

Whatever happened to Weissensteiner - The Person and the Principle?

Let me begin with a disclaimer: I wrote this talk when I was a barrister.

I wondered whether I should change its tone because I am no longer a barrister – but I thought ‘no, I will just let it be’ and you will understand that it reflects my thoughts and opinions from my old life – and it does not reflect in any way the view of the court.

The first part of this talk assumes some knowledge on your part of Weissensteiner and the Weissensteiner direction and the practice of, and fundamental rules of, criminal trials. It also assumes some knowledge of the decision of the High Court in *R v Baden Clay*.

Those of you without that knowledge – *fear not* – because by the end of this talk – you will know all you need to. You will just need to bear with me for a moment.

When I read the reference to the 1993 decision of *Weissensteiner* in the judgment of the High Court in *The Queen v Baden-Clay* in August 2016, my first thought was something like: **‘oh – is Weissensteiner still a thing?’** My sense was that the case and the direction it spawned was not very much in use.

I add that *had* I been a judge when I read the decision in *Baden-Clay*, I would definitely have been keeping up.

After the decision in *Baden Clay*, there was some concern at the criminal defence bar that the High Court intended some sort of revival of the *Weissensteiner* direction and that, as a result, poorly educated, inarticulate or hopeless defendants – scared of the witness box – might be unfairly disadvantaged by its revival. That buzz seemed to pass fairly quickly. At that time, it was not something that really bothered me because, unless there was a very good reason not to, my practice was to call my clients at their trials.

It was more than a year after the decision in *Baden Clay* was delivered that I received a request from the University of Queensland to deliver this talk. I was told that I could speak about anything I wanted to speak about, but that it would *really good* if I spoke about *Weissensteiner*.

So I decided to revisit my **‘is it still a thing?’** question and to answer it in this lecture. However, because we are in this impressive courtroom, I thought I ought to elevate the title from *‘is Weissensteiner still a thing’* to *‘Whatever happened to Weissensteiner the principle?’*

As to the other half of the title of this lecture – *Whatever happened to Weissensteiner the person?* – this is how that came about:

I was at dinner last year with some academics including Professor Jeremy Gans from Melbourne Law School. He had just written a book about a real trial in England where the jurors used an Ouija board to reach their verdict. He was talking about that book and his plans for other books about trials and someone else said – *apparently there is a book about the Weissensteiner trial out there too – from Weissensteiner’s perspective*. I thought to myself

– how great if I could get that for this talk. The next day, I asked my clerk, Caitlin – to try to find it for me.

I did not really expect her to have any luck, but Caitlin is not an ordinary clerk – she is a wonder clerk – and she found me a second-hand copy of a book about the Weissensteiner trial somewhere in a dusty bookshop in Europe.

It cost me \$11.90 including postage. The price of the book itself was \$2.66 US. It took ages to arrive and I was worried I might have fallen for a scam.

We were so excited when it came but our hearts sank when we realized that, of course, it was in German. Caitlin got some quotes to have it translated, but they were all above \$10,000.

I wrote to its author, an academic at Berkley, asking whether the book had been published in English – but she did not reply.

Then Caitlin the wonder clerk said *leave it to me*, and she recruited my daughter Sabrina and the two of them spent the best part of three months using Google Translate to turn that book into English for me.

Now, let's move on to the questions raised in the title of this talk. *Whatever happened to Weissensteiner the principle?*

By *Weissensteiner* the principle, I mean the principle that, in some cases, it is appropriate for a trial judge to direct the jury that they may *more safely draw an inference of guilt* from incriminating facts if an accused person does not provide an explanation for them that is consistent with innocence.

I like the way Professor Hunter understands the phrase 'more safely draw' as meaning: you can more confidently dispose of a doubt.

Whatever happened to that principle, is it still a thing? After *a* moment of reflection, the answer is obvious. The High Court mentioned it in a high profile decision not so long ago – of course it is still a thing.

A basic search revealed that even before its mention in *Baden-Clay, Weissensteiner* had been relied upon – sometimes validly and sometimes not – at first instance and perhaps more interestingly, had been *called in aid*, by courts of appeal undertaking the independent review of the evidence they are required to undertake when an appellant argues that a guilty verdict is unreasonable, even if it had not been called in aid at first instance.

The principle has also been considered in overseas jurisdictions in their debates about the right of silence and what judges and juries might make of its exercise.

So it is definitely a thing.

As to *Weissensteiner the person* – he was deported to Austria in about August 2004, having served 14 years of his life sentence. He would be in his early 50s now.

