Applied (1955) 2 NSWLR 504.
Appl 99 ALR 423
Cons 171 CLR 506

[HIGH COURT OF AUSTRALIA.]

FITZGERALD . . . . . APPELLANT;
DEFENDANT,

AND

PENN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1954.

MELBOURNE, *Sept.* 16, 17.

SYDNEY, *Dec.* 3.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

New trial—Misdirection—Action for negligence—Contributory negligence—Causation—Explanation to jury—Sufficiency—Invitation to jury to decide on view of facts not put to it by bench or bar.

Although in cases of negligence it is necessary that a jury should be told that the cause of action is negligence causing damage and the three elements must be stated and negligence defined, what it is necessary or wise to tell the jury with regard to causation will depend on the evidence. Frequently it will not be necessary to say anything more since, in many cases, if the negligence alleged is established it could hardly be considered other than as a cause of the damage. In cases where it is desirable or necessary to tell the jury something more, no attempt should be made either to explain "causation" as a general conception or to define a degree of closeness which must subsist in the connection between wrongdoing and damage.

Where it becomes necessary to call the attention of the jury to causation, there can in many cases be no harm in using the words "material cause" or "substantial cause." In many other cases, however, an insistence on such an adjective as "material" or "substantial" will be only too likely to lead the jury away from reasonably clear and sound ideas which they would probably entertain without the help of any adjective. Either of those adjectives seems to demand theoretical analysis and exposition, and, in attempting any such analysis or exposition a field is entered which is not really appropriate for exploration by a jury. The conception in question is not susceptible of reduction to a satisfactory formula.

State Electricity Commission of Victoria v. *Gay* (1951) V.L.R. 104, at p. 106, disapproved.

As a general rule it is unwise, in charging a jury, to invite it to decide, or to tell it expressly that it may decide, a case on a view of the facts which

has not been put to it either from the bar or from the bench, as tending to lead it to think that the evidence is not of prime importance and that the jurors may let their imaginations range without limit.

In a collision case, in which vehicles struck while proceeding at night and the plaintiff's arm, which projected from the window of his vehicle, was injured, the plaintiff gave evidence that he was driving well on his correct side of the road when he met the defendant's vehicle, which was travelling with only its left headlight burning. This, according to the plaintiff, misled him into believing that he was meeting only a motorcycle until the vehicle came close enough for him to see that it was a truck, at which point of time it was too late for him to avoid a collision, although he managed to steer his vehicle a little to the left. The defendant gave evidence that he was well on his correct side of the road with both headlights burning when he met the plaintiff. In this he was supported by the evidence of a constable who described marks on the road and tests which he had made on the headlights of the defendant's vehicle a very short time after the collision. The defendant denied that he was guilty of negligence and claimed that, even if he was, the plaintiff was guilty of contributory negligence. In directing the jury the trial judge used the words, in reference to the alleged negligence of the plaintiff, *inter alia*, " collision a consequence of the negligence " negligence which " led to the collision ", " has a relationship to these events, negligence which operated as one of the factors to bring about the collision ", " was a genuine factor in bringing about the collision ". The jury found that both the plaintiff and the defendant were negligent. On the plaintiff's application the Supreme Court of Victoria set aside the verdict on the ground that the charge was defective in that it did not adequately explain to the jury the nature of the causal connection which must subsist between negligence and damage and, in particular, that it would not convey to the jury that no negligence was relevant unless it was sufficiently important and closely connected with the collision as to make it reasonable on a broad common-sense view to regard its author as responsible for it in law.

Held that the charge was sufficient in the circumstances.

Decision of the Supreme Court of Victoria (Full Court) allowing an appeal from the judgment of *Barry* J., on the verdict of a jury, reversed.

APPEAL from the Supreme Court of Victoria.

Albert Nicholl Penn brought an action in the Supreme Court of Victoria against Leslie James Fitzgerald, claiming damages for personal injury. The claim arose from a collision on 19th November 1951 on Plenty Road, South Morang between vehicles driven by the respective parties.

The action was heard before *Barry* J. and a jury. On 9th December 1953 the jury brought in a verdict for the defendant, and *Barry* J. ordered that judgment be entered accordingly.

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From this decision the plaintiff appealed to the Full Court of the Supreme Court of Victoria (*Gavan Duffy*, *Dean* and *Smith* JJ.) which, on 17th June 1954, by a majority, (*Dean* J. dissenting), allowed the appeal, set aside the verdict of the jury and the judgment, and ordered that there be a new trial of the action, but granted leave to appeal from its decision to the High Court of Australia under s. 35 (1) (*a*) of the *Judiciary Act* 1903-1950. The present appeal was brought in pursuance of that leave.

The facts, the relevant portions of the charge to the jury and the reasons for the decision of the Full Court of the Supreme Court of Victoria are sufficiently set out in the judgments hereunder.

C. A. Sweeney, for the appellant.

H. Ball, for the respondent.

Cur. adv. vult.

Dec. 3.

The following written judgments were delivered :—

DIXON C.J., FULLAGAR AND KITTO JJ. This is an appeal from an order of the Full Court of the Supreme Court of Victoria directing a new trial of an action in which the present appellant was defendant and the present respondent was plaintiff. The appeal is brought in pursuance of leave given by the Supreme Court under s. 35 (1) (*a*) of the *Judiciary Act* 1903-1950. The action was tried before *Barry* J. with a jury, and a new trial was ordered by the Full Court on the ground of misdirection. The decision was that of a majority, consisting of *Gavan Duffy* and *Smith* JJ. *Dean* J. dissented.

