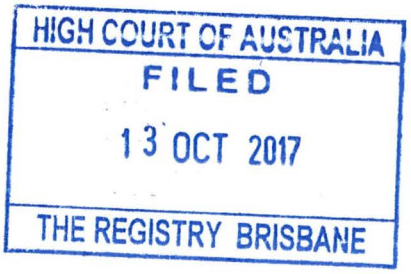
IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B48 of 2017

BETWEEN:



MICHAEL JAMES IRWIN
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I:

The respondent certifies that this submission is in a form suitable for publication on the internet.

Part II:

1. The appellant and the complainant knew, and did not like, each other. Having met, apparently by accident, at a shopping centre on the Gold Coast, the appellant pushed the complainant in the chest. The complainant stumbled back three to four metres and fell to the ground. The complainant's hip was fractured in three places in what was described as a "high-energy fracture". The appellant was convicted at trial of unlawfully causing grievous bodily harm to the complainant.

2. An issue at trial was whether the appellant was excused from criminal liability by section 23(1)(b) of the *Criminal Code (Qld)* as the injury suffered by the complainant was not intended or foreseen by the appellant and an ordinary person in the position of the appellant would not reasonably have foreseen an injury like the hip fracture as a possible consequence. The appellant appealed to the Court of Appeal on the ground that the verdict was 'unreasonable, or can not be supported having regard to the evidence'. The Court of Appeal (McMurdo P with whom Gotterson JA and Mulllins J agreed) dismissed the appeal holding, "It was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt" (QCA at [52]).

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3. In considering the ground of appeal the Court of Appeal said it was open to the jury to conclude that an ordinary person in the position of the appellant could have foreseen serious injury such as a fractured hip as a consequence of a forceful push by the appellant (QCA at [51]).

4. The issues that arise in this appeal are:

    a. Does the use of the word "could", rather than "would", indicate that the Court of Appeal did not apply the correct statutory test?

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    b. Was the Court of Appeal wrong in concluding it was most likely the appellant pushed the complainant with a "considerable degree of force"?

    c. Did the Court of Appeal err in dismissing the appeal because an innocent explanation was reasonably open on the evidence?

Part III:

The respondent considers that notice is not required to be given pursuant to section
20 78B of the *Judiciary Act 1903 (Cth)*.

Part IV:

The facts as set out by the appellant are not contested.

Part V:

The respondent accepts the appellant's statement of applicable statutory provisions.

30 **Part VI:**

The Court of Appeal did not apply the wrong test to the appellant's complaint that the verdict was unreasonable

5. The question before the Court of Appeal, pursuant to section 668E(1) of the *Criminal Code (Qld)*, was whether the verdict was 'unreasonable, or can not be supported having regard to the evidence'. Deciding this question required consideration of whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty[1].

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6. The appellant complains that in using the formulation that, "[i]t was equally open to the jury on the evidence to reach the contrary conclusion, that an ordinary

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[1] *M v The Queen* (1994) 181 CLR 487, 493; *SKA v The Queen* (2011) 243 CLR 400 [12].

person in the position of the appellant **could** have foreseen that the complainant might suffer a serious injury such as a fractured hip from such a forceful push," (QCA at [51], emphasis added) the Court of Appeal has applied a test more onerous for the appellant than that set by section 23(1)(b). This is not so for two reasons. First, the passage central to the appellant's contention should be understood as addressing the question of whether it was open to the jury to be satisfied of the guilt of the appellant, and not as describing the statutory test prescribed by section 23(1)(b). Secondly, a consideration of the history of section 23(1)(b) indicates the use of the word "could" in this particular context was not an error.

The Court of Appeal was not attempting to state the test set by section 23(1)(b)

7. At the trial of the appellant the jury were directed that the "prosecution must prove ... that an ordinary person in [the appellant's] position would reasonably have foreseen the event as a possible consequence" (QCA at [49]). The verdict of the jury indicates this jury was satisfied the prosecution had met this burden. As noted above, the Court of Appeal was then confronted with a question of whether it was open to the jury, acting reasonably, to convict the appellant. Part of this question required consideration of whether the jury, again acting reasonably, could exclude the operation of section 23(1)(b). The verdict of the jury would withstand challenge if, considering all of the evidence, it was open to the jury to be satisfied that an ordinary person in the position of the appellant would have foreseen grievous bodily harm as a possible consequence.

