HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, NETTLE AND GORDON JJ

MICHAEL JAMES IRWIN APPELLANT

AND

THE QUEEN RESPONDENT

Irwin v The Queen
[2018] HCA 8
14 March 2018
B48/2017

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation

S C Holt QC for the appellant (instructed by Nyst Legal)

G P Cash QC with M B Lehane for the respondent (instructed by Office of the Director of Public Prosecutions (Qld))

CATCHWORDS

Irwin v The Queen

Criminal law – Appeal against conviction – Where appellant convicted of one count of unlawfully doing grievous bodily harm – Where complainant suffered broken hip in three places following confrontation with appellant – Where appellant gave evidence that he pushed complainant causing complainant to stumble backwards three or four metres and fall to ground – Where s 23(1) of *Criminal Code* (Q) provides person not criminally responsible for event that ordinary person would not reasonably foresee as possible consequence – Where Court of Appeal observed there were "equally open" interpretations of evidence – Whether jury verdict unreasonable or unsupported by evidence.

Criminal law – Appeal against conviction – Where s 23(1) of *Criminal Code* (Q) provides person not criminally responsible for event that ordinary person would not reasonably foresee as possible consequence – Where Court of Appeal found it open to jury to conclude ordinary person could have foreseen injury of kind suffered by complainant – Whether Court of Appeal applied incorrect test – Whether any difference between what ordinary person "could" and "would" reasonably foresee.

Words and phrases – "could have foreseen", "grievous bodily harm", "possibility", "probability", "unreasonable verdict", "verdict unsupported by evidence", "would have foreseen".

Criminal Code (Q), s 23.

1 KIEFEL CJ, BELL, GAGELER, NETTLE AND GORDON JJ. Following trial by jury in the District Court of Queensland, the appellant was convicted of one count of unlawfully doing grievous bodily harm ("Count 1") and acquitted of a further count of assault occasioning bodily harm ("Count 2"). His appeal against conviction to the Court of Appeal of the Supreme Court of Queensland[1] was dismissed. By grant of special leave, he now appeals to this Court. The issue is whether the Court of Appeal erred in not holding that the jury's verdict of guilty in respect of Count 1 was unreasonable or could not be supported having regard to the evidence. For the reasons which follow, it should be held that the verdict was not unreasonable or incapable of being supported by the evidence, and, therefore, that the appeal should be dismissed.

The evidence at trial

2 The principal issue at trial was the contest between the account given by the complainant ("Ross") and the account given by the appellant as to a confrontation that occurred between the two men on 28 July 2012. The evidence was, in substance[2], as follows.

3 Ross, who was 55 years of age at the time of the confrontation, deposed that he had known the appellant since about 1985 after meeting him at a mutual friend's wedding. From about 1987, the appellant had worked for Ross in Tamworth in insurance sales and thereafter in selling homes. In about 2007, they worked together in a building company with the appellant as builder and Ross as sales consultant. About 12 months later, the appellant took over the company and, by late 2009 or early 2010, the appellant and Ross had stopped doing business together. They were, on the whole, good friends and remained so until 2012. Ross was the godfather of one of the appellant's children.

4 Ross stated that, on Saturday 28 July 2012, he was in his office in Cavill Avenue, Surfers Paradise, from about 8:00 am until about 10:00 am. He then left to purchase a newspaper and cigarettes, and put in a lotto ticket at a nearby shopping centre, Circle on Cavill. He deposed that he walked up a slight ramp past the Perle Nightclub, and, by reference to three photographs, he described how he saw the appellant when he neared the top of the ramp, just to the right of an orange-red post. He claimed that the appellant appeared angry, with glazed

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1 *R v Irwin* [2017] QCA 2.

2 See *Irwin* [2017] QCA 2 at [6]-[33] per McMurdo P (Gotterson JA and Mullins J agreeing at [53], [54]).

eyes, and was seething and frothing at the mouth. According to Ross, the appellant said "I've been waiting for this effing time for a long time" and pushed Ross with his left hand, causing Ross to take a few steps back. Ross claimed that the appellant then swung at him with his right fist. Ross turned his head and the blow grazed across his left ear and cheek. The push and the swing were at about the same time and left Ross a little off-balance and moving backwards. The next minute he felt "this almighty pain" in his left leg near his hip and crashed down onto the ground "like a sack of potatoes". He did not see what caused the pain, but was "pretty sure" he landed on his "butt".

5 Ross claimed that while he was on the ground the appellant kicked him in the back and around the thigh on his right-hand side towards his waist and kidneys, between six and eight times, and that, as he tried to roll away, the appellant kept coming for him, yelling at him to get up and calling him a dog. Ross recalled that the appellant was wearing sandshoes. He said that he asked the appellant to stop and told him four or five times that his leg was broken and that he could not get up. Eventually, the attack stopped and the appellant walked away. Ross said that he then pulled himself along the ground to some wire fencing and slowly pulled himself up on a little post. The pain was excruciating and he could not walk.

