63/80

HIGH COURT OF AUSTRALIA

JONES v DUNKEL

Dixon CJ, Kitto, Taylor, Menzies and Windeyer JJ

25-26 November 1958; 3 March 1959

[1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395

CIVIL PROCEEDINGS - NEGLIGENCE – ACTION – COLLISION BETWEEN MOTOR VEHICLES – NO DIRECT EVIDENCE OF NEGLIGENCE – MATTER OF INFERENCE FROM PROVED FACTS – SUFFICIENCY OF FACTS TO SUPPORT INFERENCE – PRACTICE – DIRECTION TO JURY – INFERENCE OF NEGLIGENCE OPEN ON PROVED CIRCUMSTANCES – WHETHER INFERENCE SHOULD BE DRAWN – DEFENDANT TO EXPLAIN FACTS FROM WHICH INFERENCE SOUGHT TO BE DRAWN – FAILURE OF DEFENDANT TO GIVE EVIDENCE – WHAT RELIANCE TO BE PLACED BY JURY ON SUCH FAILURE IN DECIDING WHETHER OR NOT TO DRAW INFERENCE – NATURE OF DIRECTION TO JURY.

J. a truck driver was killed when his truck collided with a diesel truck driven by Mr Hegedus (H.). J's widow brought proceedings under the *Compensation to Relatives Act* 1897-1946 (NSW) against the owner and the driver H. alleging that J's death had been occasioned by the negligence of H. There was no eye-witness to the collision which took place in darkness. H. some two or three days after the accident made a statement in writing in portion of which he said that he was "travelling down a slight grade at a speed of about thirty-five miles per hour and had just taken a right-hand bend in the roadway when I saw a vehicle coming from the opposite direction. The lights of the oncoming vehicle appeared to be bright. I applied my brakes and I do not remember anything further. Light rain was falling at the time and the roadway was wet and slippery." H. did not give evidence at the hearing of the action. The trial judge refused an application for a verdict by direction by the defendants, in whose favour the jury after retirement returned a verdict.

In the course of his summing-up the trial judge referred to the fact that H. had not given evidence and told the jury that H's counsel was within his rights in not calling H. and that the fact that H. had not been called did not absolve J's widow from adducing some evidence of the facts, the onus being upon her to prove the facts, though very slight evidence pointing to their existence might be treated as sufficient to justify the jury in holding that they did exist. At the conclusion of the summing-up and in response to a question directed by a juror specifically to the significance to be attributed to the failure of H. to give evidence the trial judge told the jury that the fact that the defendant driver had not given evidence left them in the position that they could accept the facts given by the plaintiff as proved, and that the question for them then was whether they thought that on the proved facts an inference of negligence ought to be drawn.

HELD:

1. Per Kitto, Menzies and Windeyer JJ (Dixon CJ and Taylor J dissenting). The foregoing facts furnished material from which the jury might legitimately have concluded that H. the driver of the diesel truck was guilty of negligence and thereby caused the death of the deceased.

Holloway v McFeeters **[1956] HCA 25; (1956) 94 CLR 470 at pp480, 481 referred to.**

2. Per Kitto, Menzies and Windeyer JJ (Dixon CJ and Taylor J expressing no opinion). The direction so given was incomplete in that the jury should have been told that any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied upon as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence. This incompleteness amounted to a misdirection and accordingly there should be a new trial.

Black v Tung **[1953] VicLawRp 84; (1953) VLR 629, at p634; [1953] ALR 1012, and**
Waddell v Ware **[1957] VicRp 4; (1957) VR 43; [1957] ALR 468, referred to.**

