on the corner of her right side of David Street and a fence and that you could not see right over the fence. She added: "I drove with care. I did not rely on the road signs just to think I could drive straight through. I did not think I had to give way on the right as the road sign was there. When I see a road sign I obey it."

The defendant in his account of the occurrence said that he did not know that a danger sign existed there and did not see it on that evening. As he approached David Street his speed was twenty-five miles an hour and he was in third gear. He did not see the "give way" sign and did not know it was there. As he approached the intersection he looked to his right and saw nothing coming. He was then nearly on the corner. He then looked to his left and saw the lights coming on the left. The lights of the other car were further from the intersection than he was. He thought it was a "give way on the right" street and proceeded on without accelerating. Then there was a flash and a bang and he remembered pulling up. He had not used David Street very much, but during the twelve months preceding the accident he had on a number of occasions, perhaps ten, proceeded down Abbott Street turning into the eastern part of David Street and had returned by the same route. He might therefore have seen the corresponding opposite "give way" notice on the eastern side of the intersection. He said that the girls were talking as he

approached the intersection and he added: "You can't help but listen to the conversation". He said the bang took place at the bottom side of Abbott Street. "I was nearly through the intersection when I got hit. I thought the other car would give way to the right. She was further away than I was and I thought she would give way to the right."

The plaintiff's niece sitting on the front seat of the Holden on the plaintiff's left said that she was sitting forward and turned towards the driver. As she approached David Street nearly on the intersection she looked up David Street and saw the lights of the car. "It was a fair distance away, from me to the end of the Court" (a distance of forty-five feet). I don't know its speed. As our car went on to the intersection I don't know if the speed of our car varied at all. Next I knew the lights were just on us. I put my head down. I heard a lot of splintering and crushing and our car finally stopped."

It appears from other evidence that there is a street light on the south-west corner of the intersection, that is to say on the defendant's right as he approached. The "give way" sign was on the opposite corner, that is on his left, and the danger sign, 169 yards back, was also on the left side of the road. This sign had not been painted for years and was dilapidated. Neither sign had reflectors. In Abbott Street there is a sealed roadway 20'3" wide. On the plaintiff's left-hand side as she travelled upon this part of the road was a grass and gravel verge 12'4" wide terminating, however, about twenty-five yards from the corner where the whole road was sealed. To the left of that was a footpath 10'4". On her right side was a gravel verge planted with trees 10'8" in width followed by a grass bank and park 15'5" in width. In David Street there was a sealed roadway of 21'4" with a verge of 10'4" in width on the defendant's left and a footpath of 9'. On his right there was a verge of 7'1" and a grass bank and

footpath of 18'11". Car marks were found on the centre of the road proceeding in a south-easterly direction up on to the bank in David Street on apparently the south-easterly corner, a distance of 65'. The place where the Wolseley car pulled up in David Street is 78' east of the corner of Abbott Street.

On these facts Green J. made some findings upon which much turns. He found that a motorist in David Street should see the signs and should be able to read the words "give way" which are written on them. He found that the defendant's speed as he travelled in David Street was about twenty-five miles an hour and the plaintiff's speed was somewhat less than twenty-five miles an hour and was nearer to twenty miles an hour. The latter, he found, drove close to the edge of the bitumen in Abbott Street. The defendant drove down David Street with his right-hand wheel about the centre of the line of the bitumen in David Street. He found that the plaintiff ought to have seen the defendant's car at an earlier stage than that stated in her evidence, namely as the front of her car approached the centre of David Street, and that she ought to have seen it when she still had time to take avoiding action. He rejected the defendant's statement that he was past the fence line of Abbott Street when he first saw the plaintiff's car and that it was then 30' back from the fence line of David Street and found that the defendant did not see the plaintiff's car at all until it was too late to avoid the collision. He accepted the evidence of the niece that she first saw the defendant's car when she was about two feet back from the fence line of David Street and that the defendant's car was approximately 45' to 50' away at that time. He found that the defendant ought to have seen the give way sign and if he saw it should have acted with caution and paid attention to his left. He found that each party had an equal opportunity of seeing the other car before that party did so and each should have had an equal opportunity of avoiding the

accident and found them both negligent in equal degrees. Upon the application of counsel the learned judge expressed his opinion that because the defendant had had experience of coming up David Street on the opposite side he should have been aware that there was a sign on both sides of the road and that in any case he should have seen the sign on his left in his lights and with the aid of the street light. His Honour said "I accept the position that the plaintiff knew of the existence of the signs but that she was not relying on them". His Honour refused to make any finding as to whether the defendant did in fact look to his right.

