lived had he not been killed. On the four per cent tables the value of one pound payable for thirty years is £17.29203. Applying that to £900 a year the primary figure arrived at in the widow's case is £15,628. Then deducting from this the gains as estimated by his Honour, but allowing £750 instead of £600 as the estimated value of the accelerated receipt of the deceased's estate, i.e. a total deduction of £6,685, the remainder is £8,943. But his Honour allowed a further deduction of £2,000 "for other incidents of uncertain estimate". What these were he did not say but they did not include the possibility of re-marriage. The only other possibility that I can suggest is that the wife might have pre-deceased the husband had he not been killed. But that was a somewhat remote possibility as she was seven years younger and had forty-four years expectation of life as against the deceased's thirty-six years. As to the possibility of her re-marriage, as the Privy Council said in *Nance's Case* (1) the possibility that the widow might re-marry in circumstances that might improve her financial position is in most cases incapable of evaluation. This case is not an exception, having regard to the widow's financial position and the fact that she had three children. The allowance then for both these possibilities could not reasonably be fixed at more than £1,000. Taking £1,000 as the correct figure the damages arrived at in the widow's case are £7,943, as against £7,926 fixed by his Honour.

I understand that no question now arises as to the shares of the children as assessed by his Honour. In any event I can see no ground for reducing the share in any case.

I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellants, *Jackson, McDonald, Connor & Ambrose*, Perth, by *Selwyn Gerity & Robinson*.

Solicitors for the respondent, *Stone, James & Co.*, Perth, by *J. M. Smith & Emmerton*.

R. D. B.

(1) (1951) A.C. 601.

[HIGH COURT OF AUSTRALIA.]

HOLLOWAY . . . . . APPELLANT;
DEFENDANT,

AND

McFEETERS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1956.

MELBOURNE, *Feb.* 15; *June* 6.

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

Negligence—Sufficiency of evidence—Finding of pedestrian's body on roadway in circumstances indicating collision with vehicle—Vehicle unidentified—No eye-witnesses—Whether reasonably open to jury to find that death caused wholly or in part by negligence of driver of unidentified vehicle—Action against nominal defendant—Admissibility in evidence as such of admission by conduct on part of driver of unidentified vehicle—Motor Car Act 1951 (*No.* 5616) (*Vict.*), *s.* 47 (1).

In an action for damages in which it was necessary for the plaintiff to prove that the death of her husband was caused wholly or in part by negligence on the part of the driver of an unidentified motor vehicle the facts were as follows: The deceased, aged forty-four years, had been seen at about 7 p.m. on the night in question about half a mile from the place where his body was found. He was then sober and in a normal state of health. It was then dark but the night was fine and clear. At about 8 p.m. the deceased was found lying dead in C. Road. This road runs east and west and is about thirty-two feet wide excluding footpaths. Near the point in question W. Street, in which the deceased lived and which runs north and south and including the footpaths is about forty feet wide, debouches into C. Road. Approaching W. Street along C. Road from the east the road inclines upwards, flattening out at W. Street before dipping downwards. There were lights in C. Road and there were no trees or other objects to obstruct a driver's vision of the road. The deceased's body was lying transversely across C. Road with the head to the north about eight feet from the northern kerb of C. Road and in line with the western footpath of W. Street. On the roadway beside the body there was a large pool of blood from which tyre marks of a vehicle extended in an easterly direction for about forty-two feet to a point approximately in the centre of C. Road more or less in line with the eastern building alignment of W. Street where there was a small heap of debris said to be " similar to the

dirt that falls from underneath the mudguard of a car". This debris was outside the glow of the street light at the north-western corner of C. Road and W. Street. From medical evidence it appeared that the deceased was upright when struck and that some of his injuries were caused by the initial collision and others by his being thrown down and run over at the site of the pool of blood.

Held, by *Williams*, *Webb* and *Taylor* JJ, *Dixon* C.J. and *Kitto* J. dissenting, that it was reasonably open to the jury to find that the death of the deceased was caused, wholly or in part, by the negligence of the driver of the unidentified vehicle.

Per *Dixon* C.J. and *Kitto* J., *Williams*, *Webb* and *Taylor* JJ. expressing no final opinion, the flight of the driver of an unidentified vehicle, from the scene of the collision, if an admission by conduct, is not admissible in evidence as such against a nominal defendant sued under s. 47 of the *Motor Car Act* 1951 (Vict.).

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

APPEAL from the Supreme Court of Victoria.

Dulcie Olive McFeeters commenced an action in the Supreme Court of Victoria on 31st March 1954 against Henry Francis Holloway in which the statement of claim was substantially as follows :—

1. The plaintiff is the widow of David William McFeeters late of 45 Webster Street Oakleigh in the State of Victoria, fibrous plasterer, deceased (hereinafter called the "said deceased") who died on 10th October 1953.