The plaintiff's claim in the action was for damages for injuries suffered by him in a road accident, in which motor vehicles driven by the plaintiff and the defendant respectively were involved. The accident took place a little after 8 p.m. on 19th November 1951 on the road between Melbourne and Whittlesea. The plaintiff was travelling towards Whittlesea, and the defendant towards Melbourne, on a road which consists of a bitumen surface about twenty-one feet wide with a gravel strip of a width of three feet or a little more on each side. The plaintiff was driving with his right elbow projecting from the window on the right side of his vehicle. As the vehicles passed each other, some part of the defendant's vehicle struck the plaintiff's side rear-vision mirror and the plaintiff's arm and the rear part of the plaintiff's vehicle. No damage of any moment appears to have been done to either vehicle, but the plaintiff sustained serious injuries to his arm.

The defence denied negligence and alleged contributory negligence. The particulars given of contributory negligence included

" driving on the wrong side of the road " and " failing to comply with the Regulations made under the *Road Traffic Act* "—which presumably meant, or included, failing to keep reasonably near to the left side of the road. At the trial the defendant obtained leave to amend these particulars by adding: " driving with his arm protruding from his vehicle when it was not safe to do so ".

There was a sharp conflict of evidence at the trial, notably on two points. In the first place, the plaintiff swore that immediately before the impact he was driving with his left wheels " about two to three feet " from the left edge of the bitumen. The defendant swore that immediately before the impact he, the defendant, was driving with his *right* wheels on the bitumen " just off the gravel ". It would follow that his left wheels must have been well over on the gravel. If both the plaintiff's statement and the defendant's statement had been even approximately true, it is obvious that the accident could not have happened. In the second place, the plaintiff swore that a few moments before the impact he saw coming towards him from the north a single light, which he took to be the headlight of a motor bicycle. By the time he realized that the approaching vehicle was not a motor bicycle, but a truck with only its left headlight burning, it was, he said, too late for him to avoid it, though he managed to pull his own vehicle a little over to the left. The defendant swore that both his headlights were at all times material burning brightly. On both of these two major points of conflict the defendant's evidence was substantially supported by the evidence of Constable Hateley of Epping, who arrived at the scene about 8.30 p.m. At that time the defendant's vehicle was still there in the position in which it had finally pulled up: the plaintiff's vehicle had departed for the purpose of obtaining medical aid for the injured plaintiff. The constable described certain tyre marks caused by the braking of the defendant's vehicle. That vehicle had four rear wheels, one pair on each side, and the marks were clearly marks of the right pair of rear wheels. They commenced about six feet from the presumed point of impact (which was fixed by the presence of broken glass on the road) and extended for about ninety-six feet to the south, where the vehicle was standing. Where they commenced, they were within six feet of the edge of the bitumen on the east, i.e. on the defendant's correct driving side. There were no marks of the left pair of rear wheels up to a point where they were seen to have entered the grass on the far side of the gravel from the bitumen. The inference is, of course, that they were on the gravel at the moment of impact. Constable Hateley also gave evidence that he tested the defendant's headlights, and

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found them both in perfect working order. This, of course, even if accepted, is in no sense conclusive, but it is admissible, and does lend support to the defendant's story.

The accident in this case occurred before the passing of the *Wrongs (Contributory Negligence) Act* 1951 (Vict.), and the learned trial judge accordingly proceeded to direct the jury in accordance with the common law. The jury in due course retired to consider their verdict. After the passing of something less than an hour they returned to court, when the following dialogue took place: "Associate: Mr. Foreman, have you all agreed upon your verdict? Mr. Foreman: Yes. Associate: Do you find for the plaintiff or for the defendant? Mr Foreman: Well, Your Honour, we are unanimous that both plaintiff and defendant contributed to the accident. His Honour: You find that both plaintiff and defendant were negligent? Mr. Foreman: We do. His Honour: And that the negligence of each one of them operated to cause the accident? Mr. Foreman: We do. His Honour: That involves you returning a verdict for the defendant? Mr. Foreman: Yes. Associate: How say you, do you find a verdict for the plaintiff or for the defendant? Mr. Foreman: In view of what you said, your Honour, it must be for the defendant. Associate: You have found a verdict for the defendant and so say all of you? Mr. Foreman: Yes". The jury was then discharged.

The ground of the attack on his Honour's charge to the jury was that it did not properly or adequately explain to them the nature of the causal connection which must subsist between the negligence of a defendant, or the contributory negligence of a plaintiff, on the one hand, and the damage suffered by a plaintiff on the other hand. The majority of the Full Court were of opinion that the direction was defective in this respect. It was held that it did not comply with requirements laid down in the judgment of the Full Court in *State Electricity Commission of Victoria* v. *Gay* (1). Before considering the question thus raised, it will be convenient to see what his Honour did say to the jury on the matter in question.