6 A few minutes later the appellant returned. Ross said that he felt a kick followed by another kick to his back above his kidneys and that he fell, first onto one knee and then backwards onto the ground. Ross claimed that the appellant next tried to choke him and continued to scream at him, while frothing at the mouth and spitting. The appellant said "you have told somebody that you're effing my wife". Ross said that he could not remember much after that but that the appellant was kneeling beside him with his hands around his throat, yelling and screaming, choking and shaking him, and spitting at him; "his face was angry and evil". According to Ross, the appellant also said something to the effect that Ross was lucky that it was a public place and that next time it would not be so public. Ross said that he kept saying that he was hurt, his leg was broken and he could not get up. Then, Ross recalled, a lady told the appellant to stop and a man said he would call the police. These onlookers were on the other side of the wire fence. The appellant stood up and started yelling at the onlookers, saying "this bloke is the biggest crook on the Gold Coast. He's a fraudster." Then the appellant walked off in the direction of his apartment.

7 Ross said that, after the appellant left for the second time, Ross again pulled himself up on the wire fencing, standing on his right leg with his left leg hanging. Some of the onlookers assisted him. He telephoned his son and a work colleague who were at his office nearby, and he asked them to assist him. With a

great deal of effort he was able to reach a hospital. A couple of days later he had an operation. It was followed by a slow and painful recovery. He was left with a permanent limp and suffered discomfort when sitting for long periods. He also suffered an injury to his ear, which he first noticed in hospital. He said that the appellant had kicked him a couple of times around the head when he was on the ground. He could not recall whether the kicks to the head were on the first or second occasion that the appellant assaulted him.

8 Ross agreed in cross-examination that he was on blood-thinning medication that made him prone to bruising and yet that he had suffered no bruises to his back as a result of the incident. He maintained, however, that, during the first assault, the appellant kicked him at least three times and that, during the second assault, the appellant kicked him twice to his back and twice to his head, and then strangled and shook him. But, apart from his broken hip and the small graze to his ear, Ross had no other injuries or marks. Nor had he complained to the ambulance officer, his son, his treating doctor, the nurse or the police of being strangled or kicked to the head. Ross said that he was focussed on his painful leg injury and that he had been given morphine in the ambulance. Ross also agreed that, in January 2013, he had put in a claim against the appellant under the *Personal Injuries Proceedings Act* 2002 (Q) for $112,686.90 and that he made no mention in the claim of having been strangled or choked. He said that he thought the claim was about the injury to his leg. Ross agreed that he told police that the appellant kicked him to his right ear on the first occasion he was on the ground and that, at the committal hearing, he had said that the only time he was kicked to the head was when he was on the ground on the second occasion.

9 Ross was extensively cross-examined as to his credit. He gave evidence that he sold superannuation investment properties and financial services but accepted that his trade was that of a plant mechanic and that he held no financial services licence or any formal financial services qualifications other than a diploma. He was declared bankrupt in 2010 and was discharged from the bankruptcy in May 2012. He claimed that the appellant had "ripped [him] off" for a large amount of money. Nevertheless, he agreed that, at the time of the incident, he had not made any formal demand for payment, had not instituted legal proceedings and had not seen the appellant for over a year. He agreed that he had sent the appellant a text message, probably while intoxicated, on 26 June 2012, about a month before the incident. Ross said that the appellant had taken profits of the building company that were owed to Ross by way of commission. Ross denied that he was looking forward to getting his revenge on the appellant. He said that he considered that he had given the appellant an opportunity in life.

He admitted that he had suggested that he and the appellant might have a fight at the Sea World car-park because of the appellant's unpaid business debts.

10 When cross-examined as to the confrontation, Ross said that he did not see the appellant until the appellant was "in [his] face" pushing him. Ross did not see a kick to his hip but felt it. Ross stated that when he was on the ground, the appellant was "kicking the crap out of" him. He agreed that a woman approached saying something like "Stop. Leave him alone." A man also approached. He agreed that the appellant left for a few minutes but said that the appellant then came back when he, Ross, was leaning against the wire fence. He maintained that the appellant then further assaulted him. He said that, at the time of the second assault, when he was on the ground trying to roll away, he saw the woman to his left. He thought that she was there for the second assault and that other people had come up to him during the first assault. He agreed, however, that, in his statement to police, he had said that the woman was there when he was on the ground during the first assault. Ross maintained that the first and second assaults occurred as he had outlined in his evidence in chief.

11 Jodie Broad ("Ms Broad") gave evidence that she was withdrawing money from an ATM at Circle on Cavill sometime between 8:00 am and 10:00 am one morning in July 2012 when she heard a lot of angry yelling near the Perle Nightclub. She saw one man (Ross) on the ground and one man (the appellant) standing just to the right of an orange-red post behind a wire fence about 50 metres away. The appellant was doing most of the yelling. She walked across to see what had happened. When she first heard the yelling, she saw the appellant make a kicking action. She did not know if that kick connected. As she got closer, the appellant gave a second kick. She did not see if or where that kick connected. She could tell that the men knew each other because of what they were saying.

12 Ms Broad stated that she told the appellant that it was not good to kick someone while they were on the ground. In response, the appellant referred to his relationship issues with Ross and said something about a marriage breakdown and business deals gone wrong, and about being ripped off and having text messages to prove it. At that point, the appellant did not fully calm down but he ceased all physical contact with Ross. Ms Broad said that the appellant probably continued to yell at Ross as he spoke to her. She observed that Ross was still moving but was not saying much, and she was concerned that Ross had some blood on his right ear. After more yelling, the appellant walked away. Other people had gathered around. Ross pulled himself up using the fence. Ms Broad described him as "very wobbly". She said that the appellant then returned from the direction of a newsagency. He came within a metre of Ross and yelled some

more. But there was no more physical contact; only "general hatred ... and animosity". Then the appellant walked away past Ms Broad and she confirmed with Ross that he would be able to telephone someone for assistance.

