[HIGH COURT OF AUSTRALIA.]

LUXTON . . . . . APPELLANT;
PLAINTIFF,

AND

VINES . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1952.

MELBOURNE, *Feb.* 28, 29; *April* 4.

Dixon, McTiernan, Webb, Fullagar and Kitto JJ.

Negligence—Evidence—No direct proof—Circumstantial evidence—Balance of probabilities.

In an action for damages for negligence a finding that the negligence of the defendant occasioned the injury complained of may be supported—where direct proof is not available—by circumstantial evidence 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 degrees of probability so that the choice between them is mere matter of conjecture; but, if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought, then—though the conclusion may fall short of certainty—it is not to be regarded as a mere conjecture or surmise.

The plaintiff felt ill while riding his motor cycle along a road at night. He left the cycle at the side of the road and set out to walk to the nearest town, keeping to the extreme left side of the road. He looked back and saw the lights of a motor car coming towards him from the rear. He did not remember anything else until he found himself lying in the roadway. He had sustained injuries which—according to medical evidence—were of a character unlikely to have been suffered if he had merely fallen through illness or had been run over after having fallen but likely to have been caused by his having been struck with considerable violence while standing upright. He brought an action against a nominal defendant under s. 13 (1) of the *Motor Car (Third-Party Insurance) Act* 1939 (Vict.), alleging negligence against an unidentified motor-car driver.

Held, by *Dixon*, *Fullagar* and *Kitto* JJ. (*McTiernan* and *Webb* JJ. dissenting), that the circumstances were not sufficient to support a finding of negligence on the part of a supposed driver of a motor vehicle.

Richard Evans & Co. Ltd. v. *Astley*, (1911) A.C. 674, at pp. 678, 687, referred to.

Decision of the Supreme Court of Victoria (Full Court) affirmed.

APPEAL from the Supreme Court of Victoria.

In the Supreme Court of Victoria Frank William Luxton brought an action against Edward Vines, who was sued as the nominal defendant named by the Minister pursuant to s. 13 of the *Motor Car* (*Third-Party Insurance*) *Act* 1939 (Vict.) in respect of bodily injury to the plaintiff alleged in the statement of claim to be " caused by or arising out of the use of a motor vehicle the identity of which cannot be established ". The statement of claim also alleged, by pars. 3-5, that on 27th July 1950 the plaintiff was walking along the road from Clunes to Ballarat, Victoria, in the vicinity of Broadway Park when he was struck by a motor vehicle the identity of which could not be established ; the collision was caused by the negligence of the driver of the motor vehicle ; as a result of the collision the plaintiff suffered injury.

The defendant, in his defence, did not admit any of the allegations in pars. 3-5 of the statement of claim ; and he alleged contributory negligence on the part of the plaintiff.

The plaintiff, in his reply, joined issue and alleged that, if he was guilty of contributory negligence, the driver of the unidentified motor vehicle could by the exercise of reasonable care have avoided colliding with the plaintiff and/or could have avoided the result of the plaintiff's negligence.

At the trial of the action before *Lowe* A.C.J. and a jury, the plaintiff gave evidence that at about 6.40 p.m. on 27th July he left his home at Clunes Road, Creswick, on his motor cycle with the intention of riding to Ballarat. The night was very dark and wet. At about 7 or 7.15 p.m., when nearing Ballarat, he felt ill. He was subject to sick turns and had on occasions had " black-outs ". He left his motor cycle at the side of the road and proceeded on foot towards Ballarat, keeping to the gravel at the extreme left, or east, side of the road. After he had walked for some 400 yards he turned around and saw the two headlights of a motor vehicle about 100 yards away coming towards him. The next thing he remembered was lying in the roadway, suffering intense pain, and someone bending over him. The man bending over him was the driver of a motor truck which had been travelling towards Ballarat. This man, when twenty-five or thirty yards away, saw the plaintiff lying in the road. He estimated the time as between 7 and 7.30, probably nearer to 7.30 p.m. The plaintiff was found to have suffered severe injuries. The medical evidence was that he would have been unlikely to sustain these injuries if he had merely fallen to the road through losing consciousness and that, if he had fallen for that reason and been run over while lying in the road, he would

H. C. OF A. 1952. LUXTON v. VINES.

probably have sustained injuries of a different character. There was no other evidence as to the way in which the plaintiff sustained the injuries.

Overruling an objection on behalf of the defendant that the plaintiff had not made out a case, *Lowe* A.C.J. left the case to the jury, which returned a verdict for the plaintiff for £1,380. Judgment was entered accordingly.