KITTO J: 1. Undoubtedly the evidence bearing upon the cause of the collision was meagre in the extreme, but in my opinion there was material from which the jury might legitimately have concluded that the death of the plaintiff's husband resulted from negligent conduct on the part of Hegedus. The conclusion, it is true, could not have been reached save by inference from the facts concerning the road and the two vehicles, which were deposed to by the witnesses who came upon the scene shortly after the collision; and I agree that no ground for an inference is

to be found in general considerations as to the likelihood of negligent conduct occurring in the conditions which existed at the time and place of the collision. One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed. I therefore agree that in the present case a verdict for the plaintiff could not properly have been based upon such a general reflexion as that a collision on a curve, where the road is substantially banked with a fall to the inside, and where the vehicle with the outside running is travelling downhill, is more likely to have been caused by the driver of that vehicle cutting the corner than by the driver of the opposing vehicle swinging wide. But there are some specific primary facts which the jury could have found on the evidence presented to them and which, if found, would suggest, as it seems to me, that the collision probably occurred on the diesel truck's wrong side of the road and therefore, *prima facie* as a result of negligent driving by Hegedus.

2. The facts to which I refer are these. The road was about twenty-eight feet wide, with a bitumen strip twenty feet wide down the middle and dirt shoulders four feet wide. The road surface was wet. The International truck, which was entitled to the inside running, was found afterwards, according to Constable Heyman, with its near-side front wheel against the bank of the hillside into which the road had been cut, and with its off-side rear wheel about seven feet in from the edge of the bitumen. The witness said that the vehicle was damaged on the off-side, about the centre of the front wheel; the (off-side) mudguard was torn away and pushed back against the off-side door; the windscreen was broken; and the steering wheel and the cabin were pushed back towards the front seat. The witness thought there was damage to the front near-side where the truck had gone into the bank. The same witness described the diesel truck, which Hegedus had been driving, as badly damaged across the front and as having had its near-side door torn off and lying down the embankment which formed the outside edge of the curve of the road. This truck was found, after the collision, standing about twenty paces behind the International, facing in the same direction as the International, and with its nearside wheels about a foot off the bitumen. According to the evidence, there were no marks, either on the bitumen strip or on the dirt shoulder, to suggest anything about the course either vehicle had followed, except marks indicating that the diesel truck had slid backwards, to some undefined extent, to the position in which it was found. It remains only to add that the diesel truck was described by Constable Heyman as having an overall length of about twenty feet.

3. From these facts, if the jury accepted the evidence about them, it seems reasonable to infer that the vehicles collided with their offside headlights against one another, that the International was already, or became by force of the collision, turned at an angle towards the bank, and that the diesel truck, while forcing the front end of the International against the bank, itself slewed completely round behind the International so as to face in the direction from which it had come. The crucial question is: where on the roadway were the vehicles when the first impact occurred? It seems to me that the positive evidence that the dirt shoulder on the outside of the curve showed no sign of skidding wheels, although it was wet, would justify an inference that the diesel truck in its gyrating movement round the International did not carry its rear wheels off the bitumen. That would mean that the front end of the diesel truck could not have been closer to the edge of the bitumen on its correct side than say fifteen feet, at the moment when it was at right-angles to the direction of the road. That moment could hardly have been later than the moment when the front-end of the diesel was against the driver's door of the International. On this footing, the driver's door of the International would probably have been at that moment not less than five feet in from the centre line of the road, on the International's near-side door (if, as the evidence suggests, the vehicle was nearly eight feet wide) almost thirteen feet from the centre-line, or a foot from the bank; and that is just about where Constable Heyman said that he found it afterwards. If this is correct, the only alternative to concluding that the collision took place on the International's side of the road is to suppose that in the fraction of time between the first impact and the crushing of the driver's door the diesel hurled the International's front end, notwithstanding its momentum, more than five feet across the road. When it is remembered that the rear wheels of the diesel were already skidding, or were made by the impact itself to skid, around the International, so that the pressure was not completely head-on, the jury might well have thought that the supposition should not be entertained.

4. Of course there is much room for inexactness in the figures I have given; but, whatever

modification they may be considered to require the fact which I think that the jury would have been justified in regarding as critical (assuming that they had found it to be a fact) is that the diesel truck, though in all probability it swung round the International with its nose against that vehicle, left no mark of the sideways drag of its back wheels on the outside shoulder of the road. From this, it seems to me, the inference is open that when the collision occurred no part of the International was as close to the outside edge of the bitumen as ten feet – in other words that when the collision occurred the International was wholly on its correct side of the road and the diesel truck was at least partially on its wrong side of the road.