13 In cross-examination, Ms Broad agreed that she did not know either man. She confirmed that, after she saw the appellant kick at Ross twice, the appellant walked away, returning shortly afterwards, with a bottle of water, to continue yelling at Ross. But she expressly denied that there was any further physical contact: upon his return, the appellant had not kicked Ross in the back, knocking him to the ground, nor placed his hands around Ross's throat to choke him.

14 Ross's son, Lloyd Ronald James Ross, gave evidence that he went with a work colleague to render assistance to his father at about 10:00 am on 28 July 2012. He observed that his father was bleeding from one ear and was trying to stand on one leg. There were dirt marks on the back of the shoulder of his father's jacket.

15 Shamus Bradley ("Bradley"), who had known Ross since 2006 and was introduced to the appellant by Ross in mid- to late 2007, gave evidence by video-link from Ireland. His evidence related to a conversation he claimed to have had with the appellant on Thursday 2 August 2012. Bradley said that, in response to his comment that the appellant had broken Ross's leg, the appellant said that he had "tried to break the other leg and put him in a wheelchair" and tried to choke him. According to Bradley, the appellant further admitted that he had been waiting for Ross and "just got stuck into him". Bradley reported that he had said to the appellant "you're two grownup guys ... [y]ou're business guys", to which the appellant responded by asking Bradley if he had seen the text message Ross had sent to the appellant, referring to the demand from Ross for money owed to him. Bradley asked the appellant if that was the reason he was waiting for Ross and the reason he got stuck into him. According to Bradley, the appellant said that it was.

16 Bradley stated that he was doing his best to remember the conversation but that it was nearly four years ago. He recalled that the appellant was still angry about what had happened. Bradley repeated that the appellant had said: "I tried to break his leg – to break his other leg, put him in a wheelchair"; adding that the appellant "didn't give a fuck".

17 In cross-examination, Bradley agreed that he was a good friend of Ross. Bradley's company leased a property owned by Ross's wife and, in March 2013, when the property was being sold, he was released from paying at least 12 months' rent as part of an arrangement for entering into a fresh lease for a

five-year term. He said that he thought he was released from three years of the lease, which he believed was with Ross's company. The rental payments were between $18,000 to $20,000 per month. He said that on the Tuesday before the Thursday on which he spoke with the appellant, he had spoken to Ross's wife about what had happened to Ross. Bradley gave a statement to police about his conversation with the appellant some weeks later on 30 August 2012. He said that he did not discuss his statement with Ross or Ross's wife before he went to the police. He maintained that his evidence of the conversation with the appellant on 2 August 2012 was accurate.

18 Mr Angus Nicoll, an orthopaedic surgeon, gave evidence that he examined Ross on 28 July 2012. Ross's left hip was broken in three places. He had bruising about the hip area consistent with the fracture. But there was no boot print or obvious point of impact. Mr Nicoll had no notes of bruising elsewhere on Ross. He agreed that, because Ross was taking anti-blood-clotting medication and had a slightly lower than normal haemoglobin count, he could have been expected to bruise more easily than others.

19 Mr Nicoll operated on Ross's hip on 30 July 2012 using a metal device to fix the broken bones in position. Without surgery, Ross would have had a significant disability of the hip and eventually may have succumbed to pneumonia, embolus or dehydration. After about nine months, Ross had recovered from the surgery quite well but was estimated to have lost about 25 to 50 per cent of the range of motion of the hip. Mr Nicoll's impression was that the injury was a high-energy fracture, most likely caused when Ross fell on his side onto the ground. Because the fracture required a high degree of force, it was likely to be the result of an incident like a fall from height (for example, from a step ladder onto a hard surface) or a fall while moving quickly (for example, moving or stumbling backwards and hitting the ground at speed), or a motor vehicle accident or a strike from a baseball bat. According to Mr Nicoll, fractures of the kind sustained by Ross were more common amongst older people over 70 years of age and with osteoporosis. Much more force was required to cause a fracture of that type in a younger person like Ross and there was no evidence that Ross had any osteoporosis. A normal 55-year-old male would not be expected to sustain such a fracture by a direct kick to the hip area from someone wearing a sandshoe. To cause Ross's injury a very high and concentrated application of force was required. The injury was consistent with being pushed and then falling directly onto the left side on a hard concrete-tiled surface with some speed. It was conceivable, albeit quite unlikely, that the injury could have been suffered from a direct blow.

20 Dr Sarjit Singh gave evidence that he was the emergency physician who attended on Ross on 28 July 2012 at about 3:30 pm. He thoroughly examined Ross. He observed that Ross's main injury was to his left hip. There was a very minor skin tear on his left ear. In cross-examination, Dr Singh noted that there was no evidence of head injury, loss of consciousness, or any other injury however slight to any other part of Ross's body, apart from the minor tear to the left ear. In re-examination, Dr Singh agreed that bruising can sometimes take a few days to develop.