2. The said deceased died intestate and there is no administration of his estate.

3. The plaintiff brings this action for and on behalf of herself and Noel William McFeeters a child of the plaintiff and the said deceased.

4. The defendant is a nominal defendant named by the Minister pursuant to s. 47 of the *Motor Car Act* 1951 and is sued as such.

5. On 10th October the said deceased was a pedestrian in Castlebar Road at or near the intersection of Webster Street Oakleigh.

6. On the said date a motor vehicle the identity of which cannot be established was being driven in Castlebar Road Oakleigh aforesaid and the unidentified vehicle struck or collided with the said deceased.

7. The said collision was caused by the negligence of the driver of the said unidentified vehicle. Particulars of negligence : (a) Failing to keep any or any proper lookout. (b) Failing to observe the said deceased on the roadway. (c) Travelling at an excessive speed in the circumstances. (d) Failing to control the course and/or

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speed of his vehicle so as to avoid striking the said deceased. (e) Failing to have any or any proper brakes on the said vehicle. (f) Failing to halt his vehicle at all or in sufficient time after the collision so as to avoid injuring the said deceased. (g) Failing to have any or any proper lights burning on the said vehicle. (h) Driving on the wrong side of the roadway. (j) Failing to give any or any sufficient warning of his approach. (k) Failing to observe the provisions of the *Road Traffic Regulations*.

8. As a result of the said collision the said deceased received injuries from which he died.

9. Prior to and up to the time of the death of the said deceased the plaintiff and the said Noel William McFeeters resided with him and were dependent on the earnings of the said deceased for their support and by reason of his death as aforesaid she has suffered damage in that she has been wholly deprived of the benefit of such earnings and support and the expectation of the same in the future.

(Particulars as required by the *Wrongs Act* 1928 were given.)

The defendant by his defence admitted the allegations contained in par. 4 of the statement of claim, did not admit those contained in pars. 1, 2, 3, 8 and 9 thereof, denied those contained in pars. 5, 6 and 7 thereof and pleaded that if there was any collision as alleged, the said collision was caused or contributed to by negligence on the part of the said deceased.

Particulars of negligence : (a) Failing to keep any or any proper lookout. (b) Using or being on the roadway whilst under the influence of intoxicating liquor. (c) Failing to have any or any control over his movements on or about the said roadway. (d) Failing to take and/or incapacitating himself from taking any or any sufficient steps or precautions for his own safety. (e) Proceeding into or attempting to cross the path of the said motor vehicle when it was not reasonably safe to do so.

By her reply the plaintiff joined issue and pleaded that if the deceased was guilty of any contributory negligence (which was specifically denied) the defendant could nevertheless by the exercise of reasonable and proper care have avoided the said collision.

The action was heard before *Gavan Duffy* J. and a jury. On 15th December 1954 the jury brought in a verdict for the plaintiff for £4,000 but deducted fifty per cent thereof because of the negligence of the deceased. Of the sum of £2,000 remaining the jury allotted £1,500 to the plaintiff and £500 to Noel William McFeeters. The defendant then moved for judgment notwithstanding the verdict of the jury. On 11th March 1955 *Gavan Duffy* J. delivered a

written judgment and held that judgment should be entered for the defendant.

From the decision of *Gavan Duffy* J. the plaintiff appealed to the Full Court of the Supreme Court of Victoria (*Lowe*, *Martin* and *O'Bryan* JJ.), which allowed the appeal and ordered that there be judgment for the plaintiff in accordance with the verdict of the jury.

From this decision the defendant appealed to the High Court.

Dr. *E. G. Coppel* Q.C. and *K. A. Aickin*, for the appellant.

C. A. Sweeney Q.C. and *J. G. Gorman* and *T. B. Shillito*, for the respondent.

Cur. adv. vult.

June 6.

The following written judgments were delivered :—

DIXON C.J. The question to be decided in this appeal is whether sufficient evidence to support the plaintiff's cause of action was adduced in an action brought by a widow under the *Wrongs Act* 1928 (Vict.) in respect of the death of her husband, against a nominal defendant appointed in pursuance of s. 51 of the *Motor Car Act* 1951.

The plaintiff's case was that the death of her husband had been caused by or had arisen from the use of a motor car but the identity of the motor car could not be established and that she was a person who could have obtained judgment against the driver of the motor car in respect of such death. Upon making out such a case she would become entitled under s. 47 of the *Motor Car Act* 1951 to obtain judgment against the nominal defendant.

It is to be noticed that the nominal defendant does not represent the driver of the unidentified car but is sued upon his own separate statutory liability, although it is a liability which exists only when there is a cause of action against the driver of the car.

