Accident, s 23(1)(b)[1]

General Directions

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.** [2]

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 possible 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[3] would occur.

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1 Accident is an "excuse" rather than a defence. Formerly 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.

2 Care must be taken to identify the relevant "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 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 (see footnote 4 below).

It is important to differentiate between the defendant's act or omission, and the event caused by the act or omission. 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, Kirby J (at [94]-[102]), Callinan J (at [103]-[155]), and Gaudron J (at [1]-[24]) concluded that a direction on s 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.

3 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." (emphasis added).

The High Court observed that a number of decisions of the QCA established that the event for the purposes of s 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.

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] was foreseeable as something which could happen, disregarding possibilities that are no more than remote or speculative.[4]

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,**

In *R v Condon* [2010] QCA 117 ("*Condon"*), 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 had conceded that this was a misdirection. However, earlier decisions in *R v Stuart* [2005] QCA 138 ("*Stuart"*) and *R v Peachey* [2006] QCA 162 ("*Peachey"*) (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.

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.

[4] It was accepted in *Irwin v The Queen* [2018] HCA 8 at [29] that a direction in these terms contained no error. See also *R v Trieu* [2008] QCA 28.

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.** [5]

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

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 following example direction would need to be supplemented with directions about the section 314A offence.

Further suggestion for directions on offence of murder or manslaughter:

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.

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[6] **to kill him.**

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

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[5] These 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]; McHugh J agreed with those.

[6] The onus of excluding s 23(1)(a) rests on the prosecution: *R v Taiters, ex parte A-G* [1997] 1 Qd R 333 ("*Taiters*") at 336. The "event" in s 23(1)(b) refers to the consequences of the act, and not to the physical action itself: *Taiters* at 335. See standard direction in this Bench Book on s 23(1)(a), (No.77 – "Unwilled Acts Automatism") footnotes 1 and 2.

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.[7]

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[8] **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.[9] **If, therefore, you are satisfied beyond reasonable doubt that**

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7 Authority and justification are not relevant here.

8 In this instance, the death is the "event", result or consequence of the punch, which is the act and not the event or result: *R v Van Den Bemd* [1995] 1 Qd R 401 affirming *Taiters* at 337. 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) where an intention to cause a particular result (e.g. death or grievous bodily harm) is an element, where appropriate, accident under s 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, *Stevens v The Queen* (2005) 227 CLR 319. See *R v Coomer* [2010] QCA 6 where a direction on accident was not required.

9 See s 23(1)(a). This subsection is apparently intended in effect to reinstate the decision in *R v Martyr* [1962] Qd R 398, as regards cases falling within its scope.

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.