The appeal of the plaintiff is based upon the view that she was entitled to rely on a right of way because of the existence of the give way signs facing David Street at the intersection, that the learned judge was under a misapprehension when he said that he accepted the position that the plaintiff knew of the existence of the signs but that she was not relying upon them, that what her evidence meant was that she did rely on them but not exclusively so as to feel relieved of taking the precaution of looking in that direction and otherwise taking care and that his Honour mistook the purport of her evidence on this point. She was not, it is claimed, in a situation where she ought to have given way to traffic on her right. The defendant, however, on his side had no excuse for failing to see the signs and for proceeding without caution and without seeing the plaintiff in the position which she occupied when she must have been visible to him had he looked. She urges that if she ought to have been found guilty of negligence at all she was far less blameworthy than the defendant and a reduction of her damages by half was disproportionate to the blame involved or to the responsibility which each should bear for the accident.

A contention for the appellant is that she might properly suppose that she had the right of way and that this factor had a dual operation. For, so it is claimed, in the first

place it excused her from looking to the right earlier than she did. In the second place, it makes it impossible to say that if she had seen the lights of the defendant's car down David Street to her right, she would have acted on the supposition that the defendant might not give way to her or would be likely to collide with her car.

Another contention for the appellant was that the learned judge should have inferred from the positions of the cars after the accident and the apparent consequences of the impact that the defendant entered the crossing at a much greater speed than his Honour's finding attributes to him.

For the respondent it was maintained that the defendant must have entered the intersection before the plaintiff actually reached it. Further it was said that on an acceptance of the judge's findings the line of vision open to the plaintiff must have exposed the approaching lights of the defendant's car to her view in ample time for her to avoid the collision. But nearly every element in the calculation or reasoning on which these contentions were based was in truth very uncertain. It is reasonably clear that no effect ought to be given in this Court to these attempts to give to the facts an aspect more favourable to the defendant than that which the learned judge who tried the case placed upon them.

On the other hand there is as little tenable ground for the plaintiff's claim that she should be absolved from contributory negligence. Giving full effect to the contention made on her behalf that she was entitled to treat Abbott Street as one in which she had the right of way, the manner in which the plaintiff approached the crossing and the look-out she kept should have been such as to enable her, in the circumstances, to avoid the collision. As Abbott J. said in Smith v. Dyer, 1949 S.A.S.R. 187, at p. 193: "....it does not follow that the driver having the right of way always behaves reasonably in

assuming, without looking, that in view of the common behaviour of motorists in consequence of this provision he may safely drive over the intersection."

The point of the appeal lies in the question whether Green J. was not too hard upon the plaintiff in reducing the damages which he assessed by half.

Sec. 4(1) of the Tortfeasors and Contributory Negligence Act 1954 (Tas.) is taken from sec. 1(1) of the Law Reform (Contributory Negligence) Act 1945 of the United Kingdom. The provision requires that the amount otherwise recoverable by the plaintiff in fault in respect of the damage suffered must be "reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage". This Court has already said that "responsibility" does not here refer to blame in a moral sense. "It seems clear that this must of necessity involve a comparison of culpability. By culpability we do not mean moral blameworthiness but degree of departure from the standard of care of the reasonable man". - Pennington v. Norris, unreported (6th June 1956).

It must of course be borne in mind that the provision imposes the duty upon the Courts to determine, having regard to the claimant's share in the responsibility, what reduction is just and equitable. The Court does not merely arrive at an arithmetical ratio by comparing the degrees of fault and then apply it to the amount of the damages. What is just and equitable must be determined.