The plaintiff lived with her husband and children at a house No. 45 Webster Street, Oakleigh. That is an ordinary suburban street running north from another such street which goes east and west, called Castlebar Road. On the night of Saturday, 10th October 1953, the dead body of the plaintiff's husband was found lying in Castlebar Road not far from the mouth of Webster Street. The circumstances pointed to the conclusion that he had been run down by a motor car and, it being admittedly impossible to identify the car, his widow instituted this action against the nominal defendant. To succeed it was incumbent upon her to offer affirmative proof of

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negligence on the part of the driver of the unidentified car occasioning the death. At the trial *Gavan Duffy* J., who presided, took the verdict of the jury, reserving leave, however, to the defendant to move for judgment. The defendant had pleaded contributory negligence on the part of the deceased and the jury apparently found both negligence and contributory negligence. They assessed the damages suffered by the plaintiff at £4,000 and deducted half that sum on account of the deceased's contributory negligence, awarding the plaintiff £2,000.

The learned judge, however, on the defendant's application, entered judgment for the defendant on the ground of insufficiency of evidence. An appeal from this judgment to the Full Court of the Supreme Court was allowed and judgment was entered for the plaintiff. From the order of the Full Court the appeal is brought to this Court.

The whole matter depends upon the sufficiency of circumstantial evidence to discharge the burden of proving that the death of the deceased was occasioned by negligence on the part of the driver of the unidentified car. We are not concerned with the issue of contributory negligence or how the jury got at their verdict on that issue nor with the manner in which the case was left to the jury. Indeed we have not been furnished with a copy of the learned judge's charge to the jury.

The material circumstances appearing from the evidence may be stated briefly. The last person known to have seen the deceased before his death was an acquaintance living at No. 7 Dandenong Road, which is said to be easily half a mile from Castlebar Road. At about a quarter to seven on the evening of Saturday, 10th October, the deceased passed his residence, as the witness says, on his way home, and stopped to talk with him for two or three minutes. The witness testified that the deceased was quite sober and in perfect health. Some scientific evidence was called for the defendant to show that blood taken from the deceased's body showed an excessive amount of alcohol, but the jury were entitled to prefer to act on the evidence of this witness that the deceased was sober. The witness was asked about the state of the light when the deceased talked to him and said it was dark. The next fact proved is that a constable of police arrived at the corner of Castlebar Road and Webster Street at ten minutes past eight on that night and found the body of the deceased lying on the roadway. The facts disclosed by the evidence of this constable and other evidence are these: The deceased's body was lying transversely to the direction of the road on the northern side of Castlebar Road with his head seven

or eight feet from the kerbing. If the building alignment of Webster Street were produced it would meet his body. There was a pool of blood beside the body and the injuries the deceased had received supported the inference that a vehicle had passed over it. From the body there could be traced tyre marks for forty-two feet eastwards. Webster Street is twenty-four feet wide and its two footpaths are each eight feet wide. So this meant that the tyre marks commenced two or three feet east of the easterly building line of Webster Street. Though it hardly seems material it is the fact that the point is opposite the westerly building line of a street coming into Castlebar Road from the south, Camira Street. Tracing the tyre marks back from the position of the body, they veered to the centre of Castlebar Road which, it was sworn, had a bitumen surface of thirty-two feet from gutter to gutter and footpaths of eight feet. Where the tyre marks ended forty-two feet from the body a heap of dirt was found which was described as similar to the dirt that falls from underneath the mudguard of a car. There were also found some small fragments of cream coloured enamel or paint, some fragments of broken glass and an unexplained small piece of lead flattened out. According to the evidence the mud and debris was spread over approximately four feet by two, as if it had fallen out of both mudguards of a car. It was "as if the car had been coming up the centre of the roadway". The tyre marks were four feet apart and were considered to be those of a small car. They were single tyre marks. There is a street light at the western corner of Webster Street and Castlebar Road and another seventy yards to the east, where Castlebar Road intersects with Warrigal Road. The road in Castlebar Road rises somewhat from Warrigal Road, but opposite Webster Street it becomes level. The night of 10th October 1953 was fine and clear. There were no trees or obstructions to vision in Castlebar Road. In cross-examination a senior constable of police appeared to concur in the view put to him for the defendant that at a speed of thirty miles an hour a car pulls up in approximately forty feet and that assuming that it pulled up in forty-two feet it showed that it had been travelling at something like twenty-five to thirty miles per hour.

From the foregoing circumstances certain facts may reasonably be inferred and others perhaps presumed as a matter of probability. It may be inferred that a car proceeding in a westerly direction, a small car, struck the deceased at that part of the road where the dust and debris was found, that the brakes were applied and the car swerved over from the middle of the road to the right-hand side, carrying the deceased for a distance of fourteen yards and that

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then a wheel or wheels ran over his body. It may be presumed that he was in an upright posture when the car struck him, but on the foregoing assumptions it must be taken that at the moment of impact he was in the middle of the bitumen road. No doubt it might be inferred that the speed of the car at first impact was about thirty miles an hour. Further, the possibility of the accident being caused by some obstruction to vision forming a feature of the locality is excluded. Rain and mist are also excluded.