8. In the Court of Appeal the appellant's contention was that the injury to the appellant was no more than a theoretical or remote possibility, such that it was not open to the jury to conclude an ordinary person would foresee it as a possible consequence (QCA at [37]). The authorities cited by the Court of Appeal, *R v Stuart* [2005] QCA 138, *R v Condon* [2010] QCA 117, *R v Coomer* [2010] QCA 6 and in particular *R v Taiters; Ex parte Attorney-General (Qld)* [1997] 1 Qd R 333 all correctly refer to the test as involving whether an ordinary person would foresee the event in question.

9. At QCA [49] the Court of Appeal set out relevant parts of the trial judge's directions to the jury. These directions included the issue of whether the injury would reasonably have been foreseen. The Court of Appeal noted a suggestion by the prosecution that the directions were favourable to the appellant but proceeded on the basis that they were "according to law" (QCA at footnote 59). It should be concluded from this that the Court of Appeal understood the correct test to be applied when considering the potential application of section 23(1)(b).

10. The critical passages of the judgment below (QCA at [50] to [52]) immediately followed the reference to the trial judge's directions and are set out in full:

> "[50] Like the primary judge, I consider that the jury could not safely act on the evidence of the complainant. Nor could they safely accept the evidence of Mr Bradley, given his friendship with the complainant; the implausibility of the appellant making such admissions to the complainant's friend; that he made no contemporaneous notes and did not give a statement to police for several weeks; that he had spoken to the complainant's wife about the July 2012 incident before the alleged conversation; and that in March 2013 he was released from obligations to the complainant totalling hundreds of thousands of dollars. What is clear is that the appellant was extremely angry with the complainant when he pushed him. The medical evidence makes it most likely that the complainant broke his hip after the appellant pushed him with a considerable degree of force, causing him to fall heavily on a ramp in a tiled shopping centre. This conclusion receives support from the appellant's own evidence.
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> [51] A jury may well have considered that an ordinary person in the position of the appellant could not have reasonably foreseen the complainant would in those circumstances suffer a fractured hip. That, it seems, was the trial judge's view. But that is not the test for this Court. It was equally open to the jury on the evidence to reach the contrary conclusion, that an ordinary person in the position of the appellant could have foreseen that the complainant might suffer a serious injury such as a fractured hip from such a forceful push. The resolution of the issue was a matter for the jury. They had the advantage of seeing the height and build of the 55 year old complainant and appellant. Assuming they were of average build and height, the appellant's push of the complainant, necessarily on the medical evidence forceful, on a slight downward sloped tiled ramp, could foreseeably result in the complainant falling badly and seriously injuring himself, even breaking his hip. Such a result was not theoretical or remote.
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> [52] After reviewing the whole of the evidence, I am satisfied that the jury verdict of guilty of grievous bodily harm was not unreasonable and against the weight of the evidence. It was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt. It follows that I would dismiss the appeal against conviction."

11. Seen in this context it can be understood that the Court of Appeal was addressing the question of whether it was open to the jury to exclude the operation of section 23(1)(b), notwithstanding that a different jury might have reached a different conclusion. Despite the use of the phrase "could have foreseen", which does not conform to the words of section 23(1)(b), a consideration of the whole of the judgment does not lead to a conclusion that the Court of Appeal misunderstood or misapplied the test raised in this case by the section. The passage should be read as indicating that it was open to the jury in

this case to reach a view of the facts upon which the operation of section 23(1)(b) would be excluded.

12. The appellant's challenge to the phrase at the start of paragraph [51] of the decision of the Court of Appeal, "[a] jury may well have considered that an ordinary person in the position of the appellant could not have reasonably foreseen the complainant would in those circumstances suffer a fractured hip," should not be accepted. The words conform to those used by the Court of Appeal in *R v Van Den Bemd* [1995] 1 Qd R 401 at 405[2]:

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> "The test of criminal responsibility under section 23 is ... whether death was such an unlikely consequence of that act an ordinary person could not reasonably have foreseen it."