5. Whether that inference ought to be drawn was, of course, a question for the jury. But they should not have been sent away to consider that question without proper guidance as to the relevance of the defendants' failure to put Hegedus into the witness-box. On that question a juryman actually asked the trial judge to supplement his summing-up, and counsel for the plaintiff submitted that if there was evidence to go to the jury they were entitled to take into consideration (meaning, obviously, on the question whether they should infer negligence) that "there was one person who could have told them the facts and they have no answer from that person". In my opinion, the direction which the judge proceeded to give was insufficient, and, because of its incompleteness, was incorrect. His Honour told the jury that the fact that Hegedus had not gone into the box left them in this position, that they could accept the facts given by the plaintiff as proved, and that the question for them then was whether they thought that from the proved facts an inference of negligence ought to be drawn. It was right enough to point out, in effect, that the evidence given might be the more readily accepted because it had been left uncontradicted, and that the omission to call Hegedus as a witness could not properly be treated as supplying any gap which the evidence adduced for the plaintiff left untouched. But what should have been added, and not being added was in the circumstances as good as denied, was that any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence. The jury should at least have been told that it would be proper for them to conclude that if Hegedus had gone into the witness-box his evidence would not have assisted the defendants by throwing doubt on the correctness of the inference which, as I have explained, I consider was open on the plaintiff's evidence. In my opinion what his Honour said on the point amounted to a misdirection.

6. For these reasons, I would allow the appeal and direct a new trial of the action.

MENZIES J: 1. The action out of which this appeal arises was one by the widow of a man who had been killed in a collision between two trucks, one of which was being driven by the deceased and the other by the defendant Hegedus. The plaintiff alleged that the collision was caused by the negligent driving of Hegedus and the most important issue was whether Hegedus was driving upon his correct side of the road. Upon this there was no direct evidence but the plaintiff relied upon evidence which showed: (i) that Hegedus was driving downhill on the outside of a curve whereas the deceased was driving uphill on the inside of a curve on a road cambered towards the inside of the curve; (ii) after the collision the deceased's truck was on its correct side of the road with its near-side front wheel against the bank at the edge of the road and its off-side rear wheel seven feet on the bitumen; (iii) after the collision the defendants' truck was on the same side of the road as the other vehicle, facing the same way but some twenty paces behind that vehicle and with its near-side wheels about one foot off the bitumen; (iv) the damage to the deceased's truck was on its right-hand side as it faced, whereas the damage to the defendants' truck was across the front; (v) there were no marks upon the road which showed how the vehicles came to be in the position in which they were found after the collision but on a road which was about thirty feet wide and having a strip of bitumen twenty feet wide the defendants' truck, which was twenty feet long, had both passed the deceased's truck and swung completely around to face the direction opposite to that in which it was going.

2. On this the trial judge held, and I think correctly held, that there was a case to go to the jury. As has been said, "Inferences from actual facts that are proved are just as much part of the evidence as those facts themselves. In a civil cause 'you need only circumstances raising a more probable inference in favour of what is alleged . . . where direct proof is not available it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they

must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is mere matter of conjecture: see per Lord Robson, *Richard Evans & Co Ltd v Astley* (1911) AC 674, at p687 . . . . All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood'. These passages are extracted from the unanimous judgment of this Court (Dixon J, as he then was, Williams, Webb, Fullagar and Kitto JJ), in *Bradshaw v McEwans Pty Ltd* ([1951] HCA 480; Unreported, delivered 27th April 1951).": see *Holloway v McFeeters* [1956] HCA 25; (1956) 94 CLR 470, at pp480 481. The direct evidence did, I think, make it more probable that the collision occurred on the deceased's side of the road than on Hegedus's side of the road. The jury, however, found for the defendants and an application for a new trial on the ground of misdirection was refused by the Full Court of New South Wales. It is from that refusal that this appeal is brought.