On the footing of the foregoing state of facts *Lowe* J. was of opinion that the conclusion might reasonably be formed that the accident arose from some act of negligence on the part of the driver of the unidentified car. *Martin* J. concurred in this view. *O'Bryan* J. also concurred in it but his Honour added that the jury might infer that the driver knew that he had run down the man and severely injured him and had yet left him where he lay. The jury might regard this behaviour as implying a consciousness of guilt and as being of the nature of an admission. As to the view that it is tantamount to an admission by conduct, the difficulty is that the driver is not a party to the proceedings nor is the nominal defendant sued on his behalf. The admissions of the driver would not, as such, be receivable in evidence against the nominal defendant. At the same time the circumstance that the deceased was left dead or dying on the road is one of the parts or details of the facts in issue and cannot be excluded. But it is to be considered, not as an admission by conduct, but simply as one of the circumstances of the deceased's death to be taken into account in reaching a conclusion as to the manner of its occurrence.

The state of facts which has been set out as the basis of the judgment of the Full Court is, of course, the product of inference. But the real difficulty of the case lies not in finding a foundation for those preliminary inferences, but in the next step. For the state of facts inferred itself leaves room for conflicting conjectures or hypotheses as to the cause of the accident. How came the deceased in the path of the approaching car? Did he move in front of it and into the range of vision suddenly? Was he walking along the middle of the road with his back to it? Did the driver fail to see him until too late by reason of the darkness of his clothes and the upward slope of the road until it levelled out where he was walking? The conjecture that the driver must have been in fault in failing to see him in time to avoid him may be shrewd. But is it more than a conjecture? Before the plaintiff can succeed in such a case as this the circumstances must lead to a satisfactory inference, even though resting on a balance of probabilities, that the accident

was caused by some negligence on the part of the driver. In the present case the true cause of the accident is in truth unknown. The state of facts reached by inferences is itself compatible with a number of hypotheses, some of them implying fault on one side, some on the other, some on both sides. Hypotheses of this kind are not inferences. What is required is a basis for some positive inference involving negligence on the part of the driver as a cause of the deceased's death. The inference may be made only as the most probable deduction from the established facts, but it must at least be a deduction which may reasonably be drawn from them. It need not be an inference as to how precisely the accident occurred, but it must be a reasonable conclusion that the accident in one way or another occurred through the lack of due care on the part of the driver and not otherwise. Reluctant as one is to differ from judges so experienced in such matters, the difficulty seems insuperable of finding a foundation for an inference that the accident was caused in a manner implying negligence in the driver of the unidentified car. For that reason the appeal should be allowed and the judgment of *Gavan Duffy* J. restored.

WILLIAMS, WEBB AND TAYLOR JJ. In October 1953 the husband of the respondent to this appeal died as the result of injuries sustained by him when he was struck by a motor vehicle the identity of which has not been and cannot be established. Thereafter, the respondent instituted proceedings on her own behalf and on behalf of her infant child to recover damages from a nominal defendant named for the purposes of s. 47 of the *Motor Car Act* 1951. The claim of the respondent was based upon the allegation that the death of the deceased was caused by the negligence of the driver of the unidentified vehicle but there were no eye-witnesses of the accident and at the trial it was sought to establish this allegation by inference from evidence concerning the anterior movements of the deceased and that relating to marks on the roadway which gave some indication of the course and movements of the vehicle concerned.

The accident took place in Castlebar Road, Oakleigh, close to the point where Webster Street debouches into that road from the north and it is established that it occurred some little time before 8.10 p.m. on 10th October 1953. The deceased was last seen alive about 7 p.m. by one, Bishop, who lived in Dandenong Road, Oakleigh, about half a mile from the junction of that road with Castlebar Road. According to this witness the deceased called at the residence of the former and spent a few minutes there " more

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or less passing the time of the day " on his way home. It was then dark and in view of other evidence to which reference will be made it is of some importance to observe that this witness said that the deceased was sober and appeared to be in a normal state of health. Thereafter, nothing was seen of the deceased until his body was found in Castlebar Road. We are not told who found the deceased there or precisely at what time this occurred but Constable Ryan gave evidence to the effect that he went to the corner of Castlebar Road and Webster Street at approximately 8.10 p.m. and that he there saw the deceased's body. It was lying with the head to the north in Castlebar Road approximately in line with the western footpath of Webster Street. The head was about eight feet from the northern kerb of Castlebar Road and there was a large pool of blood on the roadway beside the body. From this pool of blood the tyre marks of a vehicle extended in an easterly direction for some forty-two feet where they came to an end at a point where there appeared a small heap of dirt or dried mud, some small fragments of cream-coloured enamel or paint and some fragments of broken glass. The dirt was said to be " similar to the dirt that falls from underneath the mudguard of a car ". This debris was in the centre of Castlebar Road and more or less in line with the eastern building alignment of Webster Street which, including the footpaths, is forty feet wide. The roadway of Castlebar Road has a bitumen surface some thirty-two feet wide and from the point where the debris was found the course of the tyre marks commenced to veer to the north side of the road until they connected with the pool of blood already referred to. It is not unimportant to notice that the deceased's residence was in Webster Street.