13. The use of this phrase does not suggest error or misunderstanding by the Court of Appeal.

History and meaning of section 23(1)(b) – the word "could" was not inappropriate in this case

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14. Since 2011[3], section 23(1)(b) has provided that a person is not criminally responsible for:

> "(b) an event that-
> (i) the person does not intend or foresee as a possible consequence; and
> (ii) an ordinary person would not reasonably foresee as a possible consequence."

30 15. Prior to 2011, section 23(1)(b) referred to "an event that occurs by accident". This phrase had been the subject of considerable judicial consideration before amendment of the section in 2011. In 2013 section 23(1)(b) was again amended[4] to insert the following note[5]:

> "Note—
> Parliament, in amending subsection (1)(b) by the Criminal Code and Other Legislation Amendment Act 2011, did not intend to change the circumstances in which a person is criminally responsible."

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[2] In refusing the Crown special leave to appeal against the decision of the Court of Appeal a majority of the High Court endorsed this interpretation – *The Queen v Van Den Bemd* (1994) 179 CLR 137 at 139.
[3] Criminal Code and Other Legislation Amendment Act 2011, section 4.
[4] Justice and Other Legislation Amendment Act 2013, section 42D.
[5] The note forms part of the Act: *Acts Interpretation Act 1954 (Qld)* section 14(4).

16. In *R v Taiters; Ex parte Attorney-General (Qld)* [1997] 1 Qd R 333 the Court of Appeal considered the meaning of "an event that occurs by accident". The Court of Appeal held (at 338) that it would be a sufficient direction to instruct a jury that:

> "The Crown is obliged to establish that the accused intended that the event in question should occur or foresaw it as a possible outcome, or that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome."

17. As can be seen the legislative amendment in 2011 largely adopted the words used in *Taiters*. It may be inferred that in adopting the words of *Taiters* the parliament intended them to take the meaning that had been judicially attributed to those words[6]. Such an inference is strengthened by reference to the note inserted in 2013. It follows that an examination of cases considering the phrase "an event that occurs by accident" assists in understanding the present issue. A survey of such cases reveals that the words "would" and "could", and the phrases "could not" and "would not", have been used by Courts dealing with the meaning of "an event that occurs by accident".

18. In *Kaparonovski v The Queen* (1973) 133 CLR 209, 233-234, Gibbs J stated:

> "It must now be regarded as settled that an event occurs by accident within the meaning of the rule if it was a consequence which was not in fact intended or foreseen by the accused and *would* not reasonably have been foreseen by an ordinary person. It is impossible to say that the grievous bodily harm suffered by Bajric was so unlikely a consequence of pushing a glass forcibly towards his face that no ordinary person *could* reasonably have foreseen it..." (citations omitted, emphasis added)

19. In *Van Den Bemd* [1995] 1 Qd R 401, 405 the Court of Appeal citing *Kaparonovski* stated:

> "[C]riminal responsibility ... depended on whether the grievous bodily harm sustained was so 'unlikely' a consequence of the act that no ordinary person would have foreseen it. The test thus appears to be one of probability or 'likelihood'."

20. As noted above the Court of Appeal went on to state the test was whether the event was "such an unlikely consequence of that act an ordinary person could not reasonably have foreseen it".

21. In *R v Taiters; Ex parte Attorney-General (Qld)* [1997] 1 Qd R 333 the Attorney-General asked the Court of Appeal questions concerned with the degree of

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[6] *Re Alcan Australia Ltd; Ex parte Federation of Industrial Manufacturing and Engineering Employees* (1994) 181 CLR 96, 106.

likelihood or probability involved in an event being foreseeable. The Court of Appeal stated (at 338):

> "The references which have been made in the cases to 'reasonably' and 'ordinary person' in the context under discussion, give an emphasis to the fact that the relevant test calls for a practical approach and is not concerned with theoretical remote possibilities. It directs inquiry to what would be present in the mind of an ordinary person acting in the circumstances with the usual limited time for assessing probabilities, this being a factor which is applicable to a great deal of human activity. However, it should not be accepted that some real risk of an outcome which an ordinary person in the circumstances would have been conscious of, can be disregarded by the doer of an action, yet still, if it eventuates, be called accidental within the meaning of the section."