On appeal by the defendant, the Full Court of the Supreme Court by a majority (*Martin* J. and *Coppel* A.J.) (*Barry* J. dissenting) set aside the verdict and judgment and entered judgment for the defendant.

From this decision the plaintiff appealed to the High Court.

H. T. Frederico, for the appellant. The probabilities favour the hypotheses on which the plaintiff's case depends. If that is so, it is not to the point that the matters given in evidence could fit in with some other hypothesis. The probability is that the plaintiff was struck by a vehicle while he was in an upright position at the side of the road; and it is significant, in that view, that the driver of the vehicle was not to be found. No doubt, the circumstances are susceptible of an innocent explanation; but the absence of an explanation is in the plaintiff's favour, not against him. In view of the short time that appears to have elapsed between the time at which the plaintiff saw the lights of a car overtaking him and the time at which he was found lying in the roadway, the probability is that that car was the vehicle that struck him; and the evidence is more consistent with negligence on the part of the driver than with any other explanation. The evidence was sufficient to support the jury's finding; and the verdict should not be disturbed.

C. A. Sweeney, for the respondent. The most that can be inferred from the evidence is that the plaintiff was struck by a vehicle; there is nothing to warrant an inference that it was a motor vehicle or, if it was, that the driver was negligent. The plaintiff is not assisted by probabilities; there is no one explanation which can be said to be more probable than another. Although the plaintiff's injuries were severe, it is no more likely that they were caused by a motor vehicle than by some other kind of vehicle. As the plaintiff cannot say what happened, his evidence that he had been walking at the side of the road is not conclusive as to his position when he was, supposedly, struck by a vehicle. The place in which he was found lying in the road suggests that his

position changed after he turned around but that he was unconscious of the change or cannot remember it. In any event, the evidence is no more consistent with negligence on the part of a driver of a vehicle than with inevitable accident.

H. T. Frederico, in reply.

Cur. adv. vult.

April 4.

The following written judgments were delivered :—

DIXON, FULLAGAR AND KITTO JJ. The appellant is the plaintiff in an action of negligence who obtained a verdict at the trial and the order from which he appeals sets aside the verdict and enters judgment for the defendant. The defendant, who is the respondent upon this appeal, was sued under s. 13 (1) of the *Motor Car (Third-Party Insurance) Act* 1939 (No. 4688) (Vict.) as a nominal defendant. A plaintiff suing under that provision in respect of bodily injury to himself must prove first that the injury was caused by or arose out of the use of a motor car an expression covering motor vehicles in general, second that the identity of the motor car cannot be established and third that he could have obtained a judgment against the driver of the motor car in respect of such injury.

The appeal turns upon the sufficiency of the evidence adduced at the trial to support a finding upon the first and third of these issues in the plaintiff's favour. The second proposition was clearly made out.

The plaintiff began a journey by motor cycle from Clunes to Ballarat at twenty minutes to seven in the evening of 27th July 1950, a cold and wet winter's night. As he neared Ballarat he felt ill and decided to leave his motor cycle at the roadside and walk on towards Ballarat, hoping to obtain a lift from some motor car travelling in the same direction. The middle of the road is bitumen and on each side there is a gravel strip, flanked by a table drain and long grass. There is no footpath. He said in evidence that he walked on the extreme left-hand side of the gravel as far off the bitumen as he could get, two or three yards off. He estimated the distance he so walked at about 400 yards from the place where he left his motor cycle. Ahead of him was a place of amusement called Broadway Park and he could see the lights of cars which had come from Ballarat turning into it. He said that he turned round looking for cars coming towards Ballarat and saw two lights. He estimated the distance of the lights at 100 yards or possibly 200 yards. The lights were not shining on him. His evidence proceeded :—" When I turned round I had intended to

H. C. OF A. 1952. LUXTON v. VINES. Dixon J. Fullagar J. Kitto J.

hail a car to get a lift into Ballarat. I think that I turned to the left, I cannot recollect clearly whether I turned to my left or right. I am left handed. After turning round and seeing the lights, the next I remember is lying on the roadway on my face and suffering intense pain and somebody bending over me." The man bending over him was in fact the driver of a truck journeying to Ballarat who had seen the plaintiff's form lying on the bitumen roadway. He said that when twenty-five or thirty yards away he saw an object on the road and stopped. He found that it was the plaintiff's body.