The only other evidence to which reference need be made is medical testimony to the effect that tests of a sample of blood taken from the deceased indicated the presence of alcohol. According to this testimony the quantity of alcohol present indicated that the deceased " would . . . exhibit a picture of being under the influence of alcohol " and that " possibly " he " would not be able to control his movements properly on the roadway ". The effect of this evidence was somewhat diminished by concessions made in cross-examination that the deceased's alcoholic " tolerance " and other factors could be material in assessing his actual condition at the time.

The action was tried with a jury and upon these facts they found a verdict for the plaintiff for £2,000. The total damages they assessed at £4,000 but, holding as they did that the deceased was

equally to blame for the accident, they deducted fifty per cent of this amount on that account.

Before leaving the matter to the jury the learned trial judge was asked by counsel for the defendant to direct a verdict for the defendant. This his Honour refused to do in view of "the extent to which the case had progressed" but he remarked that he had an opinion on which he might be prepared to act and that he would give leave to the defendant to move for judgment notwithstanding any verdict that might be returned. After the jury's verdict had been returned his Honour heard further argument and, thereafter, entered judgment for the defendant. Subsequently, an appeal to the Full Court succeeded and judgment for the plaintiff for £2,000 was entered. It is from the order of the Full Court that this appeal is now brought.

No objection has been taken at any stage to the course pursued by the learned trial judge (see *Phillips* v. *Ellinson Bros. Pty. Ltd.* (1)) and the sole question for decision in the circumstances of the case is whether there was any evidence upon which the jury was entitled to conclude that there was negligence on the part of the driver of the unidentified vehicle which constituted a cause of the deceased's death. The "particulars" alleged in the statement of claim, as frequently happens, ranged over the whole gamut of driving and mechanical faults and they may be disregarded as a clue to the case which the respondent attempted to make on the trial. And in view of the fact that no formal attack was made on the learned trial judge's charge to the jury and that a transcription of it was, therefore, omitted from the appeal book we are without knowledge concerning the manner in which the case was left to the jury. But upon the appeal counsel for the respondent contended that the jury was entitled to conclude from the proved facts that the unidentified vehicle was travelling at an excessive speed and, either, that its driver did not keep a proper look-out or failed to give an adequate warning and to take reasonable steps to avoid the deceased.

Upon the evidence the jury was entitled to conclude that the deceased was struck by a vehicle at that point in Castlebar Road where the small pile of debris was found and that he was carried or thrown from there to the position in which his body was found. They were also entitled to conclude that the brakes of the vehicle were applied at or about the point of impact and that the vehicle then veered in its course towards the northern side of the road. The evidence would also enable them to conclude that at the time of the impact the deceased was on his way home and that at that

(1) (1941) 65 C.L.R. 221.

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moment he was about the middle of the road. Moreover, they were undoubtedly entitled to say that the deceased was then sober.

The picture which these conclusions suggest is of a man about the centre of the road being struck by a vehicle the brakes of which were applied about the moment of impact. It is not suggested that there was any reason why the deceased should not have seen the vehicle approaching or why a person in the centre of the road should not have been observed by the driver of the vehicle for, although it was dark, visibility in the area was not otherwise obstructed or impeded. Possibly, this is why the jury thought that both parties were equally to blame. But there is no evidence concerning the movements of either the vehicle or the deceased in the critical few seconds before the impact. It is therefore possible that in those few seconds the deceased's own actions could have created a state of imminent danger to himself and made the impact inevitable. It is also possible that the conduct of the driver of the car created the danger or contributed to it. All sorts of possibilities as to how the accident happened may be imagined. But in the end the time-honoured question that we have to determine, and it is a question of law, is whether it was reasonably open to the jury on the evidence to find that the death of the deceased was caused, either wholly or in part, by the negligence of the driver of the unidentified vehicle. There can at least be no doubt that it was open to the jury to find that the deceased was struck and knocked down and pushed or carried along and finally run over by the vehicle and that his death resulted from the injuries he then received. So the real difficulty is to determine whether there was sufficient evidence to justify the finding that the driver was to blame for the accident. It is clear that it is a mistake to think that because an event is unseen its cause cannot be reasonably inferred: *Jones* v. *Great Western Railway Co.* (1). 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* (2) . . . 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,

(1) (1930) 144 L.T. 194, at p. 197.