The degree of departure on the part of the plaintiff from the standard for a reasonably prudent and careful driver may perhaps be variously assessed. There is no reason to doubt that she assumed that she had the right of way, but she would have been guilty of a very definite want of due care had she treated that as relieving her from the necessity of careful

observation and driving in approaching the crossing.

The defendant doubtless supposed that traffic in Abbott Street on his left travelling south would be under a duty to give way to him and apparently that was theoretically true. For the sign was not as prescribed and the street was not declared a right of way street. But the signs would produce the contrary belief in any drivers familiar with them who were travelling along Abbott Street. He may have been negligent in failing to see the danger sign, but perhaps it was so old and dilapidated that it did not matter. His failure, however, to see the "give way" sign has been definitely found to be negligence. Had he seen it, however, he construed it, there can be no doubt that it ought to have induced a more cautious approach to the crossing. As it was he entered the crossing incautiously and in a manner which left him unable to avoid the plaintiff's car when he saw it.

The question is whether the apportionment adopted by Green J. placed too little emphasis on these aspects of the defendant's negligence in the comparison between their respective degrees of fault and erred so definitely that this Court should interfere with the apportionment.

In the first place it must be noted that there is no specific finding or process of reasoning contained in his Honour's judgment which is really open to challenge. It is true that it may be said that there was a misinterpretation of the plaintiff's statement that she did not "rely on the road signs just to think I could drive straight through". But if so it led to no substantial mistake in any finding of fact. It meant only that the learned judge regarded the plaintiff as saying in effect that she approached the crossing with as much attention to possible vehicles on her right as she would show if no such sign existed. In the next place it cannot be said that such an apportionment is so unreasonable as to show that something must have gone amiss in reaching the result. After

all the case is one in which at an hour when little traffic might be expected at the crossing two vehicles meet in the intersection neither seeing the other in time to avoid the collision. It is natural to start in such a case with a prima facie view that equality of fault best explains it. Attempts at very precise reconstructions of the exact events and refined criticisms of what each might have done are inherently unsatisfying and are apt to leave out of account the otherwise evident fact that without combination of negligence such a collision would be very unlikely to occur. On the whole the case is one in which there is no sound ground for impeaching the apportionment of the primary judge. His opportunities of forming a correct appreciation of the relative degrees of fault and what was just and equitable included both a view of the place and a view of the people, as they gave evidence. He has found the facts on ample materials and he was under no misapprehension as to the criteria he should apply or the significance of his detailed conclusions of fact.

The appeal should be dismissed with costs.

HEADLAM

v.

HOWELL

JUDGMENT

McTIERNAN J.
FULLAGAR J.
TAYLOR J.

JUDGMENT

As appears from what has already been said the appellant received the injuries, in respect of which she claimed damages, in a collision between two motor cars at the intersection of Abbott and David Streets, Launceston. The car which the appellant was driving approached the intersection from the north and the defendant was driving from the west. Abbott Street is approximately sixty-nine feet wide overall. In the centre there is a sealed strip approximately twenty feet in width and on the eastern side of this strip there is a grass verge, some twelve feet in width, extending to a ten foot footpath. Adjoining the sealed strip on the western side there is a strip of gravel a little over ten feet wide and in this some trees are planted. Beyond the gravel there is a grassy bank rising to a path. The bank and path altogether are something over fifteen feet wide. The construction of David Street is much the same. Altogether it is a little over sixty-six feet wide and the various measurements are such that the nearside of a motor car travelling along it with its offside wheels about the centre of the sealed strip would be about twenty-four feet from the northern fence alignment of the street. The appellant, it was found, was driving her vehicle with its nearside wheels on the extreme left-hand edge of the sealed strip in Abbott Street and reference to the plan which was accepted by the learned trial judge and to the measurements already mentioned fixes the distance from the offside of her vehicle to the eastern alignment of Abbott Street at about forty feet.