The book I mentioned tells his story. According to him – he is not guilty of murder. We will come to that later.

My original plan for this talk was – apart from talking about the book – to take you through examples of the application of the principle here and overseas. I was hoping to find cases where the *Weissensteiner* direction was the tipping point in a case – because you might think it was in *Weissensteiner* itself. However, the cases I found did not really hold my interest and I could not find an interesting tipping point case.

What did hold my interest, and what I would like to focus on, was the development of the argument about the validity or appropriateness of the *Weissensteiner* direction at trial, in the Court of Appeal and in the High Court.

This is because, knowing that *Weissensteiner* is still a thing, an understanding of the development of the argument which led to the High Court endorsing the direction puts you in the best place to argue, in a particular case, whether or not the direction should be given.

To understand *Weissensteiner*, you have to put it in the context of an accused person's right to remain silent throughout the course of a criminal prosecution. You will know that an accused person has a right of silence *before* trial: they cannot be compelled to answer police questions. They also have a right of silence *at* trial: they cannot be compelled to give evidence at their trial. They cannot be compelled to explain themselves or, more relevantly to this discussion, to explain incriminating evidence presented by the prosecution.

Of course, we are not talking about a right to remain silent at trial as an alternative to giving evidence as some sort of unchallenged speech – although that used to be the case. Now, if an accused gives evidence, they will be cross-examined. There are many articles on the right to silence – and its justification – and many commentators question how it can be a right worth preserving if a trial is all about truth and justice. But that is a long debate for another time. For the purposes of this talk, it is enough to understand the right to silence at trial as complementary to the burden of proof: In a criminal trial, a defendant is presumed innocent and it is for the prosecution to prove its case against a defendant beyond a reasonable doubt. It is accepted in our criminal justice system that it would be unfair to shift that burden onto an accused person by imposing upon them an obligation to defend themselves against the allegations made at any point in the criminal prosecution process. In other words, an accused person has a right of silence which exists before their trial, during the police investigation and interrogation stage, and at trial.

Even though an accused person who chooses not to give evidence at trial is exercising a right to which they are entitled, the law is very aware that it is human nature to *suspect* that a silent accused is a guilty accused. For this reason, juries – full of human nature – are told by trial judges not to read anything into an accused person's silence at trial.

Juries are directed –

- That an accused person has a right not to give evidence at trial;
- That an accused person is presumed innocent and is entitled to insist that the prosecution prove its case against them, *if it can*; and
- That the prosecution bears the burden of proving the guilt of the defendant beyond a reasonable doubt and the fact that a defendant did not give evidence is not evidence against a defendant.

Juries are told that an accused's silence at trial proves nothing at all. It cannot be considered by the jury when deciding whether the prosecution has proved its case beyond a reasonable doubt and it does not make the prosecution's task any easier.

That was the backdrop for *Weissensteiner*: Criminal trials which respect an accused's right to remain silent at trial.

Let us now talk about the case.

Johann Manfred Weissensteiner was an Austrian backpacker, who loved Australia. He first came here in 1988 and twice renewed his 6-month visa. In 1989, he was a tourist in his 20s in Cairns. By 1991, he had been convicted of the double murder of Hartwig Bayerl and Susan Zack and the theft of their boat. He was sentenced to mandatory life imprisonment for the murders and 5 years imprisonment for the theft of the boat.

Hartwig Bayerl was Austrian. He met Susan Zack, a British woman, in Cairns in 1989 and they fell in love. Bayerl spent all his money on a sailing boat – a 36-foot cutter. Zack spent all of her savings on alterations to it. The boat was called *Immanuel*, which means *God with us*. Bayerl and Zack told their families that they planned to sail the Pacific together, and if that worked out – they would marry. Zack was pregnant.

Bayerl advertised for a labourer to help with alterations to the boat. Weissensteiner, who knew Bayerl from an earlier trip to Cairns, answered the advertisement and got the job. In exchange for his labour, he would cruise the Pacific with Bayerl and Zack.

I said a moment ago that Zack spent all her money on alterations to the boat. The alterations were out of the ordinary. They were designed to make the boat battle proof – more particularly, World War 3/nuclear holocaust proof. Bayerl – whom the newspapers described as a handsome and charismatic 35-year-old, obsessed with the bible – believed that there would be a third world war in May 1990.

He believed that there existed a pyramid of power involving the Freemasons, the Lions and the Apexians, who wanted to destroy the earth. He also had a thing about lizard people: aliens among us, waiting to take over the world. His plan in 1989 was to wait out the May 1990 holocaust on an island in the Pacific.