21 The appellant, who was 55 years of age at the time of trial, gave evidence that he met Ross in 1986 and worked for him as an insurance agent for about two years. He and Ross then became directors of a company which later went into receivership, causing the appellant to become bankrupt in 1993. The appellant worked as a real estate agent until 1996 when he was discharged from bankruptcy. The appellant operated his own real estate company until 2001, worked as a property consultant until 2006 and then began his own construction company. He said he had very little contact with Ross between 1993 and 2006. Following the establishment of the appellant's construction company, he and Ross agreed upon a business relationship whereby Ross's company would receive a $22,000 commission, exclusive of GST, for each client it referred who purchased a house from the appellant's company. A company related to Ross's family also held shares in the appellant's company. In 2008, those shares were transferred to the appellant. As part of the transfer, it was agreed that referrals from Ross would result in a higher commission of $35,000 and that additional commission would be backdated to past referrals. Ross and the appellant continued doing business on that basis until about late 2009 when Ross's wife commenced her own building company. From that point, Ross and the appellant had little or no contact. In the early hours of one morning in June 2012, the appellant received a text message from Ross accusing him of owing Ross a lot of money and suggesting he had stolen from Ross. According to the appellant, that was not true and the allegation upset him.

22 The appellant gave evidence that he lived in a residential apartment in Circle on Cavill and that Ross worked nearby and went to Melba's, a venue at Circle on Cavill, daily. The appellant denied that he was waiting for Ross on the day in question or that he had ever said so to Bradley. The appellant added that he would have had no difficulty locating Ross had he wished to. The appellant stated that on Saturday 28 July 2012 he left his apartment at about 7:30 am and drove to the gym, returning at about 9:30 am. He dropped his gym bag and towel at his apartment and, at about 10:00 am, carrying a bottle of water, he decided to go for a walk on the beach. Closed circuit television footage showed the

appellant leaving his apartment building at 10:02 am and returning, about seven minutes later, at 10:10 am.

23 As he was walking towards the beach, the appellant saw Ross about four or five metres away. Ross approached him and said, "Irwin, where's my fucking money?". The appellant told him to "fuck off". According to the appellant, Ross continued to follow him and then pushed him on his right shoulder saying, "I'm going to get my money". The appellant said that, by this stage, he was feeling "really angry [and] really cranky". He was heading down a ramp towards Cavill Avenue trying to avoid Ross when Ross pushed him again. The appellant stumbled down onto one knee. Ross then said again, "I'm going to get my fucking money". As the appellant stood up, Ross was in front of him on the downward side of the ramp.

24 The appellant stated that he was angry because he had paid Ross everything to which Ross was entitled and because Ross had said things previously to the appellant's eldest daughter about the appellant's wife, including that Ross had had a relationship with her. The appellant said that he was also really cranky about Ross pushing him. As a result, the appellant stood up and pushed Ross in the chest. Ross "stumbled back probably about three or four metres and then fell to the ground ... [r]easonably hard". The appellant walked over and told Ross to get up, adding that, if Ross wanted to have a fight, they would have a fight. The appellant said that he kicked Ross twice in the right buttock but only when Ross was on the ground. The appellant estimated that he used about 40 to 50 per cent of his strength and that they were not hard kicks. He claimed that Ross did not say that he had broken his leg, but agreed that Ross did not get up. A woman he now knew to be Ms Broad was "singing" out to him to stop. He was furious with Ross and told Ms Broad why.

25 After speaking to Ms Broad for about 30 seconds, the appellant left and continued towards the beach. As he had finished his bottle of water, he went to the newsagency to buy another. He was thinking about all the things that Ross had done to him and returned to see Ross leaning up against the wire fence where Ms Broad was talking to him. The appellant said he had no further physical contact with Ross but continued to tell Ross in angry terms that he had repaid everything he owed Ross and more, and to keep away from him and his family. He did not kick Ross again and he did not put his hands around Ross's neck. The appellant said that when he had finished yelling at Ross he was too upset to go for his walk so he returned to his apartment.

26 The appellant denied having a conversation of the kind attested to by Bradley and denied saying the things that Bradley attributed to him. He said that

he had pushed Ross only after Ross assaulted him, that he had felt intimidated and threatened and that he pushed Ross away in defence. He said that he kicked Ross when he was on the ground to prompt Ross to get up and fight because he was really angry with him.

27 The appellant agreed in cross-examination that there was no written documentation of the backdated commission agreement made with Ross following the transfer of Ross's shares to the appellant, which was said to be worth $1.26 million. Although he and Ross had previously confronted each other at Melba's when Ross was drunk, they had never come to blows. He agreed that, in 1992, he had called Ross out to a fight in the Sea World car-park, after Ross pushed him against a wall in front of Ross's wife and children, one of whom was the appellant's godson. But he said that the incident had passed and their relationship continued as normal. He agreed he was very angry about the text message sent by Ross demanding money and, when he saw Ross that July morning, he was furious and frothing at the mouth. He denied, however, that he was waiting for Ross or that he knew Ross went to the newsagency every Saturday morning. He admitted that he told onlookers, including Ms Broad, that Ross had ripped off hundreds of people on the Gold Coast and that he had text messages to prove it. He also agreed that, in truth, he did not have any such text messages. He maintained, however, that Ross had ripped off a lot of people. He was not aware whether his spittle got on Ross's face during the confrontation. He maintained that his account of the confrontation was truthful.