3. Before this Court it was argued that the way in which the trial judge put the matter to the jury did not do justice to the plaintiff's case as a whole, but because of the *Supreme Court Rules*, OXXII, r15, I am not prepared to consider that argument. It was further argued that there were a number of particular misdirections. As to these, some are not open to the appellant by reason of the rule to which I have already referred, and others are without substance but there is one substantial matter that is, I think, open to the appellant and that concerns the trial judge's direction as to the significance that the jury were entitled to give the fact that Hegedus did not give evidence.

4. Nearly all that is known about what Hegedus did either before or after the collision appears from a statement that he dictated to a policeman and signed three days after the collision while he was still in hospital. This statement is as follows: "I am a lorry driver and I reside at Hume Highway, Mittagong. At about 8.10 p.m. on the 15th of January 1953 I was driving a Seddon diesel truck No. AGY 109 in a southerly direction on the Hume Highway about 12 miles south of Berrima. The truck is owned by J Dunkel of 12 Hereward Street, Maroubra Beach. The truck was empty and I was on my way to Marulan to load limestone. I was travelling down a slight grade at a speed of about 35 miles per hour and had just taken a right hand bend in the roadway when I saw a vehicle coming from the opposite direction. The lights of the on-coming vehicle appeared to be bright. I applied my brakes and I do not remember anything further. Light rain was falling at the time and the roadway was wet and slippery. I have been driving heavy vehicles for about 2½ years and I have not previously been involved in an accident." The only additional information is that he was taken away from the place of the collision in an ambulance and that near a spot off the roadway and forty feet distant from his truck there was found the near-side door of his truck and blood upon the ground.

5. The summing-up proceeds, and I think correctly proceeds, on the footing that Hegedus might have been called as a witness and had he been called he might have been able to give information beyond that which appears from the statement I have quoted.

6. In the course of his summing-up the trial judge said two things upon the use the jury might make of Hegedus's failure to give evidence. The first was that counsel for the defendants upon whom the responsibility for the conduct of the defendants' case rested was within his rights in not calling Hegedus, and secondly, to use his own language, "the fact that Mr Hegedus has not been called does not absolve the plaintiff from adducing some evidence of the facts. The onus is upon her to prove the facts but very slight evidence pointing to their existence may be treated as sufficient to justify you in holding that they do exist."

7. After the judge had finished summing up a juryman asked a direct question seeking further guidance upon the significance of the fact that the defendant Hegedus could have given evidence and did not. His question was: "Rightly or wrongly I have it in my mind that the defendant could have come here today and given evidence. Am I entitled to regard that in my mind as a weakness in the case of the defendants, that he did not?" The judge said: "Counsel for the defendant has the responsibility for the conduct of the defence. Counsel decided not to call evidence, and having directed you already with regard to that matter I do not propose to say anything more to you." Counsel for the plaintiff then intervened and in the course of doing so referred to what Jordan

CJ had said in *De Gioia v Darling Island Stevedoring and Lighterage Co Ltd* (1941) 42 SR (NSW) 1; 59 WN (NSW) 22; and submitted "when the matter goes to the jury then I do submit that the jury are entitled to take into consideration that here was a case where on the merits there was one person who could have told them the facts and they have no answer from that person". Counsel for the defendants then submitted that the plaintiff had the onus of proof "and the fact that the defendant does not call any evidence does not absolve the plaintiff from proving her case". The trial judge then gave a further direction as follows: "This is the position, the defendant having called no evidence it is a matter of common sense that you should accept the plaintiff's evidence with respect to the facts as being accurate. The fact that the defendant Hegedus has not gone into the box and offered any explanation leaves you in this position, that you can accept the facts given by the plaintiff as proved, but the question then is whether you should find negligence against him as a matter of inference to be drawn from those facts, and that is the question for you, whether you think from the proved facts an inference of negligence ought to be drawn. If you think so, the plaintiff is entitled to your verdict. If, on the other hand, you think no such inference can be drawn then the verdict must go against the plaintiff and in favour of the defendant."