Weissensteiner, a labourer, worked with Bayerl to fit out the boat with bulletproof glass. They coated the hull with steel – 20 millimetres thick. There were power generators and a water de-salinator on board.

Weissensteiner was at first intrigued by, and then later convinced of, Bayerl's beliefs about the end of the world. A newspaper report from the time of his committal hearing said that when the Gulf War erupted in August 1990 – while Weissensteiner was on remand at Lotus Glen prison – he told other inmates that it was the beginning of the end of the world.

Bayerl and Zack were last seen, with Weissensteiner, on their boat near Cairns, in late November 1989. Around that time, Bayerl and Zack stopped contacting their families or accessing their bank accounts and Zack received no pre-natal care thereafter.

In January 1990, Weissensteiner told the harbourmaster at Trinity Inlet, who was trying to get an important message to Zack, that Bayerl and Zack were on the Atherton Tablelands.

On the same day, he told a customs' official that the owner of the boat was in Papua New Guinea. A little later, the boat cleared customs and left Cairns.

Weissensteiner was on the boat then – it is not clear whether Bayerl and Zack were with him. After clearing customs, Weissensteiner was only ever seen *alone* on the boat. He sailed the Pacific telling different people different things about the whereabouts of Bayerl and Zack.

Having not heard from Bayerl or Zack for several months, their families worried. They initiated a search for them and Interpol became involved. The boat and Weissensteiner were eventually found in the Marshall Islands.

The boat's name had been changed from *Immanuel* to *Mani* – the short form of Manfred: Weissensteiner's second name and the name he was known by.

By the time he was found, Weissensteiner had spent about 8 months sailing the Pacific. He told police he had been turned away from Bougainville by the Papua New Guinea Navy. He had sailed to Micronesia, then to Kiribati and then to the Marshall Islands. He told a person in Kiribati that Bayerl and Zack had gone to Western Australia. He told a person in the Marshall Islands that he had taken Bayerl and Zack to Bougainville, where they were smuggling arms.

After he was found, he was taken into custody in the Marshall Islands awaiting extradition to Australia. He told police, while he was in custody, that Bayerl and Zack were alive but he did not know where they were. He thought they'd gone to Western Australia. He said they told him to sail to the Marshall Islands and wait for further instructions. He told a friend who was urging him to return to Australia voluntarily to face trial, '*But they have nothing. They have no bodies. They have no proof.*'

Weissensteiner was taken to Cairns and charged with the double murder and theft.

Meanwhile, the police were sailing the boat back to Cairns from the Marshall Islands. It may come as no surprise to you that the boat was struggling with a steel reinforced hull. By the time it got to Nauru, it was taking on water.

One of the police officers involved explained [very technically] that *'the water pump was buggered and the whole thing was packing it in – it was a wonder it got as far as it did'*.

While Weissensteiner was in custody in Australia, he said to another prisoner, in German, a statement which that prisoner said translated to: *"They'll never find those two"* (although the High Court pointed out that it was more accurately translated as *'They cannot find those two'*).

Weissensteiner's committal hearing and trial were in Cairns. He was represented by a barrister called Mr. Sumner-Potts, who died a few years ago.

The case against Weissensteiner was wholly circumstantial. Nothing in what Weissensteiner said before his trial implicated him in the murder of Bayerl and Zack – but the changes in his story were suspicious.

On the other hand, the bodies of the deceased have never been found. Bayerl had very strange beliefs, and he had planned to hide at about the time he went missing. There was no blood or sign of 'foul play' on the boat, and there was no obvious motive. Theft is one thing – but murder – double murder – is another.

Bayerl and Zack's belongings were still on the boat. Those belongings included items they treasured, like Bayerl's bible, and items which were of no use to Weissensteiner, like Zack's maternity bras, nappies and baby clothes. The prosecution used the fact that Bayerl and Zack's belongings remained on the boat to suggest that they must have left the boat *involuntarily*. That fact is also, you might think, consistent with an expectation that they would return.

At the committal hearing, Mr. Sumner Potts argued that there was no case to answer. He suggested that Bayerl and Zack were sunning themselves on an island in the Pacific or in Western Australia, waiting for a holocaust to pass. He also argued that there were problems proving that Bayerl and Zack had died in an Australian jurisdiction. His no case application was unsuccessful, and Weissensteiner was committed for trial to the Cairns Circuit Court.

As the case was wholly circumstantial, for the prosecution to succeed at trial it had to persuade the jury that the facts it could prove pointed to, or gave rise to the inference of, Weissensteiner's guilt beyond a reasonable doubt. In other words, the prosecution had to satisfy the jury that there was no other reasonable possibility that would explain the facts other than that Bayerl and Zack were murdered by Weissensteiner.