The trial judge's directions

28 Relevantly, the trial judge directed the jury as to Count 1 as follows:

> "There's a provision of our criminal code that provides so far as it's here applicable as follows:
>
> > *A person is not criminally responsible for an event that: (1) the person does not intend or foresee as a possible consequence; and (2) an ordinary person would not reasonably foresee as a possible consequence.*
>
> The prosecution must prove that the [appellant] intended that an injury like the fracture of [Ross's] hip should occur, or foresaw it as a possible consequence, or that an ordinary person in his position would reasonably have foreseen the event as a possible consequence. In considering whether the [appellant] did foresee it or an ordinary person would have, you should focus on whether an injury like the hip fracture here was

> foreseeable as something which could happen, disregarding possibilities that are no more than remote or speculative.
>
> I referred, already, to the medical evidence about the force required to cause a fracture of that – of this kind and to the evidence of – about what occurred given by [Ross] and [the appellant]. The evidence of the doctors and of [the appellant], in my view, clearly raises for your consideration, the possibility that neither the [appellant] nor an ordinary person could reasonably have foreseen that [Ross] would suffer an injury such as here occurred, a fracture of his hip.
>
> ...
>
> I remind you it's not for the [appellant] to prove anything. Unless the prosecution proves, beyond reasonable doubt, that an ordinary person in the position of the [appellant] would reasonably have foreseen the serious injury suffered as a possible consequence of his actions, or that the [appellant] intended or foresaw that, in fact, you must find him not guilty of the charge of grievous bodily harm."

29 It is accepted that there was no error in the trial judge's directions.

Proceedings before the Court of Appeal

30 Before the Court of Appeal, the appellant contended[3] that the jury could not rationally have excluded the reasonable possibility that Ross assaulted the appellant and that, in response to that assault, the appellant pushed Ross, who fractured his hip when he hit the ground. It followed, in the appellant's submission, that the jury could not rationally have excluded, as a reasonable possibility, that an ordinary person in the appellant's position would not reasonably have foreseen the possibility of a broken hip of the kind sustained by Ross as a possible consequence of a push of the kind described by the appellant. Such an injury, it was submitted, was no more than a theoretical or remote possibility.

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3 *Irwin* [2017] QCA 2 at [34]-[40] per McMurdo P (Gotterson JA and Mullins J agreeing at [53], [54]).

31 The Crown submitted[4], inter alia, that it was open to the jury to reject the appellant's account that Ross was the instigator of the confrontation, and also referred to other aspects of the appellant's evidence, such as his account of the push, to support the conviction. The Crown contended that it was open to the jury on that basis to find beyond reasonable doubt that an ordinary person in the appellant's position would reasonably have foreseen the possibility that Ross would suffer grievous bodily harm of the kind in fact inflicted.

32 McMurdo P (with whom Gotterson JA and Mullins J agreed) accepted[5] that the reliability of Ross's evidence had been starkly brought into question by the medical evidence and Ms Broad's evidence. Given that Ms Broad was an independent and apparently reliable witness, there was no reason for the jury to doubt her testimony. It followed, her Honour concluded, that the jury could not reasonably have relied on Ross's evidence; the verdict of acquittal on Count 2 was consistent with the jury having rejected his evidence at least in part. McMurdo P further accepted[6] that the jury could not safely have relied on Bradley's evidence, in view of Bradley's friendship with Ross; the implausibility of the appellant making admissions of the kind which Bradley alleged; the absence of contemporaneous notes of the alleged admissions, coupled with the fact that Bradley did not make a statement to police for several weeks thereafter; the fact of Bradley having spoken to Ross's wife before making a statement to police; and the fact that Bradley had been released from debt obligations to Ross's family totalling hundreds of thousands of dollars.

33 Her Honour added[7], however, that it was clear that the appellant was extremely angry with Ross when he pushed him and the medical evidence made it most likely that Ross broke his hip after the appellant pushed him with "a considerable degree of force, causing him to fall heavily on [the] ramp". The

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4 *Irwin* [2017] QCA 2 at [42] per McMurdo P (Gotterson JA and Mullins J agreeing at [53], [54]).

5 *Irwin* [2017] QCA 2 at [46].

6 *Irwin* [2017] QCA 2 at [50] (Gotterson JA and Mullins J agreeing at [53], [54]).

7 *Irwin* [2017] QCA 2 at [50] (Gotterson JA and Mullins J agreeing at [53], [54]).

probability of that being so was confirmed by the appellant's own evidence. Her Honour thus concluded[8] that:

> "A jury may well have considered that an ordinary person in the position of the appellant *could* not have reasonably foreseen [Ross] 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 [Ross] 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 [Ross] and appellant. Assuming they were of average build and height, the appellant's push of [Ross], necessarily on the medical evidence forceful, on a slight downward sloped tiled ramp, *could* foreseeably result in [Ross] falling badly and seriously injuring himself, even breaking his hip. Such a result was not theoretical or remote.
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> ... It was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt." (emphasis added)

Relevant statutory provisions

34 "[G]rievous bodily harm" is defined in s 1 of the *Criminal Code* (Q) as meaning:

> "(a) the loss of a distinct part or an organ of the body; or
>
> (b) serious disfigurement; or
>
> (c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health;
>
> whether or not treatment is or could have been available."

