Accident: section 23(1)(b)

Legislation

23 Intention—motive

(1) Subject to the express provisions of this Code relating to negligent acts and omissions, **a person is not criminally responsible for**—

(a) an act or omission that occurs independently of the exercise of the person's will; or

(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.

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.

(1A) However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality.

(2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

Commentary

Accident is an "excuse" rather than a defence. The onus of excluding the excuse rests on the prosecution: *R v Taiters, ex parte A-G* [1997] 1 Qd R 333 at 336.

Formerly, section 23(1)(b) was the second "limb" of s 23. The sub-section was amended in 2011, effectively substituting the common law definition of 'accident' for the term itself.

The "event" in section 23(1)(b) refers to the consequences of the act, and not to the physical action itself: *Taiters* at 335.

Notwithstanding dicta in *R v Mullen* (1938) 59 CLR 124 and *Fitzgerald* (1999) 106 A Crim R 215 that "accident" is not relevant to an offence under s 302(1)(a), in which an

intention to cause a particular result (e.g. death or grievous bodily harm) is an element, where appropriate, accident under section 23(1)(b) is required to be left to the jury and is not subsumed in the question of intent: see *Murray v The Queen* (2002) 211 CLR 193 (below) and *Stevens v The Queen* (2005) 227 CLR 319.

In *R v Trieu* [2008] QCA 28 at [32], de Jersey CJ said:

> The question to be addressed under s 23 is would an ordinary person in the position of the appellant reasonably have foreseen the suffering of this grievous bodily harm (the "event") as a possible outcome of the circumstances … that is, something which could happen, excluding remote or speculative possibilities …

The complainant in *Trieu* suffered grievous bodily harm by way of a cut to his arm by a meat cleaver. The "circumstances" in Trieu (at best for the appellant) included that the appellant was lying on his back on the ground, in the dark, waving a meat cleaver about during a continuing scuffle with the complainant. The Chief Justice (de Jersey CJ) considered that the answer to the section 23 question would necessarily have been "yes" and that section 23 did not therefore arise. McMurdo P agreed. Her Honour considered that, on the evidence, it was "inevitable" that the appellant would have reasonably foreseen that serious injury to the complainant was a possible outcome of his waving the cleaver around. Had Fryberg J been the trial judge, his Honour *might* have left accident to the jury – but his Honour ultimately concluded that the jury would necessarily have decided that an ordinary person, in the appellant's position, would reasonable have foreseen the infliction of grievous bodily harm on the complainant as a possible outcome of waving the cleaver in the whole of the circumstances. In his Honour's view also, no direction was called for.

See also *R v Coomer* [2010] QCA 6 where a direction on accident was not required

Care must be taken to identify the relevant "event" and to distinguish it from the acts or omissions which caused the event.

In *R v Taiters* [1997] 1 Qd R 333, the Court of Appeal explained that the reference to "act" is to "some physical action apart from its consequences" and the "event", in the context of an event occurring by accident, is a reference to "the consequences of an act" For example, in a homicide, the relevant event will be death. For an offence of unlawfully doing grievous bodily harm, the "event" is injury *of the kind* in fact suffered.

It is not possible to be prescriptive about the precision with which the injuries sustained must be identified; for example, it may not be necessary to name the exact facial bone fractured by a blow. See also: *R v Camm* [1999] QCA 101; *R v Francisco* [1999] QCA 212; *R v Grimley* [2000] QCA 64; *R v Coomer* [2010] QCA 6.

In *R v Condon* [2010] QCA 117, the Court of Appeal held that the relevant event was the injury suffered by the complainant, namely, a broken jaw, and that the trial judge had misdirected the jury by referring to the foreseeability of "injury amounting to grievous bodily harm", which could include a less serious injury than a broken jaw. The Crown conceded that this was a misdirection. However, earlier decisions in *R v Stuart* [2005] QCA 138 and *R v Peachey* [2006] QCA 162 (to which the Court in *Condon* was not referred) suggested that a broader reference may suffice ("injury of the kind in fact

suffered": *Stuart* [22] and "serious injuries similar to those actually incurred": *Peachey* [32]). Such an approach was described as "arguably' sufficient in *R v Wardle* [2011] QCA 339.