8. I regard this direction as incomplete and because the trial judge gave it as part of his answer to the juryman's question and after counsel for the plaintiff had objected to the earlier part of that answer, I think OXXII, r15, does not prevent the misdirection being taken as a ground of appeal.

9. In my opinion a proper direction in the circumstances should have made three things clear: (i) that the absence of the defendant Hegedus as a witness cannot be used to make up any deficiency of evidence; (ii) that evidence which might have been contradicted by the defendant can be accepted the more readily if the defendant fails to give evidence; (iii) that where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference.

10. Taking the summing-up as a whole I think the first and second matters to which I have referred were covered adequately but I do not think that the third was referred to at all and in giving the guidance that the juryman sought not only was no reference made to it but the distinction made in the course of the summing-up between "proved facts" and "inferences" was emphasised and the impression was conveyed that once the jury came to the point of drawing inferences the defendant's absence from the witness-box could have no significance. To use the words of Smith J in *Black v Tung* [1953] VicLawRp 84; (1953) VLR 629; [1953] ALR 1012: "The charge therefore withdrew from their consideration a matter which, if there was evidence proper to be submitted to them, they were entitled to regard as rendering more probable the inferences as to negligence and causation contended for by the plaintiffs" (1953) VLR at pp634, 635 . In my opinion this entitled the plaintiff to a new trial.

11. The Full Court was, it appears, inclined to think that there was no case to go to the jury and being of that view it rejected the argument that the failure of Hegedus to give evidence could be relied upon to supply the deficiency of evidence. I agree with the Full Court that the failure of Hegedus to give evidence could not be used to fill gaps or to convert suspicion into inference but I treat this as a case where the failure to give evidence could be used to assist the jury in deciding which of the inferences open to them they should draw.

12. For the foregoing reasons I think the appeal should succeed and that a new trial should be ordered.

WINDEYER J: 1. I consider that there should be a new trial in this case.

2. I reach that conclusion with misgiving, because of the different view of some members of this Court and of the judges who sat as the Full Court of the Supreme Court. Furthermore, I think that, speaking generally, it might be better if questions of the sufficiency of a summing-up at *nisi prius* could be settled finally in the Supreme Court. ...

5. The main facts are set out in the judgment of the learned Chief Justice of New South

Wales. It is enough to say here that, from the evidence, the manner in which the accident occurred could, at best, be only a matter of inference; and whether there could be any rational inference, as distinct from mere conjecture, was debatable and debated. Any hypothesis of what occurred runs into some difficulty. How did it come about that, within the very short time which elapsed before the witness, Burdus, came on the scene, the two vehicles, both badly damaged, were at a standstill on the western side of the road, with the deceased man dead or dying in the cabin of his truck; and with the truck which the defendant, Hegedus, had been driving, some twenty paces behind, and both trucks facing in the same direction, north? And how did it happen that when, shortly afterwards, the police came, they found the nearside door of the truck driven by Hegedus, which had been broken from its hinges, lying forty feet away below the bank on the eastern side of the road, with blood on the ground beside it? And how did two heavy vehicles collide, and one finish facing in the opposite direction from that in which it had been travelling before the accident, without leaving marks on the road?

6. At the trial the evidence led by the plaintiff established the circumstantial details. No evidence was led as to where Hegedus was or what he was doing, either when Burdus first arrived on the scene or when he later came back with the ambulance. And no evidence was led as to whether Hegedus said anything to either Burdus or the ambulance superintendent who took him to hospital. However, a signed statement, which Hegedus had made three days after the accident when a police officer visited him in hospital, was put in evidence for the plaintiff. In it he said he was travelling to Marulan, that is in the opposite direction from that in which the deceased man, Jones, was travelling. The statement included the following passage, elicited by the policeman's question "What happened?" "I was travelling down a slight grade at a speed of about 35 miles per hour and had just taken a right hand bend in the roadway when I saw a vehicle coming from the opposite direction. The lights of the on-coming vehicle appeared to be bright. I applied my brakes and I do not remember anything further. Light rain was falling at the time and the roadway was wet and slippery. I have been driving heavy vehicles for about 2½ years and I have not previously been involved in an accident."