His Honour began by explaining to the jury that the ground of liability was negligence, and that contributory negligence was a good defence. He said: "It is necessary before the plaintiff can succeed that he establishes negligence in the defendant *resulting in* the collision, and, even if he does establish negligence in the defendant *resulting in* the collision, if the defendant satisfies you that the plaintiff was also negligent and that the collision was

(1) (1951) V.L.R. 104.

a consequence of the negligence of the plaintiff and the defendant operating together, then under the law as it stood on 19th November 1951 the defendant is entitled to your verdict. In brief, if the plaintiff has not satisfied you that the defendant is negligent you would find for the defendant. If the plaintiff has satisfied you that the defendant was negligent but the defendant has satisfied you that the plaintiff was negligent you find for the defendant. But if you are satisfied that the defendant was negligent and you are not satisfied that the plaintiff was negligent then you find a verdict for the plaintiff".

Pausing here, we may observe that the learned judge appears to have used words calculated to convey quite clearly to the jury that only negligence on the part of either party which has been a cause of the collision can be relevant for their consideration. The latter part of the passage quoted does omit any reference to causation, but it would, in our opinion, be quite plain to the jury that the negligence to which his Honour was there referring was negligence which had "resulted in" the collision or from which the collision flowed as "a consequence".

His Honour then referred generally to the nature of the evidence, defined the term "negligence" in terms which have not been criticised, and then proceeded: "But the important question in every case is whether a particular act of carelessness alleged *did bring about* the collision and here you have to say whether, examining his conduct, the defendant did something which in the particular circumstances a reasonable man would not have done or whether he failed to do something which in those circumstances a reasonable man would have done, and when you come to examine the plaintiff's conduct . . . it is for you to say . . . whether he did anything which *led to the collision* which a reasonable man would not have done . . . or whether he failed to do something which a reasonable man would have done".

His Honour then correctly directed the jury with regard to the relevance of the regulations under the *Road Traffic Act*, and recalled to the jury the more important parts of the evidence. He then told the jury that questions of law were for him but questions of fact were for them, and he proceeded: "I have told you that, if the plaintiff does not satisfy you that the defendant was negligent, you find for the defendant. If the plaintiff satisfies you that the defendant was negligent but the defendant satisfies you that the plaintiff was also negligent, then you find for the defendant. If you are satisfied that the defendant was negligent and the defendant has not satisfied you that the plaintiff was negligent, then you

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find for the plaintiff . . . When I speak of being satisfied that the plaintiff was negligent or that the defendant was negligent, I am talking about negligence which *has a relationship to these events, negligence which operated as one of the factors to bring about* the collision and you will understand any direction I have given you, where I have employed the word negligence, as having that meaning ".

Finally, his Honour said: " If you decide the plaintiff has not proved his case against the defendant, or if you decide that the plaintiff has proved his case against the defendant but that the defendant has also shown the plaintiff was negligent, and that the plaintiff's negligence was *a genuine factor in bringing about* the collision, then you will not have to consider damages at all. You will merely come in with a verdict for the defendant ". His Honour then went on to deal with the subject of damages.

The learned judge's charge to the jury is open to the criticism that it merely stated general principles of law, and then left the jury at large to apply those principles to the evidence before them. It did not set out to explain how those principles might be applied to the particular case. As to the general desirability of some such explanation, see *Alford* v. *Magee* (1). The present case may indeed be said to illustrate the desirability of following the course there recommended. The charge, however, was not attacked on this ground, and we do not suggest that such an attack might have succeeded. With regard to the ground of attack which did succeed in the Full Court, we are of opinion that the direction was adequate. The learned judge appears to us to have said quite sufficient to make it plain to the jury that no negligence was relevant except such negligence as could fairly be considered to have been a cause of the accident. That is all that he was required by law to do. It was not, as we think, necessary or even desirable in this case to say more. His Honour used various expressions. He spoke of negligence " resulting in " the accident, negligence of which the accident was " a consequence ", negligence which " led to " the accident, negligence which " operated as one of the factors to bring about " the accident, negligence which was " a genuine factor in bringing about " the accident. But these expressions, practically speaking, are equivalent and interchangeable, and there was no likelihood that any or all of them would in any way mislead the jury or leave them without sufficient guidance.

The decision under appeal was expressly founded on a passage in the judgment of *Herring* C.J., *Gavan Duffy* J. and *Coppel* A.J.

(1) (1952) 85 C.L.R. 437, at p. 466.