In *Irwin v The Queen* [2018] HCA 8; (2018) 92 ALJR 342 at [51] the High Court said that "[w]hat 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".

The High Court observed that a number of decisions of the QCA established that the event for the purposes of section 23(1)(b) is (relevantly to the facts in *Irwin*) an injury of a kind which constituted the grievous bodily harm in fact suffered by the complainant. In *Irwin*, the trial judge referred to an "injury like the hip fracture here". It was accepted that there was no error in such a direction.

In *Murray v The Queen* (2002) 211 CLR 193, the trial judge had not separated the concept of the (willed) act, in "discharging the gun", from the "event" caused by the will act – that is the death of the deceased.

Further, in *Murray*, Kirby J (at [94]-[102]), Callinan J (at [103]-[155]), and Gaudron J (at [1]-[24]) concluded that a direction on section 23 was required in a trial on a charge of murder, even where intention was the major issue on the trial, where the evidence raised its application. Kirby J said at [98] and [99]:

> It may not be doubted that the death of the deceased was causally related to certain deliberate conduct on the part of the appellant. He invited the deceased home, notwithstanding their earlier conflict. He provided him with continuous alcohol over some time. He approached him with a gun that he knew was loaded. He accepted that he might have cocked the gun ready for firing and that he might have put his finger on the trigger. He agreed that he pointed the gun in the direction of the deceased. The deceased was seated. All of these were acts which, without more, were incompatible with a conclusion that the ensuing death had arguably occurred "by accident".
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> But if the jury accepted that the death occurred by the discharge of the gun caused by the appellant's being startled or hit and so handling the gun as to result in its discharge in the direction of the deceased, it would be open to the jury to conclude (subject to the provisions of the Code relating to negligent acts or omissions) that the death of the deceased had, in the circumstances, occurred "*by* accident". At least it would be open to the jury to so conclude if they decided that the Crown had not negatived as a real possibility that the death was caused by an unintended act on the part of the appellant when all that he wanted to do, by procuring and pointing the gun, was to frighten the deceased and caused him to leave his home. Consistently with what I have said in relation to s 23(1)(a) the question is not one for the judge. It is for the jury, assisted by an explanation from the judge as to the provisions of par (b).

Section 23(1A) effectively reinstates *R v Martyr* [1962] Qd R 398, as regards cases falling within its scope. In *Martyr*, the deceased had a "peculiar" inherent weakness in his brain which caused him to die from a blow which was extremely unlikely to have

killed someone without such a weakness. It was held than the excuse of accident did not apply in a case in which the deceased had an existing physical condition or inherent weakness or defect of a person and the willed act of the appellant caused death.

Suggested Direction

The evidence in this case requires you to consider the excuse of "accident" – which operates like a defence – which the prosecution must exclude, beyond reasonable doubt, for you to convict the defendant.

As you know, the defendant has been charged with [XX**].**

The excuse of accident requires you to consider the way in which [the event**] occurred.**

Speaking generally, a defendant is not criminally responsible for the consequences of an act or omission if they did not intend those consequences, or reasonably foresee them, and an ordinary person in their position would not have reasonably foreseen the consequences as a <u>possible</u> consequence of the act or omission either.

The evidence raising the possibility of the excuse of accident in this case is: [refer to the evidence raising the possibility of the defence excuse of accident**].**

That evidence raises for your consideration the possibility that neither the defendant nor an ordinary person would reasonably have foreseen that [the event**] – that is, an injury *of the type* which in fact occurred would occur.**

If, on the whole of the evidence, the prosecution has not persuaded you, beyond reasonable doubt, that:

- **The defendant intended [**the event**] to occur; or**
- **The defendant reasonably foresaw [**the event**] as a possible consequence of his/her act or omission; or**
- **An ordinary person, in the position of the defendant, would have reasonably foreseen [**the event**] as a possible consequence of the defendant's act or omission,**

then the excuse of accident applies, and the defendant would be not guilty of the offence.