7. When the plaintiff's case was closed counsel for the defendant applied for a verdict by direction on the ground that it was not open to the jury to infer that the accident was caused by the negligence of the defendant. The learned trial judge refused this application saying: "If a plaintiff leaves the evidence in a state where a jury are to speculate or to guess, it might be said that there is no evidence of negligence, but a jury is entitled to draw inferences from proved facts. In dealing with Mr Ross' application, I have to consider whether there are proved facts from which reasonable men might properly draw an inference in favour of the plaintiff's case. The question whether such inference is proper or not in this case I think should be left to the jury, but I propose to warn them that if they are of opinion that the case is left in such a state that they must speculate or guess what happened, their verdict must go to the defendant."

8. Counsel then addressed the jury. What they said is not before us. But it is apparent from passages in the summing-up that the plaintiff's counsel laid stress, as naturally he would, on the failure of the defendant to call evidence. In his summing-up his Honour adverted more than once to this matter. He said: "Here, let me say, Mr Ross who appeared for the defendants was within his rights in adopting the course which he did. He elected not to call evidence and that is a practice which is adopted very often in these courts from day to day and you must not criticise Mr Ross for his conduct of the case or his decision to call no evidence." And: "The fact that Mr Hegedus has not been called does not absolve the plaintiff from adducing some evidence of the facts. The onus is upon her to prove the facts, but very slight evidence pointing to their existence may be treated as sufficient to justify you in holding that they do exist; and so I come to this very important question, what are the proved facts?"

9. He warned the jury not to mistake mere conjecture for reasonable inference; and then, after some generalities about speed and rule of the road, he referred to some of the theories and suggestions which counsel had advanced and said: "With this set of facts, the law to be applied is this, where direct proof is not available, it is enough if the circumstances appearing in the evidence give rise to a reasonable and definite inference; but they must do more than give rise to conflicting inferences with equal degree of probability so that the choice between the two is a mere matter of conjecture. Applying those principles to this case can you really say whether Jones was on his correct side and Hegedus was on his incorrect side?"

10. This was apposite. At the end of the summing-up, and as the jury were about to retire, a juryman said to his Honour: "Rightly or wrongly I have it in my mind that the defendant could have come here to-day and given evidence. Am I entitled to regard that in my mind as a weakness in the case of the defendants, that he did not?"

11. The proper answer to this question, if an answer were to be given in one word, was "yes". The matter is discussed in Wigmore on Evidence under the heading "Conduct as Evidencing a Weak Cause"; and those were the juryman's very words. What his Honour actually said was: "Counsel for the defendant has the responsibility for the conduct of the defence. Counsel decided not to call evidence, and having directed you already with regard to that matter I do not propose to say anything more to you." Whatever the learned judge had said earlier, and whether or not it was sufficient, clearly the juryman felt the need of further guidance. Lawyers are accustomed to the concept of a civil action as a matter to be decided on the evidence produced by the parties, one of them bearing the burden of proof. They do not always appreciate that laymen may well feel, not only that such proceedings are not well designed to get at the real truth, but that they ought to be. Jurymen seeking to get at the truth might naturally have qualms when the only man who was able to tell them what really happened did not vouchsafe to do so. However, the matter did not stop with his Honour's statement. A discussion ensued, in which counsel for both parties addressed his Honour, and in which the judgment of Jordan CJ in *De Gioia v Darling Island Stevedoring & Lighterage Co Ltd* (1941) 42 SR (NSW) 1; 59 WN (NSW) 22 was referred to. Mr Bowring, the plaintiff's counsel, put the view for which he was contending succinctly: "If the judge says there is no evidence to go to the jury that is an end of the matter; but when the matter does go to the jury, then I do submit that the jury are entitled to take into consideration that . . . there was one person who could have told them the facts and they have no answer from that person".