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8 *Irwin* [2017] QCA 2 at [51]-[52] (Gotterson JA and Mullins J agreeing at [53], [54]).

35 Section 23(1) of the *Criminal Code* was amended in 2011[9]. It provides, and provided at the time of the offence in question, 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."

36 In 2013, a note was inserted into s 23(1)[10]:

> "*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."

37 The relevant "event" for the purpose of s 23(1)(b) in the instant case was the grievous bodily harm suffered by Ross in the form of a badly fractured hip.

The appellant's contentions

38 As is apparent from the text of the *Criminal Code* in its current form, the test posited by s 23(1)(b)(ii) is whether an ordinary person *would*, not *could*, reasonably have foreseen the possibility of – in this case – grievous bodily harm in the form of a badly fractured hip. As can be seen in the passage of the Court of Appeal's reasoning earlier set out, the test stated and applied by the Court of Appeal was whether an ordinary person in the position of the appellant *could* have foreseen that Ross might suffer grievous bodily harm in the form of a badly fractured hip. The Court of Appeal concluded that it was open to the jury to be satisfied beyond reasonable doubt that the appellant's push of Ross *could* foreseeably have resulted in such an injury.

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9 *Criminal Code and Other Legislation Amendment Act* 2011 (Q), s 4.

10 *Justice and Other Legislation Amendment Act* 2013 (Q), s 42D.

39 In the appellant's submission, that statement and application of the test involved material error. According to both ordinary acceptation and authority, proof that an ordinary person "would" reasonably foresee the occurrence of an event entails proof of the probability or perhaps even near certainty of the occurrence. That requires proof of greater foresight than is necessary to demonstrate that an ordinary person "could" reasonably foresee the occurrence of the event. Hence, by substituting "could" for "would" the Court of Appeal had significantly lowered the standard of proof which the Crown was required to meet.

40 The appellant also argued that the Court of Appeal made a critical error of fact as to the effect of the medical evidence: by concluding[11] that it was most likely that the appellant pushed Ross with "a considerable degree of force". In the appellant's submission, the medical evidence was silent as to the force of the push. It established[12] no more than that, if Ross's injury were caused by a fall, it was likely that it was an accelerated fall – such as, for example, would be the case if Ross was "moving or stumbling backwards" – and, therefore, was consistent with Ross having been "pushed and then falling onto a hard concrete tiled surface". Nor was the appellant cross-examined as to the force with which he had pushed Ross. In those circumstances, it was submitted, it was not open to the jury to say beyond reasonable doubt that the force used was any more than nominal. And, for the same reason, it was not open to the jury to conclude beyond reasonable doubt that an ordinary person in the position of the appellant would reasonably have foreseen the possibility that the push would result in Ross suffering a badly fractured hip.

41 Additionally, it was contended that the Court of Appeal erred in upholding the conviction in circumstances where the Court was apparently of the view[13] that a verdict of guilty and a verdict of not guilty were both equally open to the jury.

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11 *Irwin* [2017] QCA 2 at [47] per McMurdo P (Gotterson JA and Mullins J agreeing at [53], [54]).

12 See *Irwin* [2017] QCA 2 at [23]-[24] per McMurdo P (Gotterson JA and Mullins J agreeing at [53], [54]).

13 *Irwin* [2017] QCA 2 at [51] per McMurdo P (Gotterson JA and Mullins J agreeing at [53], [54]).

The Crown's contentions

42 Before this Court, the Crown accepted that the test for the purposes of s 23(1)(b)(ii) of the *Criminal Code* is whether an ordinary person *would*, not *could*, reasonably have foreseen the possibility of the subject injury; and thus that the Court of Appeal may have been better advised to use "would" rather than "could" in its analysis. The Crown submitted, however, that it should not be thought that the Court of Appeal was attempting a definitive statement of the test prescribed by s 23(1)(b)(ii), and hence that no error was established by the Court of Appeal's use of language. In the Crown's submission, it was apparent from the fact that McMurdo P set out the trial judge's directions on s 23(1)(b) that her Honour well understood the correct test and proceeded accordingly. It was also apparent from the authorities, both pre-dating and post-dating the amendment to s 23(1)(b) in 2011, that the notion of what an ordinary person "would not reasonably foresee" is to be applied practically and as excluding remote or theoretical possibilities. Consequently, it was submitted, courts have sometimes employed the expression "could not reasonably foresee" as an analogue for "would not reasonably foresee", and so as an antonym for the expression "would reasonably have foreseen"[14]. The Court of Appeal's reasoning was to be viewed in that light. Moreover, in the Crown's submission, there would be few if any cases where a useful distinction could be drawn between what *could* and *would* reasonably be foreseen: if a particular consequence is objectively sufficiently obvious that an ordinary person could foresee it as a possible consequence, it is hard to imagine circumstances in which an ordinary person would not foresee it.