Now the respondent says that as he was approaching David Street his vehicle was travelling at approximately twenty-five miles per hour. He was not, he said, on the wrong side of the road, but his offside wheels may have been "over the line to my wrong side". The learned trial judge found that as the

respondent approached the intersection the offside wheels of his vehicle were about the centre line and there is no reason why this should not have been so. The respondent further said that as his vehicle entered the intersection - and when it had proceeded some three feet into it - he saw the lights of the appellant's car to his left. They were then, he said, in Abbott Street some thirty feet back from the intersection and, believing that the driver of that vehicle would give way to him, he proceeded on. This evidence was entirely rejected by the learned trial judge. His Honour was clearly of the opinion - and upon the evidence, we have no doubt, rightly so - that the respondent did not see the appellant's car until it was too late to avoid an accident. Indeed the respondent does not seem to have taken any steps whatever either to reduce his speed or alter the course of his vehicle before the impact and this is of considerable significance when regard is had to the credible evidence concerning the relative positions of the vehicles as they approached the point of collision. It should also be said that the finding of the learned trial judge concerning the stage at which the respondent saw the appellant's vehicle reveals as pure invention his evidence that, having seen that vehicle some distance back in Abbott Street, he proceeded on because he thought it would give way to him.

Travelling with the appellant, in the front seat of her car, was the appellant's niece and, in her evidence, she said that she first saw the respondent's car when it was about forty-five or fifty feet away. Whether she meant forty-five or fifty feet from the point of collision or from her position in the appellant's car is not clear but, whichever was meant, the significance of the evidence is clear. At that time her position in the car was some two feet back from the northern alignment of the intersection - that is to say, the front of the appellant's car already protruded some four or five feet into the intersection.

We are told that from then on neither vehicle altered its course or speed before the impact and, since the front of the appellant's vehicle struck the nearside of that of the respondent, it is reasonable to suppose, if the evidence of this witness be accepted, that in the intervening period before the collision the respondent's vehicle travelled a considerably greater distance to the point of collision than did that of the appellant. On the figures which we have given the latter travelled about nineteen or twenty feet whilst the former travelled not less than forty feet and, probably, considerably further. The evidence of the appellant's niece was accepted entirely and it was, according to the learned trial judge, partly upon this evidence that he made his finding as to the relative speed of both cars. It is true that the respondent said that his speed as he approached David Street was twenty-five miles per hour and that this evidence was supported by a passenger in his car but in reaching his conclusion the learned trial judge appears to have placed little reliance upon it. Nor, in view of his Honour's express rejection of the respondent's version of the events immediately preceding the collision, would we be disposed to do so. Nevertheless his Honour apparently thought that the evidence of the appellant's niece gave some support for the conclusion that if the speed of the appellant's car was twenty m i l e s per hour that of the respondent's car was about twenty-five miles per hour. We do not entertain the view that it is ever possible, after the occurrence of an accident such as this, to make anything like conclusive calculations of the speed of either car by accepting as precise estimates of positions and distances honestly made by witnesses in the agony of collision. At the best such estimates can be no more than approximate and do not constitute data capable of supporting precise calculations. This, of course, is far from saying that such estimates may not be of value in some cases for the purpose of evaluating the evidence of one or both parties. The apparent discrepancies, after making the full allowance for approximation may be so great as to demonstrate that other oral evidence concerning the movements of either vehicle is unreliable. We have not, however, referred in detail to the relevant measurements and

estimates for the purpose of demonstrating the unreliability of the evidence of the respondent. That has already been rejected substantially by the trial judge. But the estimates were relied upon by him in part to make a finding as to the speed of the respondent's car as it approached the intersection and it has been necessary to examine just how far they support his conclusion. And as we have already pointed out the evidence of the appellant serves to indicate - if, in the circumstances, it gives any indication of the speed of the respondent's car - that it was travelling at a much higher rate of speed than that of the appellant. As far as we can see the indication is that it travelled at least twice as far as that of the appellant in the same period of time.