in *State Electricity Commission of Victoria* v. *Gay* (1). *Gay's Case* (1) is an important case, and was discussed to some extent in *Alford* v. *Magee* (2). This Court said :—" The great importance of *Gay's Case* (1) is that it recognises that there may be many cases in which, if the plaintiff's negligence is found to have been a cause of the accident, the jury's only proper verdict is for the defendant, and in which accordingly no reference should be made to the qualification of the general rule as to contributory negligence. This seems undoubtedly correct, and the decision that the particular case was such a case seems also undoubtedly correct " (3). The Court then proceeded to make certain observations on certain aspects of *Gay's Case* (1). There was, however, no occasion in *Alford* v. *Magee* (4) to consider the particular passage in the judgment in *Gay's Case* (1) which is now material. It is not necessary to quote that passage (5) in full, though it must, of course, be read as a whole. Their Honours begin by saying that no difficulty arises in directing the jury as to what amounts to negligence, the invariable practice being to use the language of *Alderson* B. in *Blyth* v. *Birmingham Waterworks Co.* (6). They then observe that more consideration is required when dealing with causation. Responsibility, they say, arises from causation, and " what the jury must understand is the nature of the causation " which involves responsibility. They say :—" It must not be a cause of the accident so remote from it, or so trifling in its effect, that common sense would reject it as a ground for liability ". The jury, they say, must understand that negligence, in order that it may involve liability, " must be sufficiently important and closely connected with the accident to make it reasonable on a broad common sense view to regard its author as responsible for it in law ". This, it is said, must be made clear to the jury by the charge, " and, where the negligence of the two parties is contemporaneous, or so nearly contemporaneous as to be treated as such, this is *sufficiently* done if the jury are told that the negligence of the plaintiff will be a good defence if it was a ' material ' or ' substantial cause of the accident '." The passage concludes :— " If, instead of such a direction, or in addition to it, the jury are given any definition or description of the necessary causation which would be likely to induce them to think they should try to find a single cause or compare the respective acts of negligence or their effects on the accident, it is extremely likely to mislead them ". A reading of the passage as a whole shows that, while their Honours

(1) (1951) V.L.R. 104.
(2) (1952) 85 C.L.R. 437, at pp. 462-464.
(3) (1952) 85 C.L.R., at p. 462.
(4) (1952) 85 C.L.R. 437.
(5) (1951) V.L.R., at p. 106.
(6) (1856) 11 Ex. 781, at p. 784 [156 E.R. 1047, at p. 1049].

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are thinking primarily of contributory negligence alleged against a plaintiff, they recognize that the same considerations in respect of "causation" are applicable when it is the negligence of a defendant that is in question.

Now it is true, as *Dean* J. said in his dissenting judgment, that this passage does not expressly say that a direction to a jury will be defective unless it tells the jury in terms that no negligence is relevant unless it was a "material" or "substantial" cause of the damage suffered by the plaintiff. We think, however, that it was correctly interpreted by *Gavan Duffy* and *Smith* JJ. as really meaning that *either* those words *must* be used *or* some other words which will convey to them that no negligence is relevant unless it was "sufficiently important and closely connected with the accident to make it reasonable on a broad common sense view to regard its author as responsible for it in law". So interpreting the judgment in *Gay's Case* (1), we think, with respect, that the general rule there laid down is not sound.

It is, of course, necessary that a jury should be told that the cause of action is negligence causing damage. The three elements must be stated, and negligence defined. For the rest, what it is necessary or wise to tell them with regard to causation must depend on the evidence in the case. Probably more often than not it will not be necessary to say anything more. In the generality of cases it is probably true to say that no real question of "causation" arises: if the negligence alleged on either side is established the position will very often be that it can hardly be considered otherwise than as a cause of the damage. In such cases any attempt to analyse or expound the notion of causation, or even the introduction of an adjective to qualify the noun "cause", is much more likely to confuse than to assist the jury.

On the other hand, there will not seldom be cases in which the attention of the jury ought to be called by the judge to the question whether a particular act or omission, which they may regard as negligent, can fairly and properly be considered a cause of the accident. Such a case came recently before this Court in *Skewes* v. *Public Curator of Queensland* (2). In that case a head-on collision had taken place while two motor cars were being driven at a fast rate in a cloud of dust which temporarily almost destroyed visibility. Driver A was on his correct side of the road, and driver B on his wrong side. The action was in fact tried by a judge without a jury, but, if there had been a jury, it would clearly in the circumstances (which need not be detailed) have been open to them to say that

(1) (1951) V.L.R. 104.

(2) Unreported. Judgment delivered in Sydney, 6th September 1954.

both driver A and driver B were negligent in driving too fast, but that the negligence of driver A was not a " cause " of the collision, which would have happened with the same results if he had been driving at a reasonable speed. In that case it would have been necessary, or at least highly desirable, to tell the jury something more than that the negligence must have been a cause of the damage. But even there it would have been neither necessary nor, as we think, very helpful to tell them that driver A, although found to have been driving at a negligent speed, should not be held responsible for the collision unless his negligence was a " material cause " or a " substantial cause " of the collision. It would have been better to explain the position by telling them to ask themselves the question whether they were satisfied that the collision would not have taken place with the same results if driver A had been driving at a reasonable speed.

The truth is, we think, that it is a mistake to attempt either to explain " causation " as a general conception to a jury or to define for them a degree of closeness which must subsist in the connection between wrongdoing and damage. To begin with, it is not really necessary, because a jury is to be expected to have a sound common sense idea of what is meant by saying that one fact is a cause of another, and, as was said in *Gay's Case* (1) itself, it is all ultimately a matter of common sense : the expression " common sense " is used twice in the passage under discussion. A jury probably does not need to be told that the absence of a tail light could not operate to cause a head-on collision even at night, though such an example might provide for them an illustration in some cases, where a real question of causation was likely to arise. But it is not merely unnecessary, in our opinion, to direct a jury as to closeness of connection between negligence and damage. It seems to us to create a risk of confusion. If one is once to enter on a philosophic examination of the meaning of " cause and effect ", there is no telling where one ought to stop. This, of course, is recognized in *Gay's Case* (1), because the whole purpose of the formula which is laid down as necessary and sufficient is plainly to define the extent to which a judge should enter upon such an examination. But the formula is not universally satisfactory. In many cases, of course, there can be no harm in using the words " material cause " or " substantial cause ". But in many other cases an insistence on such an adjective as " material " or " substantial " will, as it seems to us, be only too likely to lead the jury away from reasonably clear and sound ideas which they would probably entertain without the

(1) (1951) V.L.R. 104.