22. From these cases it can be concluded that the phrase "would not reasonably foresee" used in section 23(1)(b) is to be considered practically and is not concerned with remote or theoretical possibilities. It also appears that "could not reasonably foresee" has been used as an analogue for "would not reasonably foresee" and antonym for "would reasonably have foreseen". Applying this approach there will be few cases where any useful distinction can be drawn between what could and what would be foreseen. If a particular consequence is, objectively, such an obvious risk that an ordinary person could foresee it as a possible outcome it is difficult to imagine circumstances in which an ordinary person would not foresee it.

23. Such an approach is consistent with logic. If it is correct that a person is not criminally responsible for an event that could *not* reasonably have been foreseen[7], it should follow that an event that could reasonably have been foreseen will not result in an accused person being relieved of responsibility. While the statute and some cases use the formulation "would not reasonably foresee" there is in this case no distinction between that which could be foreseen compared to that which would be foreseen.

24. Having regard to the evidence that the appellant was angry, that while on a gradually sloping tiled ramp he pushed the complainant with sufficient force to cause him to stumble back three to four metres and fall "reasonably hard", and the nature of the high-energy fracture, the risk of an injury amounting to grievous bodily harm was sufficiently obvious that there is no separation between whether such a consequence could be or would be foreseeable.

25. The use of the word "could" does not betray error by the Court of Appeal.

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[7] *R v Van Den Bemd* (1995) 1 Qd R 401, 405; *R v Taiters* [1997] 1 Qd R 333, 338; *Stevens v The Queen* (2005) 227 CLR 319, 370;

The Court of Appeal did not err in concluding it was most likely the appellant pushed the complainant with a "considerable degree of force"

26. It was not contested that the appellant pushed the complainant. The Court of Appeal concluded that it was most likely that the push was one with a considerable degree of force or was forceful. The Court of Appeal was correct to reach this conclusion.

27. Dr Nicoll testified that while it was not impossible, he considered it unusual or not expected for an injury of this sort to be the result of simply falling over (T.2-33.4-9). While he offered a number of possible explanations for the injury, such as a fall from a height or being struck by a car (T.2-29.7-12), on the evidence at the trial the only real possibility was that the injury resulted from the complainant falling over after being pushed. Dr Nicoll testified the injury was consistent with being pushed then falling onto a hard surface (T.2-33.11-12).

28. Importantly Dr Nicoll held the opinion that the injury involved a higher amount of energy, or force applied, than that associated with a simple fall. He spoke of falls while moving quickly or of a fall while moving or stumbling backwards, the added speed of such movement supplying the additional energy involved in what he described as a high-energy fracture (T.2-32.21-T.2-33.9). The amount of additional energy supplied by an application of force must have been sufficient to explain the high-energy fracture that otherwise could have been caused by a fall from a height or being struck by a car. This was sufficient to permit the conclusion that it was most likely the application of force was "considerable".

29. The conclusion that the push was forceful, or with a considerable degree of force, was also supported by the appellant's own testimony. He testified that while he was really cranky and upset he pushed the complainant in the chest. He said the complainant stumbled back three or four metres and fell to the ground in a manner the appellant described as reasonably hard (T.2-69.37-47). The use of the adjective "considerable" to describe the force most likely associated with such a push was appropriate. The distance over which the complainant stumbled back of itself suggests the application of force that could properly be described as considerable. This is especially so when the slope of the ramp on which the complainant was standing was very gradual. The state of mind of the appellant (really cranky and upset) renders it more likely the appellant used more than minimal force.