Those facts included Weissensteiner being alone on the boat, even though Bayerl and Zack had spent so much money on it, and the fact that their treasured possessions were on the boat.

Weissensteiner gave no evidence at his trial. He exercised his right to remain silent. He did not explain to the jury how he came to be innocently on the boat alone. Instead, he – through his barrister – chose to make an argument that the prosecution’s evidence was not good enough to convict him. He did this without getting into the witness box himself, without exposing himself to cross-examination.

His barrister’s cross-examination of the prosecution witnesses was designed to provide the foundation for an argument that Bayerl and Zack were either in Western Australia or Papua New Guinea. If the jury thought those options were reasonably possible, then they had a reasonable doubt that Weissensteiner was guilty of their murder, and they would be obliged to acquit him.

A media report I read from the time of the trial said that the prosecutor was not confident of guilty verdicts. I’m not sure where the journalist found that information, but it might have been that the prosecutor was worried that, while the evidence raised a *suspicion* that Weissensteiner killed Bayerl and Zack, that was not enough and there was so much other ‘noise’ at the trial about Bayerl’s odd beliefs and his desire to hide that the Crown case could not overcome it, to establish Weissensteiner’s guilt beyond a reasonable doubt.

Having made the decision not to give evidence at trial, Weissensteiner would have expected the usual treatment of his exercise of the right of silence. He would have expected the trial judge to tell the jury that they were not to reason that he must have been guilty because he said nothing to them. Weissensteiner’s trial judge did give the jury directions along those lines.

His Honour told the jury that the Crown bore the onus of proof; the accused did not have to prove anything; and that he was under no obligation to give evidence.

However, the trial judge went on to tell the jury that, and I will paraphrase it before showing you the extract –

- because the case was wholly circumstantial; and
- because they might think that the only person who could explain the circumstances innocently was Weissensteiner; and
- because he chose not to

they could **more safely draw a guilty inference from the facts.**

They did exactly that, and Weissensteiner was convicted.

Some commentators say that he was convicted **because** of that direction. The full direction, given immediately after his Honour told the jury that Weissensteiner was under no obligation to give evidence, was this:

You cannot infer guilt simply from his failure to do so [to give evidence at trial].

The consequence of that failure is this: you have no evidence from the accused to add to, or explain, or to vary, or contradict the evidence put before you by the prosecution.

Moreover, this is a case in which the truth is not easily, you might think, ascertainable by the prosecution.

It asks you to infer guilt from a whole collection of circumstances.

It asks you to draw inferences from such facts as it is able to prove.

Such an inference may be more safely drawn from the proven facts when an accused person elects not to give evidence of relevant facts which it can easily be perceived must be within his knowledge.

You might, for example, think in this case it requires no great perception that the accused would have direct knowledge of events which can be canvassed only obliquely from the point of view of seeking to have you draw an inference from the evidence which has been led by the Crown.

The use you make of the fact that there is no evidence given or called by the defendant in these proceedings is that.

Towards the end of the summing up, his Honour gave the jury another direction to similar effect. I think (although I have not been able to confirm it) that the part of the direction inviting the jury to infer guilt from the failure to explain was *unexpected* by counsel. At the end of the summing up, Mr Sumner Potts asked for a re-direction.

He argued that part of the direction was not in accordance with the Queensland case of *R v Fellowes* [1987] 2 Qd R 606.

The fact that *Fellowes* was not raised until redirections is what makes me think that the judge's direction was unexpected.

Fellowes is the short hand reference to the case of *Fellowes, Jackson, McGeough and Buttigieg*. Those four 19 or 20 years olds, plus a juvenile called Nelson, were convicted after a trial of the arson known as 'Reid's Fire'.

Reid's was the department store in Ipswich which was totally destroyed by this fire: the heat of it was so intense that it melted the clock face on the post office building. It was a fire that was devastating for the town.

The principle Crown witness was a 15-year-old girl and a hopeless witness. All of the defendants spoke to police – but none gave evidence at trial. However, what they told police was presented to the jury at trial through evidence from the police officers to whom they spoke. All of the defendants – except for Buttigieg – told police they were not at the arson site and knew nothing about it.

Buttigieg relied on the defence of duress. She told police that McGeogh coerced her into throwing a bottle through the door at Reid's. As well as plainly implicating McGeogh, her defence was highly damaging to the others.