(2) (1911) A.C. 674, at p. 687.

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.* (1). We should think that, applying these principles to the present case, inferences sufficiently appear from the circumstances to which we have referred that make it at least more probable than not that the unidentified vehicle was being driven in a negligent manner at the time of the accident and that this was the cause of the accident. Castlebar Road is a street with lights, the night was fine and clear, and there were no trees or other objects to obstruct the driver's vision of the road and pathways. Provided the headlights of the vehicle were in a proper condition, and it would be fatal for the defendant to argue that they were not, the headlights alone should have provided the driver with a quite satisfactory vision in front of and to the side of the vehicle. Yet the vehicle not only struck the deceased but pushed or carried him for forty-two feet in front of it and then ran over him before it stopped. The medical evidence of the condition of his body after the accident demonstrates the violence of the impact. There is a suggestion in the evidence that a vehicle with its brakes in proper condition which takes forty-two feet to pull up after the brakes have been applied would be travelling at about thirty miles per hour. There is no reliable evidence to this effect and it was open to the jury to hold that the vehicle was travelling faster. But let it be assumed that the vehicle, immediately before the collision, was travelling at about thirty miles per hour. It was still open to the jury to find that this speed was excessive in all the circumstances. The deceased was struck in the centre of the road. Immediately before the collision he must either have been proceeding along or standing in the centre of the road or he must have been crossing it, and in any of these positions the driver of the vehicle, if he had been keeping a proper lookout, should have been able to see him in time to apply his brakes and stop or at least slow down the vehicle in time. If the driver's vision was temporarily obscured for any reason—approaching headlights have been suggested—it was open to the jury to hold that he should have slowed down, and that, even if thirty miles per hour was not an excessive speed to drive along a suburban road at night when his vision was perfect, it was excessive to continue to do so in periods when his

(1) (Unreported, delivered on 27th April 1951).

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vision was obscured. It was certainly open to the jury to hold that a driver who drove along a suburban road at night at such a speed that the vehicle could not be pulled up in less than forty-two feet in an emergency was driving carelessly. Nor can the fact that the driver took refuge in flight be overlooked. If the action had been brought against the driver, weight might have been attached to this circumstance. But the present action was not brought against the driver. He could not be found. It is a separate cause of action created by s. 47 of the *Motor Car Act* 1951 (Vict.) brought against the nominal defendant. It was contended that this fact could be only used as an admission against a party to the action and the driver is not a party. It is unnecessary finally to decide this point. Ordinarily this would be so; but s. 47 provides that any person who could have obtained a judgment against the driver of the unidentified vehicle may obtain against the nominal defendant the judgment which in the circumstances he could have obtained against the driver of the motor car. This appears to assimilate the position of the nominal defendant to that of the driver. It is therefore difficult to see why the probative value of the driver's flight unexplained should not be as great against the nominal defendant as against the driver. At any rate, it is at least a fact the jury were entitled to take into account in weighing the probabilities. The deceased might of course have done many foolish things. He might for instance have lurched suddenly from a safe position into the path of the vehicle, the driver's vision might have been suddenly obscured by approaching headlights; there are many other possibilities that might have happened but of none of them is there any evidence. And there is no reason for inferring that any such situation existed. After fixing the point of impact it was possible for the jury to say that the unidentified vehicle had approached from the east, and, probably, that it was travelling in the centre of Castlebar Road. In those circumstances it is not unreasonable to infer that there was no traffic approaching from the opposite direction and, therefore, that there was no reason why the driver of the vehicle could not, and should not, have seen a person in the middle of the road. Of course, if the unidentified vehicle was proceeding along the left-hand side of Castlebar Road until immediately before the impact and yet managed to strike the deceased in the centre of the road the inference of negligence would be even stronger. The question may, therefore, be said to be limited to the question whether there is any reason why the jury should have supposed that it was probable, or equally likely, that some conduct on the part of the deceased created a situation in which the driver of the

vehicle could not have avoided him by the exercise of reasonable care. If the deceased had run across the road or proceeded partly across and then turned back no doubt such a situation might have arisen. But the deceased was middle-aged and the jury was entitled to conclude that he was sober and in normal health, that he was on his way home, that, probably, at the moment of impact there were not opposing streams of traffic and, in the circumstances of the case, that there was not the slightest reason to suppose that there was any conduct of this kind on his part.