The driver of the truck said in evidence that the plaintiff was lying on the west side, that is to say, as you faced Ballarat on the right-hand side of the centre line of the road diagonally across the road. The plaintiff was on the witness' right side. His estimate of the time varied a little. In effect he gave it as between 7 and 7.15 p.m. or a little later, preferring in his evidence in chief the later time.

The injuries received by the plaintiff included a fracture of the femur of the left leg, not the neck of the femur but in the middle third of the shaft, bruising of the back above the left hip bone and of the left shoulder and abrasions and lacerations of the left forehead and face. The right shin was also bruised, but it will be seen that it was on the left side that the plaintiff was chiefly injured. His dentures were found upon the road, broken. The medical evidence was that he would have been unlikely to sustain these injuries had he merely fallen upon the roadway through losing consciousness and that if he had fallen for that reason and then been run over by a passing car while prostrate he would probably have sustained injuries of a different character. In particular it was unlikely that merely falling would break the shaft of the femur and if he had been run over while on the ground soft tissues could hardly have escaped serious and extensive damage. The plaintiff was wearing a leather overcoat, a leather skull cap and high gum boots over his ordinary clothing, a fact of course relevant both to his visibility and to the kind of injury he might be expected to suffer through falling. The truck driver who found him said that it was a very dark wintry evening and there had been falling rain; the road was very dark. He recollected no artificial light at that part of the road. His headlights were, of course, burning. The plaintiff in his evidence described it as a very cold wet night with driving rain, driving into his face from the south, that is, from the direction in which he was travelling. An important matter, no doubt, is the cause of the plaintiff's feeling ill or unwell

so that he decided to desert his bicycle and proceed on foot hoping to obtain a lift. He said in evidence that he felt sick in the stomach and his hands were numb from the driving rain and the cold. In a statement to the police he had said that some years ago he developed a cerebral tumour, approximately ten years ago. He said that two years later he had received surgical treatment for the complaint. He had had several blackouts during that period and since the operation upon him he had had several, the last one, of only a short duration, a few months before the accident. In evidence he placed the time when he entered hospital as some five years ago and he said that it was for examination not treatment. He had understood it was a cerebral tumour, but that proved to be a misapprehension. But, whatever it was, it did produce blackouts, though he had not for a number of years had serious blackouts in which he lost consciousness. Then twelve months ago he had a very minor one after fighting bush fires, but it lasted only a couple of minutes. When they were about to come on he had felt ill beforehand; he had felt dizziness and loss of power in the tongue and hands. A constable of police who had interviewed the plaintiff gave evidence that in answer to a question whether he had been struck by a motor vehicle the plaintiff had replied that no motor vehicle was involved; that he had had a blackout. The plaintiff said that he could not recall saying this; the constable saw him in hospital on the night of the accident and he was dazed. The medical evidence was that as to the events occurring within the two minutes or so immediately preceeding the infliction upon the plaintiff of his injuries he might well have no memory of them. Concussion might have caused retrograde amnesia.

Needless to say, attempts to trace a motor car by which the accident was caused were fruitless.

In this state of proof *Lowe* J. at the trial ruled that there was a case to go to the jury. The defendant called no evidence. The jury found a verdict for the plaintiff for £1,380. In the Full Court of the Supreme Court the verdict was set aside by *Martin* and *Coppel* JJ. (*Barry* J. dissenting) on the ground that there was no sufficient evidence that the bodily injury to the plaintiff was caused by the negligence of the driver of a motor vehicle. All three of their Honours thought that it was open to the jury to infer from the circumstances that the plaintiff was struck by a motor car, but both *Martin* and *Coppel* JJ. were of opinion that there was no sufficient evidence to support an affirmative finding that he was so struck owing to the negligence of the driver of the

H. C. OF A. 1952. LUXTON v. VINES. Dixon J. Fullagar J. Kitto J.

supposed motor car. *Barry* J. adopted the view that such an affirmative inference might reasonably be made from two matters. The first was, in effect that, whatever might be said about the wintry night and the dark clothes of the plaintiff, his body lying on the road could be seen twenty or thirty yards ahead by the driver who came to his assistance, and, as the latter testified, far enough away to avoid striking him with comparative ease. The other matter was that, although according to the medical opinion the plaintiff was probably struck while on his feet and with considerable violence, the car driver did not stop, from which fact the jury could infer that either owing to inattention and failure to keep a proper look out he did not see the plaintiff or he was conscious of wrong doing.