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help of any adjective. Indeed either of the adjectives which are held to be appropriate seems to demand theoretical analysis and exposition. And, as soon as one attempts such analysis or exposition, one must enter on a field which is not really appropriate for exploration by a jury. In truth the conception in question is not susceptible of reduction to a satisfactory formula.

In the majority judgments examples are taken of possible views of the primary facts, and it is said that, if the jury had taken any one of those views, it might have reached a wrong ultimate conclusion through lack of guidance in the manner required by *Gay's Case* (1). We think it very unlikely that the jury would take any of the views suggested as to the primary facts. It is indeed very doubtful whether it was open to them to do so on the evidence, and that is anything but a reason for supposing that they may have acted on such a view. A jury has, as was said in *Alford* v. *Magee* (2), a wide latitude in arriving at its own reconstruction of what actually happened, but there are limits to the legitimate range of its imagination. However, even if any of the views suggested were legitimate and were entertained, it seems to us that the jury had sufficient guidance in the charge of the learned judge, and would not have been in any better position to cope with the situation if it had been told that a cause must be material or substantial. The simplest and most probable explanation of the jury's view seems to us to be that they thought that both drivers were " cutting things too fine " by keeping too close to the centre of the road.

We have set out above what occurred after the jury returned into court and before the verdict was recorded. Counsel for the respondent did not suggest that this in any way vitiated the verdict, but he did submit that what took place showed that there was some doubt in the minds of the jury, and that this doubt might well have been occasioned by his Honour's omission to direct the jury in accordance with *Gay's Case* (1). We think it is impossible to attach any such significance to what the foreman said.

We would only add that we think that, as a general rule, it is unwise to invite a jury to decide, or to tell it expressly that it may decide, the case on a view of the facts which has not been put to it either from the bar or from the bench. Such a course seems to us to be dangerous, as tending to lead the jury to think that the evidence is not of prime importance, and that they may let their imaginations range without limit.

For the reasons given, this appeal should, in our opinion, be allowed.

(1) (1951) V.L.R. 104.

(2) (1952) 85 C.L.R., at pp. 464-465.

WEBB J. In a collision between the respondent's motor car and the appellant's motor truck the respondent was injured, but in an action brought by him to recover damages the jury found that he had been guilty of contributory negligence and judgment was given for the defendant, the appellant. The respondent was driving the car with his elbow resting on the car window sill when the truck struck his elbow and broke his arm. The Full Court of Victoria on appeal thought that the direction of the trial judge on the issue of contributory negligence was inadequate and ordered a new trial. The appellant seeks to have this order for a new trial set aside and the verdict and judgment thereon restored.

The adequacy of a direction depends on the issues and the range of findings reasonably open on the evidence. In this case there was I think need for a direction to the effect if not in the terms of that framed for general guidance in *State Electricity Commission of Victoria* v. *Gay* (1) as follows: "In order properly to carry out their duty in considering a plea of contributory negligence, the jury must therefore understand that to make the plea good there must be negligence, that such negligence must be sufficiently important and closely connected with the accident to make it reasonable on a broad commonsense view to regard its author as responsible for it in law . . . The charge to the jury to be adequate must, therefore, make this duty clear" (2).

The adequacy of that form of direction was not questioned on this appeal.

The jury in this case did not fully accept either the plaintiff's or the defendant's evidence, as they found both guilty of negligence after each had given evidence which, if accepted, would have cleared him of negligence and shown that the accident was solely caused by the negligence of the other. But that finding should have been foreseen as a reasonable possibility and such a direction given as to ensure that any negligence that might be found by the jury would be covered by the direction.

Now I am not prepared to hold that *Barry* J. did not give such a direction. His Honour told the jury that the negligence he spoke of in his summing up was that which had a relationship to the accident, "which operated to cause the accident", which operated as "a genuine factor", as "a contributing factor" to bring it about. He also told the jury that they had to apply their commonsense to a problem to be solved by commonsense, the problem of deciding what was the fair decision to come to on the evidence.

(1) (1951) V.L.R. 104.

(2) (1951) V.L.R., at p. 106.

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Webb J.

In the absence of any clear indication to the contrary in the summing up I think that this last direction to apply commonsense was intended by the learned trial judge to apply to all the questions of fact that the jury had to determine, although the contrary view appears to have been taken by one of their Honours in the Full Court. I find it difficult to hold that the trial judge conveyed to the jury that commonsense had to be applied only in the determination of a particular question. It may be that there is no need to direct a jury to use their commonsense, as it can be assumed that all juries are bent on doing that according to their understanding, which is not enlightened by a mere direction to apply commonsense, although they may not always succeed in applying it. However it is common enough to direct juries to that effect, and *Gay's Case* (1) expressly provides for it, as already appears.