The trial judge gave the jury the usual direction about a defendant not giving evidence. His Honour told the jury that they were not to assume that the accused persons were guilty because they had not gone into the witness box. That fact did not prove anything one way or another. It did nothing to establish guilt, but on the other hand, it did nothing to rebut, contradict or explain the evidence put by the Crown.

Then his Honour said:

There has been no account from them as to their movements on the night in question, and I am giving you this direction – that it is legitimate for you to take this failure into account as a consideration which makes it less unsafe to infer guilt than it otherwise would have been. It is still however, for the Crown to prove their guilt to your satisfaction beyond a reasonable doubt.

That direction was held to be a misdirection. The judgment of the Court of Appeal was a judgment of the Court in which their Honours said:

That direction may be taken as to some extent contradictory of the earlier directions, because it suggests to the jury that some inference of guilt may be made by reason of the accused's failure ... to give evidence of their movements on the night in question.

The oblique and somewhat amorphous expression '**less unsafe to infer guilt**' cannot save it from the charge that it could be understood by the jury as a statement that some inference of guilt may be derived from the failure of the accused to give such evidence.

Nor is it saved by the final sentence if the jury's satisfaction beyond reasonable doubt is aided by an inference they should not have drawn.

I do not want to spend too much time on *Fellowes*, but the court there looked to other cases in which similar directions had been properly given. The court thought the key feature of a case which would warrant such a direction was that *the accused had elected not to give evidence of relevant facts which, it can easily be perceived, must be within his knowledge*.

Without question, there are no similarities between the nature of the case in *Fellowes* and the nature of the case in *Weissensteiner*. The defendants in *Fellowes* were not confronted by a circumstantial case. For three of them the defence was: *I was not there*. The court held that in circumstances of alibi or something similar to it (including an assertion that the defendant was not there), the '**less unsafe to infer guilt**' direction was not appropriate. The particularly interesting thing to note from *Fellowes* is the requirement that the relevant failure to give evidence must be one which – inferentially – can increase the intrinsic strength of the Crown case:

The failure to support an alibi by giving evidence, or the failure to go into the witness box to deny presence at the scene is not a failure that can increase the intrinsic strength of the Crown case.

Thus, as in that case, not giving evidence to support an alibi or to deny your presence at the scene might do nothing to improve the defence case, but it does nothing to add to the strength of the evidence in the prosecution case.

To now return to the trial of Weissensteiner.

Having been referred to *Fellowes*, the trial judge declined to redirect. A little later – while the jury were still deliberating – defence counsel referred the trial judge to the decision of the High Court in *Petty & Maiden* which had been delivered in Adelaide about three weeks earlier. The trial court reconvened to discuss it, but the trial judge still declined to re-direct.

Briefly, Petty and Maiden were prison escapees convicted of the murder of a hitch-hiker. Before trial, in interviews with police, Maiden said Petty killed the hitch-hiker after telling Maiden to push him over. Petty told police that he and Maiden killed the deceased accidentally. At trial, they both gave unsworn statements from the dock that they had killed the deceased accidentally – Maiden was now telling Petty's story. The issue was the way in which the jury might use the fact that, during the committal hearing, Maiden had not backed away from the version he'd given the police.

The High Court found that the jury could use his prior 'conduct' – that is his conduct in maintaining through the committal that Petty had killed the deceased – in evaluating the genuineness of his defence at trial that the killing was accidental.

The circumstances of *Petty & Maiden* were very different from *Weissensteiner*. However the High Court in *Petty* spoke of an accused's right to remain silent at a committal and made the point that silence provided no basis for an adverse inference against an accused. That is what defence counsel attempted to rely upon.

After five hours of deliberations, the *Weissensteiner* jury returned their guilty verdicts. Mr Sumner Potts lodged an appeal immediately, complaining about that direction.

Weissensteiner lost in the Court of Appeal – 2:1. Justices of Appeal Pincus and McPherson were in the majority. Justice Shepherdson dissented.

Justice Pincus said he found the question whether the **less unsafe to draw the inference** direction was a misdirection a difficult one. His Honour thought that the trial judge in *Weissensteiner* was right to conclude that the *Weissensteiner* case was the sort of case *Fellowes* had in mind in which the **less unsafe to draw the inference** direction was appropriate. His Honour spent some time analyzing the decision in *Petty* and said nothing in it suggested that a jury could never draw an adverse inference from an accused's silence. His Honour's decision – that the trial judge's direction was not prohibited by *Petty*, was qualified by his Honour's statement that the contrary was arguable. That is – that it was arguable that *Petty* indicated that the silence of an accused at trial was simply irrelevant to the jury's deliberations.