In considering whether the defendant did foresee [the event], or whether an ordinary person would have foreseen it, you should focus on whether [the type of injury in fact caused – e.g. "an injury like the hip fracture here" (see *Irwin*)**] was reasonably foreseeable as a possible outcome, disregarding possibilities that are no more than remote or speculative.**

In the context of this case: [frame direction around facts, for example as follows]

- ***If* the defendant did not intend or foresee [**the event, that is an injury of the type sustained, such as a life-threatening injury, a broken bone etc**] of [**the complainant**] as a possible consequence of his actions [**e.g. kicking him, hitting him with a bat**]; and**
- ***If* an ordinary person in the position of the defendant would not have foreseen that as a possible consequence of those actions,**

then the defendant would be excused by law of the offence of [xx**], and you would have to find him not guilty.**

It is not for the defendant to prove anything.

Unless the prosecution proves beyond reasonable doubt that the defendant intended or foresaw [the event**] or that an ordinary person in the position of the defendant would reasonably have foreseen [**the event**] as a possible consequence of his actions, you must find him/her not guilty.**

(The above directions are taken in part from the direction suggested by Callinan J in *Stevens v The Queen* (2005) 227 CLR 319 at 370, para [160]; with whom McHugh J agreed.)

Even if you reject the defendant's account of what happened, you must still consider the possibility that the event occurred unforeseen and unintended.

Example Direction in the case of a murder/manslaughter trial

NB: This excuse is excluded in the case of an assault causing death if the defendant has been charged with unlawful striking causing death under section 314A. If a charge under that section has been included as an alternative to murder or manslaughter then, even if the excuse of accident would apply to manslaughter, it would not apply to the section 314A offence. The example direction would need to be supplemented with directions about the section 314A offence.

> **On the evidence, you may decide that Ben Brown punched John Smith in the head in the course of argument between them in the street; that Ben Brown fell back and hit his head on the kerb; that he was taken to hospital and received treatment there; but that he died some 36 hours later.**
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> **If you are satisfied beyond reasonable doubt that when he punched Smith, Ben Brown intended to cause his death or do him grievous bodily harm, then you may find Brown guilty of murdering Smith. For that purpose, the question is not whether Brown meant to punch Smith - you may think he certainly did - but whether in punching him he intended to kill him.**
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> **If you are not satisfied Brown had such an intention so as to make him guilty of murder, then you must go on to consider whether or not he is guilty of manslaughter. Manslaughter in circumstances like these is killing another human being but without having the intention to kill or having any excuse in law for doing so.**
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> **In law a killing is excused if an ordinary person in the position of the accused - Brown in this case - would not have foreseen the death of Smith as a possible consequence or result of his punching him in the head. In order to convict, the Crown must satisfy you beyond reasonable doubt that an ordinary person in the defendant's position would reasonably have foreseen Smith's death as a possible outcome of punching him in the way he did. Unless the Crown so satisfies you, you must find the defendant not guilty of manslaughter.**

(Concealed) defect, weakness, or abnormality

The present case is, however, complicated by the medical evidence we have heard at this trial. Dr Tong, who examined Smith's body after death, said he found that what, in his opinion, had caused death was the rupturing or bursting of an aneurism, which is like a bubble on a blood vessel in the brain. He told us here that it was likely that the aneurism burst when Smith's head struck the kerb. He also said that Brown, or anyone else, could not have known that Smith had such an aneurism or bubble in his brain. Indeed, even the victim Smith himself would not have known that he suffered from such a condition.

That might well lead you to think that no reasonable person would have foreseen the possibility that Smith would die as a result of being punched in the way he was.

However, I am bound to tell you that in law this may not matter in this instance. That is so because under our law a person is not excused of manslaughter if the death of the victim is the result of a defect, weakness or abnormality from which the victim suffered. If, therefore, you are satisfied beyond reasonable doubt that the aneurism of which Dr Tong told you was a "defect, weakness or abnormality" from which Smith suffered, and also that Smith's death resulted because of it, then it is open to you as the jury to find Brown guilty of unlawfully killing Smith, even though no reasonable person would or could have foreseen his death as a possible result of the punch delivered by Brown. In that event, you may return against Brown a verdict of manslaughter.