It is conceded that, in the circumstances of this case, the finding of negligence against the respondent is not open to question but the learned trial judge found that both the appellant and the respondent "should have seen the other car before they did". "Each", he said, "had an equal opportunity of doing so and each should have had an equal opportunity of avoiding the accident. She should have given way to her right. He should have been warned by the sign." In the result his Honour found each party negligent to an equal degree. It is for the purpose of examining the validity of these findings, so far as they affect the appellant, that it has been necessary to examine the implications of the evidence in some detail for in part they must depend substantially upon the view of the learned trial judge that the respondent was proceeding at the comparatively modest speed of twenty-five miles per hour. The appellant, herself, did not see the respondent's car until she was approaching the middle of the intersection and this was regarded as tantamount to an admission that she paid inadequate regard to traffic approaching from her right. But if the respondent's car was travelling at a much higher speed than twenty-five miles per hour it may well have been that as she came close to the intersection the respondent's car was then well back from it. Indeed she said that as she

approached the intersection she looked to the left and to the right and "saw no traffic coming either way". She was able to look to the left before reaching the intersection because it is possible "to look over the fence on the left". The fence containing the corner on her right was erected on elevated ground and it was impossible to see over it. Thereafter she said she did not see the respondent's car until she was close to the middle of the intersection. She then saw two headlights "coming very fast on my right from High Street - like a train coming at me. I remember nothing further." Immediately after she had seen the headlights of the respondent's vehicle the collision occurred and some minutes later, when one of the witnesses who gave evidence in the case reached the scene, the appellant's car was found some fifty feet up David Street to the east of Abbott Street facing in a general northerly direction. It had been turned completely round and the respondent's car had come to a standstill still further away on the side of the road. There is in the case ample evidence to support a finding of negligence against the respondent without concluding that the speed of his car was grossly excessive. Indeed the finding of the learned trial judge, so far as the respondent's conduct is concerned, in no way depended upon such a conclusion but a conclusion concerning the speed of the respondent's vehicle was, we should have thought, most material in reaching a finding that the appellant was equally, or at all, to blame for it depended upon the finding that she had failed to see approaching the intersection a car travelling at a modest rate of speed. To say the least the evidence leaves us far from satisfied that this was the situation.

It was for the respondent to establish negligence on the part of the appellant and so far as this allegation depended upon the assertion that his car was being driven at a reasonable speed in the circumstances it must, we think, be taken to have failed. His own evidence was unreliable, the evidence of his passenger, who saw nothing of the other car "until the impact which came without warning" is of little, if any, value and

every circumstantial indication is to the contrary. It may, of course, be said that the appellant should have seen the respondent's car at least as soon as her passenger but if she had looked to the right, as she said she did, even a moment or two before her passenger observed the respondent's car, it may well have been sufficiently remote from the intersection to have avoided detection if it was travelling at a fast rate of speed.

So far we have had little to say concerning the "Give Way" sign erected in David Street a little distance from the intersection. Its existence, in the form in which it stood, did however provide a subject for some forensic skill in aid of the respondent. It was not, it was said, a "prescribed sign" for, although in other respects it conformed to the requirements of the Traffic Regulations 1943, it did not carry the border inscription in smaller lettering "Right of Way Street". If it had there could have been no doubt that the respondent would have been obliged by the regulations to "enter the intersection immediately beyond the sign as slowly as practicable and yield right of way to vehicular traffic in the intersecting street." The absence of the border inscription was of little consequence to the respondent who not only failed to notice the sign on this occasion but was unaware of its existence although it had stood in this position for over two years. The sign was erected on a post painted yellow and was two feet in diameter with six inch lettering. Nevertheless the respondent said, for some reason or other, that if he had seen the sign he would not think it marked a right of way street. No doubt the sign was not strictly in accordance with the requirements of the regulations but, equally, there is no doubt that any prudent driver would have given effect to its injunction. Indeed to conclude otherwise would be - if one may go beyond the adaptation in Smith v. Hudson 21 S.R. 547 - to entertain the view that motorists are, in some instances, made for road signs and not road signs for motorists. Unlike the respondent the appellant was aware of the existence of the sign but, presumably, was not aware that its verbiage was unduly economical. Accordingly she

observed it and, in my view, was entitled, within reason, to assume that it would regulate the conduct of other drivers also. But the learned trial judge says that "she should have given way to her right" and this circumstance, no doubt, influenced his conclusion that the parties were equally to blame. How far it was also influenced by his penultimate observation that he accepted "the position that the plaintiff knew of the existence of the signs but that she was not relying on them" does not appear. But that he was influenced in some measure by this consideration is beyond doubt. We do not, however, read the appellant's evidence on this point with any significance adverse to her. She did not say that she was not relying on the existence of the sign; the relevant passage in the report of her cross-examination is as follows:

> "I did not rely on the road signs just to think I could drive straight through. I did not think I had to give way on the right as the road sign was there."