I think the jury would have understood from what *Barry* J. told them that unimportant negligence, negligence not closely connected with the accident, could not properly be found to have operated as a cause of the accident, or to have been " a genuine factor " or " a contributing factor " : they would, I think, have understood from his Honour's direction that they had to exclude trifling and remotely connected negligence as a cause. If so, the direction in *Gay's Case* (1) was really given, but in different words. At all events there was, in my opinion, no departure from it that could properly be said to have amounted to a substantial wrong or miscarriage of justice calling for a new trial : see *Hoyt's Pty. Ltd.* v. *O'Connor* (2).

I would allow the appeal, set aside the order for a new trial and restore the verdict of the jury and the judgment of *Barry* J.

TAYLOR J. This is an appeal by leave from an order of the Full Court of the Supreme Court of Victoria which, by majority, directed a new trial of an action in which the appellant was the defendant and the respondent was the plaintiff. Upon the trial the jury returned a verdict for the defendant and the order for a new trial was made upon the application of the present respondent.

The claim of the respondent in the action was to recover damages for injuries which, it was alleged, he sustained as the result of the appellant's negligence. Contributory negligence was alleged by the appellant and at the end of the trial the jury returned to court and, after having indicated that they had agreed upon a verdict, announced that they were unanimous that both the plaintiff and the defendant had contributed to the accident. The transcript

(1) (1951) V.L.R. 104.

(2) (1928) 40 C.L.R. 566, at p. 576.

records the following questions and answers relevant to this incident: "Associate: Mr. Foreman, have you all agreed upon your verdict? Foreman: Yes. Associate: Do you find for the plaintiff or for the defendant? Foreman: Well, Your Honour, we are unanimous that both plaintiff and defendant contributed to the accident. His Honour: You find that both plaintiff and defendant were negligent? Foreman: We do. His Honour: And that the negligence of each one of them operated to the cause of the accident? Foreman: We do. His Honour: That involves you returning a verdict for the defendant. Foreman: Yes. Associate: How say you, do you find a verdict for the plaintiff or for the defendant? Foreman: In view of what you said, your Honour, it must be for the defendant".

No objection was raised to the course which the matter took at this stage, nor was any objection thereto subsequently raised, the criticism advanced on the appeal being based upon the observations of the Full Court in *State Electricity Commission of Victoria* v. *Gay* (1). The point is made clear by reference to a short passage in the reasons of *Gavan Duffy* J. who constituted one of the majority of the court: "In a judgment of the Full Court (*State Electricity Commission of Victoria* v. *Gay* (1) the question of the proper direction concerning contributory negligence was dealt with at some length, but it is sufficient to refer to the following passages: 'In order to properly carry out their duty in considering a plea of contributory negligence, the jury must therefore understand that to make the plea good there must be negligence, that such negligence must be sufficiently important and closely connected with the accident to make it reasonable on a broad commonsense view to regard its author as responsible for it in law . . .' 'The charge to the jury to be adequate must therefore make this duty clear'. I may add that, in order to assist judges presiding at jury trials, the Court went on to say that this duty would be satisfactorily carried out by telling the jury that the negligence must be a 'substantial' or 'material' cause of the accident, though of course it was not thereby intended to establish such words as the indispensable means of carrying out the duty, or to suggest that the jury should not be assisted by the trial judge in applying this principle to evidence. In my opinion the learned trial judge did not make this duty clear to the jury in the present case". Nothing, his Honour added at a later stage, could be found in the charge to the jury which amounted to a sufficient direction or warning that "in determining whether a negligent act or omission was such a cause of the collision

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as to create legal liability, it must be sufficiently important and closely connected with the accident to make it reasonable on a broad commonsense view to regard its author as responsible for it in law". *Smith* J. expressed the substance of the principle, which it was contended was violated by the learned trial judge's charge, in the following manner: "In *State Electricity Commission of Victoria* v. *Gay* (1) it was laid down by the Full Court that to make good a defence of contributory negligence in a collision case the negligence of the plaintiff 'must not be a cause of the accident so remote from it or so trifling in its effect that commonsense would reject it as a ground for liability'; and that in order properly to carry out their duty in considering such a defence, the jury must understand that to make good the defence the plaintiff's negligence 'must be sufficiently important and closely connected with the accident to make it reasonable on a broad commonsense view to regard its author as responsible for it in law'. The Court further held that it followed from these principles that 'the charge to the jury, to be adequate, must . . . make this duty clear'".

All members of the court agreed that it would be wrong to treat *Gay's Case* (1) as requiring a trial judge, when instructing a jury on an issue of contributory negligence, to use the words "substantial" or "material" to explain the distinction between those negligent acts or omissions which on the one hand will, and on the other will not, disentitle a plaintiff to relief. They thought it sufficient if other appropriate words were used to exclude from the consideration of the jury negligent acts which were not "sufficiently important and closely connected with the accident to make it reasonable on a broad commonsense view to regard its author as responsible for it in law" and acts "so remote from the accident or so trifling in their effect that commonsense would reject them as a ground for liability".