"Would" or "could" reasonably foresee a possible consequence

43 Up to a point, there is some force in the Crown's submissions. Prior to amendment in 2011, the defence provided for in s 23(1)(b) was expressed in terms of whether an act or omission for which it was alleged a person was criminally liable was "an event that occur[red] by accident". As was stated[15] in

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14 See, for example, *Kaporonovski v The Queen* (1973) 133 CLR 209 at 231-232 per Gibbs J (Stephen J agreeing at 241); [1973] HCA 35; *R v Van Den Bemd* [1995] 1 Qd R 401 at 405; *R v Taiters, ex parte Attorney-General* [1997] 1 Qd R 333 at 336, 338; *Stevens v The Queen* (2005) 227 CLR 319 at 370 [160] per Callinan J (McHugh J and Kirby J relevantly agreeing at 332 [32], 345-346 [79]); [2005] HCA 65.

15 (1973) 133 CLR 209 at 231 per Gibbs J (Stephen J agreeing at 241).

Kaporonovski v The Queen in relation to that provision, "an event occur[ed] by accident within the meaning of the rule if it was a consequence which ... would not reasonably have been foreseen by an ordinary person". As the Crown submitted, courts were also sometimes inclined to explain the application of the defence to particular circumstances in terms of whether the consequence in issue was so unlikely that "no ordinary person could reasonably have foreseen it"[16], or so unlikely that "an ordinary person could not reasonably have foreseen it"[17]. Further, as is apparent from the note to s 23(1), Parliament, in amending s 23(1)(b) in 2011, did not intend to change the circumstances in which a person is criminally responsible[18]. The intent was to retain the existing law, while also making it clearer.

44 Contrary to the Crown's submissions, however, it does not follow that there is logically no difference between what an ordinary person would reasonably foresee and what an ordinary person could reasonably foresee. The former involves a degree of probability[19], albeit that it need not be more likely than not, whereas the latter is a matter more akin to mere possibility[20]. Accordingly, although it is axiomatic that, if no ordinary person could reasonably foresee a consequence, it is not open to be satisfied beyond reasonable doubt that an ordinary person would reasonably foresee it, it logically does not follow that if

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16 *Kaporonovski* (1973) 133 CLR 209 at 232 per Gibbs J (Stephen J agreeing at 241). See and compare *Vallance v The Queen* (1961) 108 CLR 56 at 61 per Dixon CJ, 65 per Kitto J, 82 per Windeyer J; [1961] HCA 42.

17 *Van Den Bemd* [1995] 1 Qd R 401 at 405.

18 The note forms part of the Act: *Acts Interpretation Act* 1954 (Q), s 14(4).

19 See and compare *Green v The Queen* (1997) 191 CLR 334 at 340 per Brennan CJ; [1997] HCA 50; *Heron v The Queen* (2003) 77 ALJR 908 at 921 [79]-[80] per Callinan J; 197 ALR 81 at 99-100; [2003] HCA 17; *R v Sievers* (2004) 151 A Crim R 426 at 431 [21]-[22] per Levine J, 441 [71]-[72] per Simpson J, 444 [89] per Barr J; *Attorney-General of the Northern Territory v EE* (2013) 33 NTLR 102 at 107 [13].

20 See and compare *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at 190 per Bowen CJ and Beaumont J, 194-196 per Sheppard J; *Green* (1997) 191 CLR 334 at 340 per Brennan CJ; *Sievers* (2004) 151 A Crim R 426 at 444 [89] per Barr J; *Revenue and Customs Commissioners v Isle of Wight Council* [2007] BTC 5,240 at 5,252-5,253 [35].

an ordinary person could reasonably foresee a consequence, it is open to be satisfied beyond reasonable doubt that an ordinary person would reasonably foresee it. It is, therefore, prone to lead to error in the application of s 23(1)(b)(ii) to pose the test in terms of whether an ordinary person could reasonably have foreseen the consequence. While the ultimate question for the Court of Appeal was whether the verdict was open[21], the critical point to which the analysis of the Court was directed was the application of the test in s 23(1)(b)(ii) to the evidence. The Court of Appeal should not have expressed the test in the terms it did and the practice should not be repeated.

45 That said, however, the jury were properly directed that, in order to find the appellant guilty of the offence of unlawfully causing grievous bodily harm, they had to be satisfied beyond reasonable doubt that an ordinary person in the appellant's position *would* reasonably have foreseen the possibility that Ross would sustain grievous bodily harm, and they were further correctly directed that what the ordinary person *would* need to have foreseen was a real and not theoretical possibility of harm. As will be explained, there is no reason to doubt that the jury adhered to those directions, or cause to doubt the reasonableness of the verdict on that basis.

Conclusion as to "considerable degree of force" behind push

46 It will be recalled that, in the appellant's submission, the medical and other evidence did not establish the level of force with which the appellant pushed Ross, and therefore it could not be concluded, as the Court of Appeal concluded[22], that the appellant used "a considerable degree of force".

47 Contrary to the appellant's submission, there was no error in the Court of Appeal's assessment of the evidence. Given the appellant's own evidence – that he pushed Ross in the chest as Ross stood below him on a hard-surfaced, gradually downward-sloping ramp, while "really angry [and] really cranky", with sufficient force to cause Ross to stumble back three or four metres and fall "reasonably hard" – and given further, as it emerged from the medical evidence, that the appellant must have pushed Ross with sufficient force to cause him to fall "while moving quickly" and to hit the ground "with some speed", it was open

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21 See *M v The Queen* (1994) 181 CLR 487 at 492-493, 494-495 per Mason CJ, Deane, Dawson and Toohey JJ; [1994] HCA 63.