The test to be applied in determining in cases like this whether circumstantial evidence suffices to support a finding that negligence for which the defendant is responsible vicariously or otherwise occasioned the injury complained of was restated recently by this Court in *Bradshaw* v. *McEwans Pty. Ltd.* (1), and for the purposes of this case it is enough to set out the following passage from the judgment: "Of course as far as logical consistency goes many hypotheses may be put which the evidence does not exclude positively. But this is a civil and not a criminal case. We are concerned with probabilities, not with possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, 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 degrees of probability so that the choice between them is mere matter of conjecture: see per Lord *Robson*, *Richard Evans & Co. Ltd.* v. *Astley* (2). But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise: cf. per Lord *Loreburn* (3)".

In the present case the plaintiff is in the unfortunate position of having to rely upon deduction from circumstances for every element in the conclusion necessary for his success. Only by deduction

(1) (1951) Unreported.
(2) (1911) A.C. 674, at p. 687.
(3) (1911) A.C., at p. 678.

can the conclusion be reached that his bodily injuries were caused by a motor vehicle and only by further deduction can the additional conclusion be reached that it was owing to the negligence of the driver. For the first he must primarily rely on the exclusion by the medical opinion, concerning his injuries, of any probability that they were caused by a mere fall. He must also rely on the existence nowadays of a higher *a-priori* probability that if something on a highway runs a man down it will be a motor vehicle and not some other form of traffic. It may be conceded that these two considerations upon which the plaintiff relies do suffice to raise a reasonable inference, in the absence of evidence to the contrary, that the plaintiff's injuries were the result of a motor vehicle coming into contact with him. To support the further conclusion that it was owing to the negligence of the driver it seems obvious that as a first step the probability must be excluded of his having been run over while lying prostrate on the road after a fall. For from the mere fact that at night in such weather a motor vehicle of some sort or other ran over a prostrate man in dark clothing it would be hard without knowing more to infer negligence in the driver. But again the medical evidence seems enough foundation for a reasonable inference that, supposing a motor vehicle came in contact with him, he was on his feet when it did so. Conceding so much to the plaintiff, it is another thing to find in the proved circumstances a sufficient basis for the inference of negligence on the part of the driver of the supposed motor vehicle. It may be possible to say that with proper headlights a motor driver ought prima facie to have been able to see the plaintiff in time to avoid him, in spite of his dark clothes and of the dark wet night. But that supposes that he was standing or walking on the road in the line of light. He says, however, that when he last remembers he was far over on the gravel at the side of the bitumen. It is quite impossible to reconstruct from any materials the manner in which he and the supposed car or vehicle came into contact. It can be done only by conjecture. But a number of conjectures is open, equally plausible. His failure to remember what happened may be due to retrograde amnesia resulting from concussion. Equally well, however, it may be due to what he called a blackout, as he himself seems to have instinctively felt in his dazed state when the policeman saw him in the hospital. His feeling of illness coupled with his medical history make a loss of consciousness something more than a logical possibility. It must be placed in the category of reasonably probable hypotheses. It follows that the hypothesis of his staggering and so coming into contact with

H. C. OF A. 1952.

LUXTON v. VINES.

Dixon J. Fullagar J. Kitto J.

the car cannot be considered improbable or an unreasonable or unlikely theory. What is the explanation of the position on the road in which he was found lying? His injuries rather point to his having been thrown down heavily on his left side. What is the explanation of that? Many conjectures may be put forward which would explain these matters, but the fact that some of them imply negligence in the driver of the vehicle is not enough. Some of them clearly do not and there is no reason for rejecting the latter in favour of the former. There is no higher degree of probability on the one side than the other. On the footing that he did not lose consciousness or become dizzy through his mental or physical condition and that the blank in his memory of events is due only to concussion, what did he do after turning with the intention of hailing the on-coming car? Was it an ordinary motor car? Possibly it was a wide transport vehicle, the side of which may have struck him without the driver being aware of it. It is hard to see what inference of negligence can be built on the fact that the supposed vehicle did not stop.

Any answer that you give to such questions is a guess. All lies in conjecture. The fact is that whatever reasons you can find for one explanation of the accident, reasons of equal sufficiency or insufficiency exist for other explanations.

The circumstances give rise to nothing but conflicting conjectures of equal degrees of probability and no affirmative inference of fault on the part of a driver of a motor car can reasonably be made.

The appeal should be dismissed with costs.