Justice McPherson agreed with Justice Pincus' analysis of *Petty* and said it confirmed the settled rule that no inference that the accused is guilty may be drawn from the mere fact that he or she chose to remain silent at trial – but his Honour said nothing like that had been suggested in the *Weissensteiner* trial. His Honour found that observations of high authority sanctioned the less unsafe to draw the inference direction. His Honour found that – according to the authorities – adverse inferences may be drawn where the evidence of the prosecution had reached the point where it called for explanation from the accused if he was to avoid an inference of guilt. His Honour said: 'Once that stage is reached – an accused person who, by remaining silent, leaves critical inculpatory facts unexplained, does so at the risk of being found guilty of the charge against him.' His Honour found that in *Weissensteiner*, the prosecution case had reached the stage where guilt might properly be inferred in the absence of some answer or explanation from the accused. Thus, the comment to that effect from the trial judge was legitimate and did not infringe on the fundamental right of an accused to remain silent at trial.

This seems to align with a point made by Justice Pincus that – *'It is one thing to say that there is a right of silence and another to say that its exercise shall never be permitted to disadvantage those who exercise it'*.

Justice Shepherson dissented. His Honour saw the authorities as establishing that, where the crown had prima facie proved its case, and where the only source of exonerating facts was the accused alone – then the failure of an accused to give evidence of exonerating facts might be used by the tribunal of fact in determining whether the Crown had proven its case.

Justice Shepherdson reasoned, in effect, that there was nothing in the Crown case from which the inference that Weissensteiner was the killer could be drawn. In his Honour's view, the Crown had not gotten to the prima facie stage. To say that he and only he must have known of the facts which might prove his innocence was to assume what the Crown had to prove – namely that he was involved in their death.

From Weissensteiner's perspective, he had a 2:1 decision of the Court of Appeal and one member of the majority expressing some reservations about their decision. Of course he went to the High Court.

In November 1993, the High Court held, by a majority of 5:2, that the direction was a valid direction and his convictions were not disturbed. The majority found ample precedent for a reasoning process which allowed the failure of a party to give or call evidence to be taken into account in evaluating the evidence presented to the court. The famous quote, validating the direction in *Weissensteiner's* case, is at paragraphs 28 to 30 of the judgment of Mason CJ, Deane and Dawson JJ:

We have quoted rather more extensively from the cases than would otherwise be necessary in order to show that **it has never really been doubted that when a party to litigation fails to accept an opportunity to place before the court evidence of facts within**

his or her knowledge which, if they exist at all, would explain or contradict the evidence against that party, the court may readily accept that evidence.

It is not just because uncontradicted evidence is easier or safer to accept than contradicted evidence. That is almost a truism. It is because **doubts** about reliability of witnesses or about the inferences to be drawn from the evidence **may be more readily discounted** in the absence of contradictory evidence from a party who might be expected to give or call it. In particular, in a criminal trial, hypothesis consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused.

Of course, an accused may have reasons not to give evidence other than that the evidence would not assist his or her case. A jury must bear this in mind in determining whether the prosecution case is strengthened by the failure of the accused to give evidence. Ordinarily it is appropriate for the trial judge to warn the jury accordingly.

Not every case calls for explanation or contradiction in the form of evidence from an accused. There may be no facts peculiarly within the accused's knowledge. Even if there are facts peculiarly within the accused's knowledge the deficiencies of the prosecution case may be sufficient to account for the accused remaining silent and relying upon the burden of proof cast upon the prosecution. Much depends upon the circumstances of a particular case and **a jury should not be invited to take into account the failure of the accused to give evidence unless that failure is clearly capable of assisting them in the evaluation of the evidence before them.**

Their Honours made the point that an accused person had to take into account the risk of a *Weissensteiner* direction when deciding whether to give evidence at their trial. They said that was not to deny a right to silence, but rather to recognize that the jury cannot be required to shut their eyes to the consequence of its exercise.

Their Honours also made the point that they were only asked to determine whether the direction was appropriate. No complaint was made about its form, and in particular, no complaint was made that it did not include an instruction that a reason may have existed for *Weissensteiner's* failure to give evidence which would preclude the jury from using that failure in the manner directed by the trial judge. Without question – the direction given was incomplete. Nevertheless, the only ground argued failed. In a joint judgment, Justices Gaudron and McHugh dissented. Their Honours accepted that there was long standing authority to the effect that in some cases, comments on an accused's failure to give evidence was permissible. Their Honours emphasised that it was the failure to explain – not the failure to give evidence – which the authorities allowed to be taken into account. Consideration was permissible only where the circumstances presented by the prosecution so obviously suggested a particular conclusion that they called for an explanation, if there was one, consistent with innocence – something more than the prima facie case discussed by Shepherdson J in the Court of Appeal.