22 *Irwin* [2017] QCA 2 at [50] per McMurdo P (Gotterson JA and Mullins J agreeing at [53], [54]).

to infer, as the Court of Appeal inferred, that the appellant pushed Ross with "a considerable degree of force". Indeed, as a matter of common sense and ordinary human experience, it is difficult to see how one could rationally come to any other conclusion.

48 While other quantifying descriptions of the amount of force used might also have been justified by the evidence, for the reasons given there was no error in the Court of Appeal's description of "a considerable degree of force" and the appellant's submission that the medical evidence was silent as to the degree of force should be rejected.

Equally open to find either way

49 There was equally no error in the Court of Appeal's observation[23] that there were "equally open" interpretations of the evidence before the jury. Contrary to the appellant's submission, that statement did not mean that the jury acting rationally were bound to conclude that there was a reasonable doubt as to whether an ordinary person in the appellant's position would reasonably have foreseen the possibility that Ross would suffer an injury in the nature of grievous bodily harm. Rather, it appears as having been intended to convey that, while possibly more than one view of the evidence was open, depending on which view of the evidence was taken it was open to be satisfied that an ordinary person in the appellant's position would reasonably have foreseen the possibility of the injury that was suffered. There is no reason to doubt that was so.

50 As the Court of Appeal stated[24], the assessment of the evidence was a matter for the jury. It was open to the jury to accept the appellant's evidence that he was angry with Ross and, in that state of mind, pushed Ross causing him to fall down "reasonably hard" on the downward-sloping tiled ramp. Further, on the basis of the appellant's evidence, it was open to be satisfied beyond reasonable doubt that the force of the push was sufficient to cause Ross to stumble back three or four metres before falling to the ground. Taking that, then, in combination with the medical evidence, it was open to conclude that the appellant pushed Ross backwards down the ramp with sufficient force to cause Ross to stumble back for three or four metres and hit the ground at speed. And,

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23 *Irwin* [2017] QCA 2 at [51] per McMurdo P (Gotterson JA and Mullins J agreeing at [53], [54]).

24 *Irwin* [2017] QCA 2 at [51] per McMurdo P (Gotterson JA and Mullins J agreeing at [53], [54]).

finally, combining that with the jury's common sense and ordinary human experience, and assuming that Ross and the appellant were each of average height and build (there being no suggestion that either man was otherwise), it was open to the jury to conclude that an ordinary person in the appellant's position would reasonably have foreseen that so to push Ross entailed the real and not remote possibility that Ross would fall badly and thereby sustain an injury amounting to grievous bodily harm of the type that was suffered.

51 More specifically, where s 23(1)(b) is fairly raised on the evidence, the prosecution must relevantly prove, beyond reasonable doubt, that an ordinary person in the position of the accused would reasonably foresee an "event" as a possible consequence of the accused's actions. That requires that the event be identified. A number of decisions of the Court of Appeal of the Supreme Court of Queensland have established that the event for the purposes of s 23(1)(b) is, relevantly, an injury of the kind which constituted the grievous bodily harm in fact suffered by the complainant[25]. It does not suffice to prove foreseeability of simply any injury amounting to grievous bodily harm, or even any injury constituting the relevant limb of grievous bodily harm: in the instant appeal, an injury "of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health"[26]. What is required is proof beyond reasonable doubt that an ordinary person in the position of the accused would reasonably foresee the possibility of the type of injury in fact caused. That finds reflection in the current model direction in the Criminal Directions Benchbook[27].

52 Applying that formulation to the facts of the present appeal, however, the event was the injury suffered by Ross constituting the relevant element of the offence of unlawfully doing grievous bodily harm, namely a fracture of Ross's left neck of femur. It was not necessary that the precise location of the injury (the neck of femur on Ross's left-hand side) or the exact nature of the fracture (a break in three places) be foreseen. All that needed to be foreseen was that

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25 *R v Stuart* [2005] QCA 138 at [17], [22], [25]; *R v Condon* [2010] QCA 117 at [19]; cf *R v Coomer* [2010] QCA 6 at [24], [27], [32].

26 See par (c) of the definition of "grievous bodily harm" in s 1 of the *Criminal Code*.

27 See Supreme Court of Queensland, *Supreme and District Courts Criminal Directions Benchbook*, (2017) at 78.1-78.2. A previous iteration of the direction, which is in a substantially similar form, was referred to in *Stuart* [2005] QCA 138 at [19].

harm of the kind in fact suffered was a possible consequence. And in the circumstances of this case, it cannot be sensibly doubted that, when pushing a middle-aged man backwards on a downward-sloping, hard-surfaced, concrete-tiled ramp with sufficient force to cause him to stumble backwards three or four metres and hit the ground at speed, an ordinary person in the position of the appellant would reasonably foresee an injury of that kind as a real and not remote possible consequence of such a push. Having regard to the role of the jury in assessing the evidence at trial, and having reviewed the whole of the evidence, the Court of Appeal was right to conclude that the jury's verdict was neither unreasonable nor unsupported by the evidence[28].

Conclusion

53 The appeal should be dismissed.

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28 See *M v The Queen* (1994) 181 CLR 487 at 492-493 per Mason CJ, Deane, Dawson and Toohey JJ. See also *R v Baden-Clay* (2016) 258 CLR 308 at 329-330 [65]-[66], 333 [79]; [2016] HCA 35.