In *Craig* v. *Glasgow Corporation* (1) Lord *Dunedin* said: "There is all the difference between the case of a man run into on a railway and that of one run into on the road. In the latter case the man has an absolute right to be there and it is the duty of the drivers of vehicles not to run him down" (2). The driver would not be excused from blame if the jury were entitled to conclude, as we think they were, that if he had been keeping a proper lookout he must have seen the deceased wherever he was immediately before the collision and should have been able to stop his vehicle in time if it was not being driven at an excessive speed. Apparently the jury must have found that the negligence of the deceased to some extent contributed to the accident. For that reason they reduced the damages from £4,000 to £2,000. But even if the deceased was partly to blame the verdict against the defendant would still stand if it was open to the jury, as we think it was, to find that the negligence of the driver of the vehicle was the effective cause of the accident. Perhaps it would not be out of place to cite the passage from the judgment of *Kay* L.J. in *Smith* v. *South Eastern Railway Co.* (3) that was subsequently approved in the House of Lords in *Jones* v. *Great Western Railway Co.* (4): "Then it was said that the facts were equally consistent with the accident having been due to want of care on the part of the deceased man himself as with its having been caused by the defendants' negligence, and, where that is so, the law is that the judge ought to hold that there is no question for the jury to decide. I venture to say, with all respect for those who hold a different opinion, that as long as we have trial by jury and juries are judges of the facts, it should be a very exceptional case in which the judge could so weigh the facts and say that their weight on the one side and the other was exactly equal" (5).

In our opinion the appeal should be dismissed with costs.

(1) (1919) S.C. (H.L.) 1; (1919) 35 T.L.R. 214.
(2) (1919) S.C. (H.L.), at p. 11; (1919) 35 T.L.R., at p. 216.
(3) (1896) 1 Q.B. 178.
(4) (1930) 144 L.T. 194.
(5) (1896) 1 Q.B,, at p. 188.

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KITTO J. David William McFeeters was last seen alive at about 7 o'clock on the evening of 10th October 1953. He was then at the home of a friend upon whom he had called, on his way home, to pass the time of day. About an hour later his dead body was lying on a roadway. How he met his death there is no eye-witness to tell. His widow brought an action in the Supreme Court of Victoria, claiming damages from a nominal defendant under s. 47 of the *Motor Car Act* 1951 (Vict.) on the ground that the death of her husband was caused by or arose out of the use of a motor car, the identity of which could not be established, and that she could have obtained a judgment against the driver of the motor car in respect of the death. The defendant denied the allegations of fact necessary to support the claim and, in addition, alleged contributory negligence on the part of the deceased. The case was tried by *Gavan Duffy* J. and a jury. The jury found a verdict for the plaintiff, reducing the amount of the plaintiff's damages by one-half on the footing that the deceased had contributed to his death by his own negligence and that he and the driver of the unidentified car were equally at fault. The learned judge, however, gave judgment for the defendant, taking the view that there was insufficient evidence to support a finding that the plaintiff could have obtained a judgment against the driver of the car. The Full Court of the Supreme Court on appeal reversed this judgment, and the appeal to this Court is brought against the decision of the Full Court.

The question to be decided is whether there was any evidence upon which the jury could properly find that negligence of the driver was a cause of the collision. It is a question depending upon the permissible inferences from the few primary facts deposed to by the witnesses, and requires a careful observance of the distinction between inference and conjecture.

The body of the deceased was found in Castlebar Road, Oakleigh, on the roadway, and at a point eight feet out from the building alignment of a side street named Webster Street. The width of Castlebar Road was thirty-two feet from gutter to gutter. The street ran east and west. On the roadway there were tyre marks, such as might be made by a small car, reaching to the point where the body lay from a point forty-two feet to the east but in the middle of the road. These marks did not extend further in either direction. As Webster Street had a roadway twenty-four feet wide and two footpaths each eight feet wide, the end of the tyre marks remote from the body must have been about opposite the eastern building alignment of that street. At the eastern end of the tyre marks was a small

amount of debris, consisting of some dirt, such as might have been dislodged from beneath the mudguards of a car, some small fragments of cream paint, a small piece of lead and some fragments of broken glass.

On this evidence it was undoubtedly open to the jury to infer that the deceased had been struck by a motor car in the middle of the road and at the point where the debris was deposited, and had been carried by the car, which then swerved towards its right hand side, to the point where the body was found. Medical evidence, which need not now be referred to in detail, added two more facts to those which might be inferred, namely that the deceased was upright when struck, and that some of his injuries had been caused by the initial collision and others by his being thrown down and run over at the point where the tyre marks ended. The jury might also infer, from evidence given by the friend upon whom the deceased had called, a man named Bishop, that the deceased was sober when he met his death.