12. In the upshot his Honour said to the jury: "This is the position, the defendant having called no evidence, it is a matter of common sense that you should accept the plaintiff's evidence with respect to the facts as being accurate. The fact that the defendant Hegedus has not gone into the box and offered any explanation leaves you in this position, that you can accept the facts given by the plaintiff as proved, but the question then is whether you should find negligence against him as a matter of inference to be drawn from those facts, and that is the question for you, whether you think from the proved facts an inference of negligence ought to be drawn. If you think so, the plaintiff is entitled to your verdict. If, on the other hand, you think no such inference can be drawn, then the verdict must go against the plaintiff and in favour of the defendant."

13. The jury then retired, and returned later with a verdict for the defendants. On the plaintiff's moving in the Full Court for a new trial, some question arose whether the plaintiff could object to the direction finally given by the learned judge in response to the juryman's question. It was said no request had been made to him to deal further with it than he had. It seems to me, however, that the question of what was a proper direction in the circumstances was sufficiently raised at the trial. It is true that Mr Bowring did not, having interrupted during his opponent's address and at the end of the summing-up, seek to continue the discussion after his Honour had said what finally he did. But he had, with it seems to me proper persistence, made the point that the juryman's question should be correctly answered; and he did not, as I read it, acquiesce in the answer finally given. It was not necessary for him to do more than he did (cf. *Blackler v McElhone* (1913) 13 SR (NSW) 487; 30 WN (NSW) 126 , *Petree v Knox* (1917) 17 SR (NSW) 503; 34 WN (NSW) 235). Moreover, the question had become one between the judge and the jury. His Honour's direction to the jury really amounted to no more than saying that, the defendant having called no evidence, the facts proved by the plaintiff were uncontradicted, "but the question then is whether you should find negligence as a matter of inference to be drawn from those facts". But silence may amount to much more than an acquiescence in the primary facts. It may be eloquent in support of an inference to be drawn from those facts. Until facts were proved from which an inference of negligence could be drawn, the defendant was not called upon to say anything. His Honour, however, had thought that such an inference could be drawn; he had refused to direct a verdict for the defendant, and had left the matter to the jury. Having done so, he should have directed them appropriately on the conclusions they might draw from the silence of Hegedus. In my view he did not. Therefore, whether there should now be a new trial really depends upon whether he should have left the case to the jury at all. If he should not have done so, then his misdirection becomes irrelevant. In the Full Court all the learned judges thought that the trial judge should

have directed a verdict for the defendants; and this really determined their views on the questions argued.

14. I, however, think there was evidence to go to the jury. It is, I realise, always possible to confuse mere conjecture with reasoned conclusion (see per Jordan CJ in *Bell v Thompson* (1934) 34 SR (NSW) 431; 51 WN (NSW) 138), and to regard the mere fact that circumstances are consistent with a conjecture as corroboration of it. Nevertheless, I think that a jury properly directed might – not necessarily should – reasonably infer that immediately before the vehicles collided that driven by Hegedus was on the wrong side of the road. A jury could, in my view, properly think it more probable that this was so than that it was not (*Cofield v Waterloo Case Co Ltd* [1924] HCA 18; (1924) 34 CLR 363, per Isaacs J (1924) 34 CLR, at p375; *Holloway v McFeeters* [1956] HCA 25; (1956) 94 CLR, at pp480, 481 and *Carr v Baker* (1936) 36 SR (NSW) 301; 53 WN (NSW) 110, per Jordan CJ (1936) 36 SR (NSW), at p306; 53 WN (NSW) at p112). The cause of the collision can be only a matter of conjecture; but on which side of the road it occurred is, I think, susceptible of rational inference. If there is to be a new trial, it is not desirable to say more than that, in my view, an inference could properly be drawn from the positions where the vehicles were found immediately after the collision, taken in conjunction with the nature of the damage to each, the gradient and conformation of the road and other circumstances. If immediately before the collision Hegedus's vehicle was on the wrong side of the road, that, unexplained, is, I consider, some evidence of negligence on his part. I should add that I attach no weight to the fact that, in his statement made in hospital, Hegedus did not say he was on his correct side. It seems to me that his Honour was right in telling the jury that the fact that Hegedus did not in this statement say he was on his correct side could not rationally lead to an inference that he was on his incorrect side. I think that little, if anything, is to be gleaned from the statement, which to me seems quite inconclusive on any critical matter. It may be of some slight significance that Hegedus, when he made this statement, did not attribute the accident to anything the other vehicle did; but that is not an admission that he was himself to blame. It may also be of some significance that the question "how did it happen" elicited, among other remarks, "I applied my brakes and I do not remember anything further. Light rain was falling at the time and the roadway was wet and slippery". But I consider the trial judge was quite right in thinking that no conclusion could be drawn from the statement alone either to inculpate or exculpate Hegedus.