McTIERNAN J. The plaintiff was found lying on a highway used by motor vehicles. He was very seriously injured but was unable to say whether or not he had been knocked down by a motor vehicle. He sued under s. 13 of the *Motor Car* (*Third-Party Insurance*) *Act* 1939 (Vict.). It is an essential condition of the remedy given by this section that the injuries for which damages are claimed, in an action brought under the section, were caused by a "motor car". The meaning of this expression in s. 13 is to be found in s. 3 of the principal Act, the *Motor Car Act* 1928 (Vict.), to which sub-s. (1) of s. 1 of the *Motor Car* (*Third-Party Insurance*) *Act* refers. The meaning is not limited to vehicles ordinarily described as motor cars but includes motor cycles, motor trucks and other vehicles propelled by mechanical power.

The action was tried by a judge with a jury. Upon the evidence given of the circumstances in which the plaintiff was injured and

the injuries from which he was suffering when he was picked up on the highway, it was clearly open to the jury to find that the injuries were caused by a collision between the plaintiff and a vehicle travelling upon the road. That was not enough to discharge the onus of proving the condition that the plaintiff was injured by a " motor car " as defined for the purposes of the Act. The defendant contests the point whether the evidence on this issue was sufficient. He submits that the evidence was equivocal. The road upon which the plaintiff was found was not reserved for motor cars, motor cycles, motor trucks and other vehicles included in the statutory meaning of motor car. Vehicles drawn by beasts of burden and bicycles propelled by human power, no doubt, passed along the highway. The section did not entitle the plaintiff to recover damages from the defendant if the plaintiff had been injured by one of those vehicles. If the evidence raised two probabilities, namely, that a motor vehicle or some other vehicle injured the plaintiff, surely they were not so precisely balanced that it would be mere conjecture, not judicial inference, for the jury to find that the plaintiff was injured by a motor vehicle. For no other vehicle travelling on the road would be likely to strike a pedestrian who moved into its course with the violence indicated by the plaintiff's injuries and would then vanish from the scene of the accident. In my opinion there was evidence fit to be left to the jury that the plaintiff was injured by a " motor car ".

It is a more difficult question whether the learned trial judge ought to have left the issue of negligence to the jury. The issue was whether the driver of the motor vehicle, which injured the plaintiff, failed to take due and reasonable care for the plaintiff's safety. There was evidence from which the jury could find that from the time the plaintiff parked his motor cycle until he was hit by a motor vehicle, he did not suffer any attack of illness which deprived him of his power to control his own movements : that he was knocked down by a passing vehicle while he was standing or walking on the road : that the vehicle, whose lights he saw about 100 or 200 yards behind him, immediately before the accident, was the motor vehicle which hit him, and it was probably a motor car : and that when he saw that motor vehicle he intended to signal it in order to ask the driver for a lift to Ballarat. The plaintiff said he turned either to the right or to the left to observe the approach of that motor vehicle : upon the evidence of the plaintiff's purpose in turning to observe the vehicle, it was open to the jury to find that he moved towards the course of the vehicle in order to signal the driver when the vehicle was approaching nearer to him. The plaintiff was unable to remember the impact, but it

H. C. OF A. 1952. LUXTON v. VINES. McTiernan J.

was, of course, clearly open to the jury to find that between him and the motor vehicle a collision occurred. The only possible conclusions as to how it occurred are that the plaintiff ran into the vehicle or it ran into him. There is no warrant for the presumption that the plaintiff so neglected his own safety that the former is the more reasonable hypothesis. It is consistent with the evidence of the position in which the plaintiff's body was found that the driver swerved to the left to avoid the plaintiff; but that is conjecture. There was evidence upon which the jury could find that when the plaintiff was struck by the motor car he was in a position on the road in which he could have been seen by the driver and had been long enough within the driver's range of vision, if the driver had been keeping a proper look out, to enable him to take reasonable precautions to avoid running into the plaintiff.

The next question is whether all these facts, which, in my view, the jury could reasonably find, constitute prima-facie proof of the allegation of negligence. Lord *Loreburn* said in *Richard Evans* v. *Astley* (1): "It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities." In my opinion it is in accordance with principle to hold that the learned trial judge did not err in leaving the issue of negligence to the jury, if the facts which, in my view, the jury could reasonably find, pointed to the conclusion that the driver negligently drove the motor vehicle, and this conclusion is, in some degree, more probable than that the accident was due to something beyond the driver's control. *Cofield* v. *Waterloo Case Co. Ltd.* (2), per *Isaacs* J.; *Flannery* v. *Waterford & Limerick Railway Co.* (3); *Bradshaw* v. *McEwans Pty. Ltd.* (4). There is no proof that the accident was due to something beyond the control of the driver: there is, of course, no evidence proving that the driver took any care to avoid running into the plaintiff.