This report is in narrative form and the language of the cross-examiner appears to have been attributed to her. Obviously she was asked whether she did not rely on the road signs to think that she could just drive straight through the intersection and her answer was in the negative. We see no more in the evidence than an intention on her part to deny that she had relied entirely on the existence of the sign and had blindly driven into the intersection. We do not see any admission on her part that she did not in any degree have regard to the existence of the sign. On the contrary the second sentence quoted clearly shows that, if her evidence is to be believed, she did have regard to the existence of the sign.

In the circumstances we are unable to see that the credible evidence provides any basis for holding the appellant blameworthy for any part of her injuries. We are by no means satisfied that her failure to see the respondent's car at an earlier stage was due to a lack of reasonable care on her part rather than to excessive speed on the part of the respondent's vehicle. If that vehicle had been travelling at a reasonable

speed she should, of course, have seen it as she came to the intersection. But if its speed was excessive its position in David Street may have been sufficiently remote to escape detection at the time when she looked first to the right. Moreover if the respondent's car was travelling at a reasonable speed and if the appellant had seen it as she came to the intersection and before it had reached the intersection there is no certainty that the accident would have been avoided, for the respondent proceeded on in entire ignorance of the existence of the "Give Way" sign and of the presence of the appellant's car in the vicinity. It is however futile to speculate concerning what the outcome might have been if the respondent's car had been driven at a reasonable speed and if, in those circumstances, the respondent had seen it for the evidence does not establish the first of these conditions against the plaintiff. As we see the case the cause of the accident as disclosed by the evidence was the extreme carelessness of the respondent.

For the reasons given we are of the opinion that the appeal should be allowed and judgment entered for her for the full amount assessed by the trial judge.

HEADLAM

v.

HOWELL

JUDGMENT

WEBB J.

HEADLAM v. HOWELL

JUDGMENT WEBB J.

This is an appeal against a judgment of the Supreme Court of Tasmania (Green J.) awarding the appellant £4416 damages for injuries sustained by her in a collision between her motor car and the respondent's motor car in the intersection of Abbott and David Streets in the city of Launceston about midnight on 3rd September 1954. The total damages for personal injuries, including special damages, were assessed by Green J. at £8832; but his Honour found that both parties were equally to blame for the collision and so he awarded the appellant £4416. He found that both parties approached, entered and proceeded to cross the intersection without keeping a proper look out and that the speed of the appellant's car was 20 miles per hour and that of the respondent 25 miles per hour, which his Honour seemed to regard as a negligible difference in the circumstances. It does not appear whether his Honour found that the appellant reached the intersection before the respondent. If he did so find he does not appear to have given any weight to the fact. His Honour found that neither Abbott Street nor David Street was a right of way street.

Green J., who had the advantage of seeing the witnesses give their evidence, accepted "entirely", that is to say, without qualification, the evidence given for the appellant by her thirteen year old niece, Diana Archer, as to the respective positions of the two cars when she first saw the respondent's car, with all that her evidence necessarily implied. In view of his Honour's advantage, we would not be warranted in taking a less favourable view of her evidence because she was only thirteen and the appellant's niece and the collision took place at midnight. If in other parts of his Honour's reasons for judgment he found any fact that is inconsistent with a necessary implication from