15. As I think that the matter was properly left to the jury, I turn to what directions the judge should have given them concerning the failure of Hegedus to give evidence. I think, firstly, that in referring to his statement, his Honour rightly told the jury that they could have regard to it as recording what Hegedus had said; and I can see little force in counsel's objection to his Honour's, perhaps incautious, description of it as "his evidence"; but, in the circumstances, it would have been better if he had explained that it was unsworn, and that, as Hegedus had not been called, there was no opportunity of testing it by cross-examination. Then, I think, his Honour should, when the juryman asked his question, have given an answer in accord with the general principles as stated in *Wigmore on Evidence* 3rd ed. (1940) vol 2, s285, p162 as follows:

> "The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which made some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted."

16. This is plain commonsense. If authority be needed, two passages from *R v Burdett* [1814-23] All ER 80; (1820) 4 B & Ald 95 (106 ER 873) may be cited. Abbott CJ said:

> "No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected." (1820) 4 B & Ald, at pp161; 162 (106 ER, at p898) And Best J said: "Nor is it necessary that the fact not proved should be established by

> irrefragable inference. It is enough, if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just." (1820) 4 B & Ald, at p122 (106 ER, at p883)

17. As Wigmore points out (*Evidence* 3rd ed. (1940) vol 2, ss289, 290, pp171-180), exactly the same principles apply when a party, who is capable of testifying, fails to give evidence as in a case where any other available witness is not called. Unless a party's failure to give evidence be explained, it may lead rationally to an inference that his evidence would not help his case. These considerations have been discussed or applied in the following among other cases in Australian Courts: *Morgan v Babcock & Wilcox Ltd* [1929] HCA 25; (1929) 43 CLR 163 at p178; [1929] ALR 313, per Isaacs J (1929) 43 CLR 163, at p178 ; *Insurance Commissioner v Joyce* [1948] HCA 17; (1948) 77 CLR 39; (1948) 2 ALR 356; (1948) 22 ALJR 278; per Rich J (1948) 77 CLR, at p49 and per Dixon J (1948) 77 CLR, at p61; *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671; *Black v Tung* [1953] VicLawRp 84; [1953] VLR 629; [1953] ALR 1012; *Waddell v Ware* [1957] VicRp 4; (1957) VLR 43 and *Ex parte Jones; Re Macreadie* (1957) 75 WN (NSW) 136. Clearly, it is not necessary that any particular form of words be used in explaining all this to a jury. Every case is different; and standardised directions are not necessary.

18. The learned judge more than once told the jury that the responsibility for the decision that Hegedus would not give evidence lay with his counsel. This was well enough; but the way in which he emphasised it could lead the jury to think that Hegedus's silence somehow lost significance because it was on his counsel's advice that he was silent. It did not. The true inference in the circumstances was that counsel, on his instructions, thought the defendants were more likely to succeed if he kept Hegedus out of the box. One aspect of the matter does, however, need further consideration. Obviously, just as no inference can be drawn from the defendant's silence until facts be proved requiring an answer, so no inference can be drawn from his silence if he be precluded from answering. Mr Ross, naturally and properly, contended at the conclusion of the plaintiff's case that there was no case to answer. The judge took a different view; and, as I have said, in my opinion he was right. But if, as has been suggested, the consequence of seeking a ruling that there is no case to answer be to prevent the defendant calling evidence if the judge refuses so to rule, then a difficulty arises. For what, it might be argued, can silence mean, if speech would not be heard? ...