Bishop's evidence was that it was already dark when he saw the deceased. This is important, for the street lighting in Castlebar Road was not good. The only light near enough to be worth considering was at the north-western corner of Castlebar Road and Webster Street, and the only evidence as to the effectiveness of that light—evidence given by a police constable, Griffiths, who was called by the plaintiff—was that it did not show a big beam,and that the area at the eastern end of the tyre marks was outside the glow of the light. The commencement of the tyre marks at the probable point of impact makes it likely, not indeed that the car had reached that position before the driver saw the deceased, but that before the driver saw the deceased the car had approached so close that it covered the intervening distance in the time which the driver took to react to the extent of applying his brakes. A fair inference would be that this intervening distance was less than that which would be illuminated by proper headlights if there were no competition from the headlights of traffic proceeding in the opposite direction. The length of the tyre marks, forty-two feet, could not suggest that the car had been travelling at any such speed as would by itself suggest lack of due care before or at the time of the collision, for, to say the least of it, there is no greater probability that the driver released his brakes, without having stopped the car, about at the point to which the body was carried than that he stopped there and only resumed his journey on finding that the unfortunate pedestrian was dead.

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One other set of facts deposed to by Constable Griffiths should be mentioned. Castlebar Road at its eastern end meets Warrigal Road. The intersection with Webster Street is some seventy yards west. As you leave Warrigal Road, Castlebar Road rises to Webster Street, the gradient being described by the constable as a medium incline. At Webster Street it flattens out for about twenty yards, and then dips downwards. Thus, in the vicinity of Webster Street there is what the constable called the brow of a small hill.

If the jury took as established all the facts which so far have been mentioned, as they would have been justified in doing, they had a picture of a motorist coming, at night, from the direction of Warrigal Road and travelling in Castlebar Road up the incline towards Webster Street, at a speed which was brisk, but not so fast that he could not stop in a distance of forty-two feet. Approximately at the top of the incline, and at a point outside the glow of the nearest street light, a pedestrian appears directly in the path of the car. He is upright, but is seen by the driver for the first time when the car is so close that there is only time for the brakes to become fully applied before the car hits him. In these circumstances it would seem that the only reasonably probable hypotheses upon which the collision may be explained are these: (i) that the car's headlights were insufficient for a car travelling at the speed which the motorist was maintaining at the time; (ii) that the driver was not keeping a proper look-out; (iii) that the driver's view ahead was adversely affected by the approaching headlights of another vehicle or other vehicles coming either over the brow of the hill or round the corner of Webster Street; (iv) that the pedestrian moved into the driver's line of vision so suddenly that a collision could not reasonably be avoided; or (v) that two or more of these things concurred. The driver was negligent if the headlights were insufficient or if he was not keeping a proper look-out. He was not negligent if the whole explanation of the collision is either that the pedestrian moved as suddenly as above suggested into the driver's line of vision, or that opposing headlights prevented the driver from seeing him earlier than he did.

The plaintiff therefore failed to show that she could have established negligence in an action against the driver, unless the facts which she proved made it reasonable for the jury to conclude that the collision was more probably due wholly or in part to insufficient headlights on the car involved or an insufficient look-out on the part of the driver, or both these things, than exclusively to the effect of approaching headlights or to conduct of the pedestrian against which the motorist had no reasonable opportunity of

guarding. Like *Gavan Duffy* J., I cannot see that there is any ground for regarding such a conclusion as reasonably open. It is true that the collision may be taken to have occurred in the middle of the road. But I agree with *Gavan Duffy* J. in the view which he expressed by saying: "The deceased for instance may have so acted as to force the car driver to the centre of the road or at any rate to justify him in going there. There is of course no evidence that he had chosen the centre of the road as the place to drive on before the accident occurred. If the deceased had stood and looked towards the driver so as to invite him to pass and then lost his head and attempted to dash across in front, this would not be the first time such a thing had happened. A natural and blameless but useless swing of the car towards the centre might have easily been the result. I see no reason for assuming that it was in any way the negligence of the driver rather than the negligence of the deceased solely that caused them to meet in the centre of the road".

Even if it be assumed that the motorist was by his own choice in the middle of the road instead of wholly on his correct side, the plaintiff's case seems to be in no better shape. To drive in the middle of the road ordinarily involves no lack of care for the safety of pedestrians, whatever it may involve in relation to other vehicles. If it be suggested that the assumed fact that the middle of the road was chosen by the driver presents a dilemma, because it means that either the driver had no approaching headlights to contend with or unnecessarily subjected himself to their dazzling effect, the answer is that there may be many circumstances in which a driver may find it reasonably necessary to be on the centre line of a road, even though there be oncoming lights from which he would prefer to keep further away. And it is important to observe that the course which the car took after striking the deceased is not at all inconsistent with the driver's having been dazzled by approaching lights, for it would be quite possible for the vehicle with the lights to be gone before the veering of the car which struck the deceased carried it across the course of that vehicle.

It has been contended for the plaintiff that the various possibilities of the case should be considered in the light of the fact that after the accident the motorist disappeared and has not been discovered. Even if in all the circumstances the disappearance of the motorist were fairly open to be interpreted as an admission by conduct that some carelessness of his had been wholly or partly the cause of the collision, it would not be permissible to treat it as such in this action. In an action against the motorist an admission of negligence made by him in any form would be receivable as