Diana's evidence, this, I venture to say, but with some hesitation, must be due to a miscalculation from, and not to any correction of, her evidence. So it is important to consider just what Diana said. Her evidence was that she was sitting in the appellant's car alongside and facing towards the appellant; that the respondent's car was then, to use her own words, "as far away as I am from the end of the Court", which his Honour took to be approximately 45 to 50 feet away. I am taking this to be 45 feet because the evidence for the appellant should not be construed more favourably for the appellant, or less favourably for the respondent, than its acceptance necessitates. Diana also said that she herself was then about 2 feet back from the fence line of David Street. It follows from Diana's evidence that the appellant's car was then straddling the northern fence line of David Street, the front part of the car being about 4 feet within the intersection of David and Abbott Streets; and that the respondent's car was about 39 feet and the appellant's car about 23 feet from the point of the collision. I arrived at these figures in the following way: his Honour found that the respondent's car was travelling along David Street with its right-hand wheels on the centre line of that street, which was 66 feet 8 inches wide from fence line to fence line. However, the centre line was no doubt that of the sealed strip and so was 30 feet from the northern fence line of David Street, according to a sketch tendered in evidence. This would place the mid-point of the bonnet of the respondent's car about 27 feet from the northern fence line of David Street. I emphasise this because the damage done to each car was in the front about the grille, and at the right corner of the appellant's car and the left corner of the respondent's. If both cars travelled straight ahead as was likely to have been the case then the appellant's car had to travel about 23 feet to the point of collision and the respondent's car about 39 feet. The line joining the two cars and the line joining each car to the point of collision formed a right-angled triangle with a hypotenuse of about 45 feet and sides of about 23 feet and 39 feet respectively. In arriving at 23 feet I am, for the reasons

already stated, taking the view of Diana's evidence most favourable to the respondent. The shorter the distance the appellant had to travel to the point of collision after Diana first saw the respondent's car the less favourable was the position for the respondent. As the fence line of Abbott Street on Diana's right was about 39 feet away from the right side of the appellant's car, it was that distance from the point where the respondent's car crossed that fence line to the point of collision and so the respondent's car had just reached that fence line when Diana first saw that car. This shows that the appellant's car reached the intersection before the respondent's car. I arrive at this calculation of 39 feet by taking Diana to have been about 27 feet from the fence line of Abbott Street on her left, and not 22 feet as found by his Honour. This is because she said she was 16 or 17 feet from the kerb and the footpath was 10 feet 4 inches wide. But she was sitting on the left side of the car and so was about 3 feet from the right side, which was then about 30 feet from the left fence line of Abbott Street and about 39 feet from the right fence line of that street, which was 69 feet wide from fence line to fence line. Again I am taking the view of Diana's evidence most favourable to the respondent.

It appears then that in crossing the intersection and in attempting to cross the path of and before the appellant's car the respondent drove his car more than half as fast again as the appellant's car was driven without having, to say the least, any right of way as against the appellant; and so the culpability of the respondent was greater than that of the appellant in the circumstances. The danger in crossing an intersection of city streets, even at midnight, without keeping a proper look out is increased with the speed of the car. And the greater the speed the less the care displayed.

I am not prepared to find that because of the "Give Way" sign, which after all was not a prescribed sign nor erected at the entrance of a "right-of-way" street, the respondent had a greater duty of care than that imposed on him independently of that sign, that is to say, the duty to look to the left before entering the intersection.

It follows that, in my opinion, both drivers were at liberty to enter the intersection without stopping, subject to keeping a proper look out which, however, each failed to do. That was the position even though the appellant was entitled to regard the sign as a prescribed sign and Abbott Street as a "right-of-way" street and her culpability is to be determined subjectively. But, in my opinion, the conduct of the respondent was much more culpable than the appellant's because of the far greater speed at which he drove his car across the intersection and because he attempted to cross the path of and before the appellant's car without having any right of way as against the appellant. If, as the trial judge found, the appellant's car was travelling at 20 miles per hour it follows that the respondent's car was travelling not about 25 miles per hour as his Honour found, but about 34 miles per hour. This was by no means a negligible difference.

It is true that only a meticulous adherence to Diana Archer's estimates warrants these calculations; but there is no alternative as we are bound by his Honour's "entire" acceptance of her evidence and so must give effect to it.

In view of the facts as I see them I think that the respondent was twice as much to blame as the appellant for the collision and that the damages should be apportioned in the ratio of two to one against the respondent.

I would allow the appeal and increase the damages awarded to the appellant to £5,888 and vary the judgment of the Supreme Court accordingly.