Those sort of cases could not be identified with particularity, however some good examples were put forward. The first was a situation in which an accused person is 'caught red-handed,'

as in the recent possession cases where an accused is in possession of goods which had only recently been stolen. A second example is a situation in which the facts suggest that the accused is possessed of some special knowledge, for example if a murder weapon was found in their lounge room.

Accepting that in some cases, the direction was appropriate, their Honours looked at the facts of *Weissensteiner*. They said that only the appellant knew how he came to be in possession of the boat and why he gave so many different stories about the whereabouts of Bayerl and Zack, – and that, because of his lack of explanation, the jury might conclude that he had something to hide: that he had been involved in *some wrongdoing*. However, their Honours felt that there was nothing in the evidence which provided the basis for an assumption that Weissensteiner had some special knowledge as to the whereabouts of Bayerl and Zack ‘*as might be suggested if, for example, it had been established that they sailed with him from Cairns. Much less can it be said that the facts so obviously implicated him in murdering them that they call for an explanation in the sense discussed*’.

Their Honours considered the direction to have constituted a serious miscarriage of justice, and would have quashed the convictions and ordered a re-trial. However, their Honours were in the minority.

Regardless of the outcome in the case, the direction was validated by the whole of the court and it was then feared that the decision would bring about a significant change to criminal practice. It was feared that defendants would be so disadvantaged by the *Weissensteiner* direction that they would feel compelled to give evidence at their trials. This would be contrary to one of the fundamental rules of a criminal trial: that it is for the prosecution (which has behind it the machinery of the state) to prove guilt, not for a defendant (an individual citizen without such might) to prove their innocence.

Although a major change in criminal practice was expected, things did not play out that way. In later decisions, the High Court pulled back from its decision in *Weissensteiner* and confined its application to limited types of cases, which did not occur that often.

I won’t go through those later decisions, but it is worth noting that, in cases in 2000 and 2001, the High Court said that the case of *Weissensteiner* was ‘rare and exceptional’ and an expectation that an accused would give evidence in a criminal trial would occur seldom, if ever.

After those decisions, I thought *Weissensteiner* went pretty quiet – although Professor Hunter will prove me wrong – until what to me was a surprising reference in August 2016 by the High Court in its decision reinstating Gerard Baden-Clay’s conviction for the murder of his wife.

In that case, *Weissensteiner* was referred to to make the point that it was Baden Clay’s conduct, in giving the evidence he did, which could be taken into account by the jury in finding him guilty of murder. In a circumstantial case, hypothesis consistent with innocence cease to be reasonable in the absence of evidence to support them.

At 50 – 54, the High Court said:

[50] Given the unchallenged conclusion that the respondent was the agent of his wife's death, the compelling inference is that he was the last person to see his wife alive and was the only person who knew the circumstances of her death. That inference, did not, of course, diminish the overall burden on the prosecution of proving beyond reasonable doubt all elements of the offence of murder with which the respondent was charged. In the case of circumstantial evidence, the prosecution's burden requires it to exclude all reasonable hypothesis consistent with innocence. However, when an accused person with knowledge of the facts is silent, then as was said in *Weissensteiner v The Queen*:

'in a criminal trial, hypothesis consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them, when that evidence, if it exists at all, must be within the knowledge of the accused'.

...

[51] ... *Weissensteiner* was not simply a case in which the accused failed to contradict evidence of other witnesses. It was a case in which, if there were facts which explained or contradicted the evidence against the accused, they were facts which were within the knowledge only of the accused and thus could not be the subject of evidence from any other person or source.

[52] In any event, this was not a case where the accused remained silent. It is a case where the accused gave evidence. The present case is stronger for the prosecution than the Crown case in *Weissensteiner* because here the respondent gave evidence, which not only did not support the scenario hypothesized by the Court of Appeal, but was inconsistent with that scenario. The respondent's evidence was that he had nothing to do with the circumstances in which his wife was killed. On his evidence he simply was not present when her death occurred; and he could not have been the unintentional cause of her death.

...

[54] The evidence given in the present case by the respondent narrowed the range of hypotheses reasonably available upon the evidence as to the circumstances of the death of the respondent's wife. Not only did the respondent not give evidence which might have raised the hypothesis on which the Court of Appeal acted, the evidence he gave was capable of excluding that hypothesis.