There is, I should think, little doubt that if, in a case of the kind under consideration, a jury found that a plaintiff had been negligent or careless in some respect they would not find against him on an issue of contributory negligence if they were of opinion that his negligence was "not sufficiently important and closely connected with the accident to make it reasonable on a broad commonsense view to regard its author as responsible for it" or "so remote from the accident or so trifling in its effect that commonsense would reject it as a ground for liability". It may, perhaps, safely be said that if the plaintiff's negligence was so remote or trivial that a broad commonsense approach to the

(1) (1951) V.L.R. 104.

problem would require its rejection as a ground of liability no reasonable jury would be likely to regard it as a *cause* of the accident. But the adoption of the words " substantial " or " material " to make the duty of the jury clear in this respect is open to question for those words, in cases of this type, may well be taken to exclude a wider category of negligent acts than those which may fairly be said to be remote or trivial in the sense already mentioned. The word " substantial " may be understood to exclude negligence which is neither remote nor trivial in that sense, whilst the word " material " does not, of itself, provide a test at all and merely avoids the necessity of saying what is and what is not material negligence. The words were, of course, used by Lord *Wright* for a particular purpose in *Caswell* v. *Powell Duffryn Associated Collieries* (1) where, in speaking of the facts of that case, he said :— " If the defendants' negligence or breach of duty is established as causing the death, the onus is on the defendants to establish that the plaintiff's contributory negligence was a substantial or material co-operating cause " (2). It is clear that his Lordship, in using the words " substantial " and " material " had in mind that inadvertence and thoughtlessness is of necessity a common and persistent feature of work in industrial occupations and he sought to distinguish between acts or omissions emanating from these sources—and in respect of which it was a purpose of the relevant statutory requirements to make provision—and acts of negligence which themselves constitute either the sole or a contributing cause of an injury to a workman. That this is so is clear from his Lordship's observations that: " The circumstances under which men working in a mine or a factory are exposed to risk when machinery is unfenced in breach of statutory duty have general characteristics of their own. These have to be carefully considered when the question is whether a man was negligent. I think the importance of the ruling of Lawrence J. is that he drew attention to these general conditions of work and thereby gave a good practical direction and definition to help in deciding the issue of fact in any particular case. The learned judge did not mean that there are grades or degrees of negligence or that the plaintiff is not prevented from recovering by ' mild ' negligence but only by ' gross ' negligence. Generally speaking in civil cases ' gross ' negligence has no more effect than negligence without an opprobrious epithet. Negligence is the breach of that duty to take care, which the law requires, either in regard to another's person or his property, or where contributory negligence is in question, of the man's own person or

(1) (1940) A.C. 152.

(2) (1940) A.C., at p. 172.

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property. The degree of want of care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury or the Court in lieu of a jury. It is not a matter of uniform standard. It may vary according to the circumstances from man to man, from place to place, from time to time. It may vary even in the case of the same man. Thus a surgeon doing an emergency operation on a cottage table with the light of a candle might not properly be held guilty of negligence in respect of an act or omission which would be negligence if he were performing the same operation with all the advantages of the serene atmosphere of his operating theatre; the same holds good of the workman. It must be a question of degree. The jury have to draw the line where mere thoughtlessness or inadvertence or forgetfulness ceases and where negligence begins" (1). There is nothing in his Lordship's reasons to suggest that if it be shown that a plaintiff's negligence was an effective cause of his injuries it can in any circumstances be disregarded merely because it was negligence of a minor degree or, as his Lordship said, merely "mild" and not "gross" negligence. On the contrary his Lordship was clearly of the opinion that the issue of contributory negligence must be found against a plaintiff if negligence on his part is established and it is shown that that negligence was an effective cause of his injuries. Lord *Atkin*, with whom Lord *Macmillan* agreed, found it impossible to divorce any theory of contributory negligence from the concept of causation. After so expressing himself his Lordship went on: "It is negligence which 'contributes to cause' the injury, a phrase which I take from the opinion of Lord *Penzance* in *Radley* v. *London & North Western Rly. Co.* (2). And whether you ask whose negligence was responsible for the injury, or from whose negligence did the injury result, or adopt any other phrase you please, you must in the ultimate analysis be asking who 'caused' the injury; and you must not be deterred because the word 'cause' has in philosophy given rise to embarrassments which in this connection should not affect the judge" (3).

But in determining whether or not a defence of contributory negligence should succeed or fail it is not sufficient merely to pose the question whether the plaintiff's negligence contributed to the accident which caused his injuries. (See *Alford* v. *Magee* (4)). Accordingly expressions such as "effective cause", "direct cause", "real cause", "decisive cause" and "proximate cause", amongst others, have been seized upon, not for the purpose of excluding

(1) (1940) A.C., at pp. 175-176.
(2) (1876) 1 App. Cas. 754.
(3) (1940) A.C., at p. 165.
(4) (1952) 85 C.L.R. 437, at p. 451.

factors which might be thought to constitute causes in the widest philosophical sense, but for the purpose of placing the defendant's ultimate responsibility upon a practical commonsense basis. No doubt the words " substantial " and " material " as used in *Gay's Case* (1) were intended to serve the same purpose. But it is impossible, satisfactorily, to express in the terms of a formula any test which will be appropriate to the infinite variety of accidents in which human beings may suffer injury and to the infinite causes which may operate to produce those accidents. This being so, it is obvious that in negligence cases the charge to a jury must be framed in the light of the issues which arise in the case. (See *Alford* v. *Magee* (2)), and when this is done much of the difficulty experienced in attempting to frame formulae of universal application will disappear. No doubt difficulties will still be experienced in cases where the facts are open to a number of conclusions of various combinations but, nevertheless, they will be minimised by some reference to the issues and the findings which are open to the jury.