30. The appellant has not demonstrated the Court of Appeal erred in reaching this conclusion.

The Court of Appeal did not conclude that it was "equally open" for the jury to find that an ordinary person in the position of the appellant could not have reasonably foreseen the possibility that the complaint would suffer grievous bodily harm

31. Dealing with whether or not the verdict of the jury was unreasonable, or could not be supported having regard to the evidence, the Court of Appeal stated (QCA at [51]):

> "A jury may well have considered that an ordinary person in the position of the appellant could not have reasonably foreseen the complainant would in those circumstances suffer a fractured hip. That, it seems, was the trial judge's view. But that is not the test for this Court. It was equally open to the jury on the evidence to reach the contrary conclusion, that an ordinary person in the position of the appellant could have foreseen that the complainant might suffer a serious injury such as a fractured hip from such a forceful push. The resolution of the issue was a matter for the jury."

32. This should not be understood as conveying that the Court of Appeal concluded both possibilities were of precisely equal merit. While acknowledging that a jury might have taken a view favourable to the appellant, the Court of Appeal concluded that on the evidence it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty. The Court of Appeal correctly noted that the test is not whether some other conclusion might have been reached.

33. The use of the adverb "equally" in this context suggests that the conclusion the jury reached – that the appellant was guilty – was one which was reasonable considering all of the evidence. That is, a jury could legitimately reach the conclusion that the appellant was guilty or, to use the language of the authorities[8], this was not a case where "it would be dangerous in all the circumstances to allow the verdict of guilty to stand".

34. Where competing conclusions are available – one consistent with innocence and the other consistent with guilt – the question for the Court of Appeal is whether the jury, acting reasonably, could have rejected as a rational inference the innocent conclusion[9]. The finding of the Court of Appeal that it was "equally open" to the jury indicates satisfaction that the jury, acting reasonably, could have rejected the notion that an ordinary person in the position of the appellant would not have foreseen grievous bodily harm as a possible outcome. Such is sufficient to found a conclusion that it was open to the jury to find the appellant guilty.

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[8] *M v The Queen* (1994) 181 CLR 487 at 492-493 (footnotes omitted).
[9] *Knight v The Queen* (1992) 175 CLR 495, 503.

If the appellant demonstrates error the Court should determine if the verdict was unreasonable

35. The respondent agrees with the appellant that if there is error in the reasoning of the Court of Appeal, this Court should determine if the verdict was unreasonable[10], bearing in mind the ultimate question for the Court is whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty[11].

36. In undertaking this task due regard must be given to the role of the jury. In *The Queen v Baden-Clay* (2016) 258 CLR 308; [2016] HCA 35 at [66] this Court stated:

> "Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect, the setting aside of a jury's verdict on the ground that it is "unreasonable" within the meaning of s 668E(1) of the Criminal Code is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial." (Footnotes omitted.)

37. In this case one significant advantage enjoyed by the jury, as acknowledged in the Court of Appeal (QCA at [51]), was the ability to assess the height and weight of the appellant and complainant. It would be unsurprising if such an assessment was significant in a case of this nature.

38. Even considering only the evidence of the appellant and Dr Nicoll it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt. The appellant's testimony referred to in [29] above was of a push to the chest of a 55 year old man on a gradually sloped tiled ramp that caused the complainant to stumble back three to four metres and fall "reasonably hard". The appellant was "really cranky and upset" at the time. Dr Nicoll's testimony supported a conclusion that the push was forceful or with considerable force. It was open for the jury to conclude that the push was with such force and such circumstances that an ordinary person in the position of the appellant would reasonably have foreseen that an injury of the kind sustained was a possible consequence.

39. Even if the decision of the Court of Appeal was attended by error the appeal should be dismissed.

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[10] *BCM v The Queen* (2013) 88 ALJR 101 at 106 [31]; 303 ALR 387 at 392; [2013] HCA 48; *GAX v The Queen* [2017] HCA 25.

[11] *M v The Queen* (1994) 181 CLR 487 at 494-495; *The Queen v Baden-Clay* (2016) 258 CLR 308; [2016] HCA 35 at [66].

Part VII:

Not applicable.

Part VIII:

The respondent estimates it will take an hour to present oral argument.

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Dated 13 October 2017

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