As I interpret that, if Baden Clay had said nothing at his trial, then the evidence gave rise to two competing inferences: either he killed his wife intentionally, or he killed her without intending to. Manslaughter was open initially. However, because he subsequently gave an absurd story – manslaughter was no longer available.

He chose not to explain in terms of manslaughter – in doing that – he took away from the jury, in this circumstantial case, the manslaughter option. He was the only potential source of a hypothesis consistent with innocence.

The High Court also said that if it were truly the case that there was no evidence from Baden Clay about the circumstances of his wife's death, the application of the principles explained in *Weissensteiner* would have required consideration, and they were not adverted to by the Court of Appeal. The High Court said that the respondent's evidence was important, even if it was disbelieved, because it was open to the jury to consider that the hypothesis identified by the Court of Appeal was not a reasonable inference to draw from the evidence when the only witness who could have given evidence to support the hypothesis gave evidence which necessarily excluded it as a possibility.

What follows are just my thoughts and comments and I raise them as matters to think about, without providing answers:

We know Weissensteiner is still in play in the criminal justice system in Queensland. The High Court has made that plain. I wonder however, about the utility or validity of such a direction when the Crown evidence gives rise to alternative verdicts. In a case like Weissensteiner, the reasonable alternatives open on the prosecution evidence were that he had killed Bayerl and Zack or that Bayerl, who was an odd person, had decided to abandon the boat, taking Zack with him, and that they were both alive and well. It was a case of murder or nothing.

A lack of explanation therefore allows a jury to more safely draw an inference of guilt of murder.

But let's think about Baden Clay ... On the Crown case, the evidence gave rise to two possibilities: murder and manslaughter. How does a failure to explain/silence about the incriminating material assist one way or the other?

I don't think it does.

I think – to borrow a phrase from the law around consciousness of guilt evidence – it may be intractably neutral between the two alternatives.

The other thing that you might think was missing from the consideration of Weissensteiner in Baden Clay was a factoring in of the critical part of the direction, the part of the direction which was not included in Weissensteiner either: that the jury must keep in mind that a person charged might have all sorts of reasons for not giving evidence. They include things like timidity or a fear of retribution or a belief that the Crown case was so weak it was better to preserve the right of last address. I'd add to that a desperate attempt to save face.

I want to leave that hanging – to give you something to think about.

My hope is that my analysis of *Weissensteiner* gives you some sense of the issues to think about if you are in a matter where its application is contemplated.

Now – let's get to the fun stuff: The Book.

Half of the chapters in the book deal with an attempt by a bumbling Interpol agent in 1992 to find a man in a grainy photograph, said to be Bayerl – alive and well and in Europe. For a bit of gratuitous romance, he – whoever he is in the photograph – is in the company of an alluring Portugese woman in the photograph. There are reports of sightings of them from other

bumbling Interpol agents, entering smoky dens. Seemingly an attempt to create a dark and mysterious mood.

He finally tracks this person down only to find that it is not Bayerl. The man he finds looks nothing like him and is 10 cm shorter.

That story is interrupted by chapters which are based on evidence from the committal hearing and the trial and newspaper articles which tell the story of Weissensteiner meeting Bayerl, about Bayerl's odd ideas about the end of the world, and the committal and trial itself. It adopts a flashback style.

Then – after you wade through 90% of the book – it includes information said to have come from Weissensteiner, after he had been imprisoned, about what really happened.

According to the book, Susan Zack decided against sailing to the Pacific to avoid the holocaust before the boat left Cairns, but Bayerl forced her to stay with him. Apparently, he and Weissensteiner took turns guarding her. Bayerl had weapons on the boat.

Weissensteiner, Bayerl and Zack had been waiting for the nominated day of the end of the world. When that day came and went, Susan Zack wanted out. She wanted her investment back and to return to England.

One day, while he was lying on his bunk, Weissensteiner woke up to the sound of a shot. He ran to the deck and saw that Zack had been killed. He helped Bayerl throw her overboard.

They decided to sail on to Bougainville, where they were going to unload the weapons. Bayerl met up with the purchaser's ship using a dinghy. He exchanged the weapons for cannabis. Bayerl either sailed or rowed the Dinghy to Papua New Guinea. Weissensteiner sailed on, ultimately to the Marshall Islands.

Apparently, according to the book, when *The Immanuel* was searched, only one of its three dinghies was on it.

Weissensteiner went to the post office on the Marshall Islands every two weeks, hoping for mail from Bayerl which never came.

His mother said he told her he had witnessed a crime and was in mortal danger. Apparently, during the trial, he waited for a letter from Bayerl to establish his innocence... but it never came.