In my opinion the facts point to the conclusion that the driver failed to take due and reasonable care for the safety of the plaintiff. The inference can be reasonably drawn from the evidence that

(1) (1911) A.C. 674, at p. 678.
(2) (1924) 34 C.L.R. 363.
(3) (1877) I.R. 11 C.L. 30.
(4) This Court, 1951, unreported.

when the vehicle was about 100 yards behind the plaintiff he moved towards the course on which it was proceeding to signal the driver to stop and was knocked down by the vehicle. It was for the jury to find whether or not the driver was in fact negligent. The evidence of the way in which the plaintiff was dressed and of the weather raised matters which were entirely for the consideration of the jury in reaching their conclusion on the issue of negligence. A jury might consider that if the weather was likely to reduce visibility on the road, it was the duty of the driver to proceed with correspondingly greater care to avoid running into pedestrians.

In my opinion the learned trial judge was right in leaving the case to the jury.

The verdict and judgment for the plaintiff for £1,380 should be restored.

I should allow the appeal.

WEBB J. We have to decide whether any facts which the jury could properly have found on the evidence must still have left the cause of the appellant's injuries merely a matter of conjecture; or whether they could have been such that the jury might have felt an actual persuasion that the injuries had been caused by the negligence of an unknown driver of a motor vehicle. See *Briginshaw* v. *Briginshaw* (1), per *Dixon* J.

As to the cause of the appellant's injuries, the learned trial judge, *Lowe* J., and all three of their Honours who comprised the Full Court, were agreed that the jury could properly find that a collision with a motor vehicle was the cause. I see no reason to take a different view. However, their Honours differed on the question whether the jury could properly find that the collision was due to the driver's negligence. *Barry* J. agreed with *Lowe* J. that they could so find; but the majority of the Full Court decided otherwise.

If the jury could only speculate as to the reason for the appellant's failure to recollect all that happened, that is to say, as to whether his loss of memory was due to a collapse as a result of illness just before being struck by the motor vehicle, or to the vehicle striking and injuring him, then I would not be prepared to hold that the jury could properly have been persuaded that his injuries had been caused by the driver's negligence. It would have been impossible to find what were the appellant's movements on the roadway that night if his unconscious state was due to illness and not to the collision. In that condition he might, before being struck by the vehicle, have wandered across the bitumen to the driver's correct

(1) (1938) 60 C.L.R. 336, at p. 361.

H. C. OF A. 1952. LUXTON v. VINES. Webb J.

side and fallen against the vehicle when it was too late to avoid hitting him. Here it should be noted that there was evidence that the appellant was not run over, and was found lying on the correct driving side for a vehicle travelling in the same direction as the appellant. However I hesitate to say there was not sufficient evidence to have enabled the jury to feel persuaded that the appellant's failure to recollect was due to the collision and not to illness. The appellant said in evidence that the main symptom of an impending loss of consciousness due to his illness was some loss of power in the tongue. He also mentioned dizziness and loss of power in the hands as symptoms. He expressly negatived sickness in the stomach as a symptom. Now he said that just before the accident he was sick in the stomach and that his hands were numb, and he attributed the numbness in his hands to the driving rain or cold. But he did not say he was dizzy or had lost power in his tongue or hands. He also thought that his loss of consciousness was not due to illness. Such being the evidence I am not prepared to hold that the jury could not properly have felt persuaded that the appellant was conscious up to the time he was struck by the vehicle; that he was, as he stated, walking on his right side of the road on the gravel and away from the bitumen; and that he remained there until the vehicle struck him. If so they could properly have found that the driver was on his wrong side of the road when the vehicle struck the appellant; that the driver alone was guilty of negligence; and that this negligence was the cause of the accident. There was no evidence that appellant left the gravel when he turned and saw the vehicle. It might be contended that, as the appellant lost consciousness, no matter from what cause, it was not open to the jury to find that he recollected all the symptoms of his illness up to the time of the collision. I think that the answer is that the jury could properly have felt persuaded that the symptoms he mentioned negatived illness of the kind that resulted in a "blackout" and that they would have been indulging in speculation if they assumed that he might still have had that illness and for that reason deprived him of a verdict.

I would allow the appeal, set aside the judgment of the Full Court, and restore the verdict of the jury and the judgment thereon.

Appeal dismissed with costs.

Solicitors for the appellant, *T. E. Byrne & Co.*, Ballarat, by *E. L. J. Murphy.*

Solicitors for the respondent, *Oswald Burt & Co.*

E. F. H.