In the present instance the case made by the respondent on the trial was that he was driving a small car at about thirty to thirty-five m.p.h. along a country road at about 8 p.m. at night when he sighted the appellant's vehicle approaching him some 100 to 130 yards away. The approaching vehicle, however, was said by him to be showing only one headlight and that was on the near side of the vehicle. The appellant's vehicle was in fact a large lorry carrying a heavy load but this was not known to the respondent who, in the darkness, took it to be a motor cycle approaching him. The road surface consisted of a bitumen strip approximately twenty feet wide and on either side of this strip a gravel surface extended from four to six feet. The respondent maintained that he was well on his correct side of the road and that it was not until the moment of impact that he was able to perceive that the oncoming vehicle was a large lorry and that its unilluminated side extended well over the centre of the road. These facts, if believed, made out a clear case of negligence on the part of the appellant. But there was a sharp conflict of fact between the parties. The appellant alleged that both of his headlights were functioning at the time of the accident and that, additionally, his vehicle carried a small light, called a width light, on each side of the driver's cabin. All of these lights were said to be illuminated at the time of the accident and considerable support for this evidence is to be found in the testimony of a police officer who found that all of the lights were in good

(1) (1951) V.L.R. 104. (2) (1952) 85 C.L.R., at p. 466.

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working condition shortly after the accident. Additionally, the appellant's case was that immediately before the accident he was travelling on the extreme left hand side of the road and that the collision was caused by the respondent being on his incorrect side. It is, perhaps, unnecessary to say that if both parties were speaking the truth concerning the courses of their respective vehicles the collision is inexplicable. But it is possible to say upon the evidence that each vehicle was in full view of the other for some considerable distance before the collision though, as already appears, the respondent claims that he was misled by the appellant's negligence into believing that the approaching vehicle was a motor cycle on its correct side of the road.

Upon consideration of the evidence it seems probable, as was suggested in argument, that the jury did not believe that one of the headlights of the lorry was extinguished or that the width lights were not illuminated and, if this was so, it is difficult to imagine that the jury's finding of contributory negligence could have been based on some act or acts of the respondent which were so remote from the accident or so trifling in their effect that they should have excluded them from their consideration.

The question on this appeal is not, however, susceptible of determination by speculating as to the probable basis of the finding of the jury; the real question is whether, having regard to the facts of the case and the issues which arose, the jury could consistently with the directions of the learned trial judge, have rejected the plaintiff's claim because of some negligent or careless omission on his part which, though it might in a remote sense, be regarded as one of the causes of the accident, was so remote from it or so trivial in its effect that it should not be regarded as a "substantial" or "material" factor. I use the words "substantial" and "material" because of the approval given by *Gay's Case* (1) to their use for the purpose of making the duty of a jury in this respect clear to them and because no suggestion was made in the course of argument that the use of these words would not adequately serve this purpose. The question then is did the learned trial judge in the circumstances of this case sufficiently instruct the jury that if they considered the plaintiff had been negligent in some respect they should not find against him on the issue of contributory negligence unless they also formed the view that such negligence substantially or materially contributed to the accident, or, in other words, unless that negligence was a substantial or material cause of the accident? In my opinion the instruction given by

(1) (1951) V.L.R. 104.

the learned trial judge was sufficient for this purpose. To quote at length from the charge to the jury would be merely to repeat what his Honour said and it is sufficient, I think, to say that a reading of the charge leaves me with the firm conviction that it sufficiently indicated to them that the issue of contributory negligence should not be found against the respondent in the absence of negligence on his part which, in their opinion, was a substantial cause of the accident as distinct from some conduct on his part which was so remote from it or so trifling in its effect that commonsense would reject it as a ground for liability. If the jury found that the collision was "a consequence of the negligence of the plaintiff and the defendant operating together", and that the negligence of the respondent "operated as one of the factors to bring about the collision" or, in other words, "was a genuine factor in bringing about the collision" and, if in so finding, they applied their commonsense in considering the evidence before them, as they were instructed to do, they could not have based their verdict on some negligent act of the respondent which was so remote from the accident or so trifling in its effect that commonsense would reject it as a ground for liability. I should add, perhaps, that I agree with the analysis of the charge which was made by *Dean* J. in his dissenting judgment in the Full Court. Also, with *Dean* J., I feel fortified in this view by the fact that no objection to the directions of the learned trial judge on this aspect of the case were taken at the trial by counsel for the appellant. Contemporary knowledge of the course which the trial had taken and of the matters placed before the jury for their consideration by the respective parties did not then suggest that any further or other direction should be given. In the circumstances I am of the opinion that the appeal should be allowed and the verdict of the jury restored.

Appeal allowed with costs.

Order of the Full Court of the Supreme Court of Victoria of 17th June 1954 discharged. In lieu thereof order that the plaintiff's appeal to the Full Court of the Supreme Court from the verdict and judgment at the trial be dismissed with costs and that such verdict and judgment be restored.

Solicitors for the appellant, *William J. Clarke & Co.*
Solicitor for the respondent, *C. M. S. Power.*

R. D. B.