SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kleimeyer* [2014] QCA 56
PARTIES:	**R** **v** **KLEIMEYER, Karl Ernst** (appellant)
FILE NO/S:	CA No 158 of 2013 DC No 33 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Bowen
DELIVERED ON:	28 March 2014
DELIVERED AT:	Brisbane
HEARING DATE:	20 March 2014
JUDGES:	Muir and Morrison JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Refuse to admit further evidence in support of ground two.** **2. Appeal against conviction allowed.** **3. Conviction and verdict set aside.** **4. New trial ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – PARTICULAR CASES – where evidence was given by a medical practitioner in an area outside of his expertise – where basis of opinion was not sufficiently explained – where evidence had not been previously disclosed – where evidence given was not encouraged or sought by the prosecution – where trial counsel did not object to evidence – whether there was a substantial miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – FRESH EVIDENCE – AVAILABILITY AT TRIAL, MATERIALITY AND COGENCY – where statement made by the complainant at the hospital about the circumstances in which he was injured – where evidence was available but not lead at trial – whether, even if the new evidence was accepted as true, the conclusion of guilt was still open

Criminal Code 1899 (Qld), s 668E(1A)

Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588; [2011] HCA 21, cited
Gately v The Queen (2007) 232 CLR 208; [2007] HCA 55, cited
Lawless v The Queen (1979) 142 CLR 659; [1979] HCA 49, cited
Lewis v The Queen (1987) 88 FLR 104; [1987] NTCCA 3, cited
Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305, cited
R v Condren ex parte Attorney-General [1991] 1 Qd R 574, cited
R v Katsidis; ex parte A-G (Qld) [2005] QCA 229, cited
Suresh v The Queen (1998) 153 ALR 145; [1998] HCA 23, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

COUNSEL: A J Glynn QC, with P Sorenson, for the appellant
B J Campbell for the respondent

SOLICITORS: Sciaccas Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** I agree with the reasons of Applegarth J and with the orders he proposes.

[2] **MORRISON JA:** I have had the advantage of reading the reasons of Applegarth J. I agree with the reasons he gives for allowing the appeal, and wish only to add this. At the trial the prosecutor placed great reliance in the CCTV footage, exhibit six. The jury were addressed by the prosecutor on the basis that the CCTV footage supported the version of events given by Mr and Mrs Williams, who were described as independent witnesses. A detailed examination of the CCTV footage does not support that proposition. Critically it shows the complainant coming free from the headlock imposed by the appellant as a means of moving him out of the bar, and falling to his right towards the floor. At no point does the footage support what Mr and Mrs Williams suggested, namely the severe application of force to the back of the complainant's head, and his propulsion by that means into the floor. What could reasonably have been drawn from that footage creates, in my mind at least, further reason to be concerned about the prominence given to the evidence of the doctor, as detailed by Applegarth J.

[3] I agree with the orders proposed by Applegarth J.

[4] **APPLEGARTH J:** The complainant, Mr Luke Vella, and nine friends took an annual trip as part of a punting club of which they were members. In November 2010 they planned a long weekend of drinking and partying at Airlie Beach. After checking into their hotel on 4 November 2010, they began drinking. Between around 4 pm and 9.30 pm Mr Vella drank in the order of 12 full strength stubbies

before going to Magnums nightclub where he drank a few spirits. One of Mr Vella's companions, Brad Green, was also in the nightclub and had been drinking. Bar staff complained to security staff that Mr Green had gone behind the bar into a staff only area. Security officers, including the appellant, approached the two men and asked Mr Green to leave. Mr Green and Mr Vella challenged that request. Mr Vella grabbed Mr Green in a "bear hug" to prevent his removal. Mr Green was removed by two security officers and the appellant started to remove Mr Vella from the premises.

[5] What happened after that is disputed and was the subject of conflicting evidence at the appellant's trial upon a charge that he unlawfully did grievous bodily harm to Mr Vella.

[6] There was no dispute at trial that Mr Vella suffered grievous bodily harm when his face landed on concrete. The evidence left open a number of possibilities, including:

(a) the appellant having applied force to the back of Mr Vella's head and neck (a version given by Mr Williams and Mrs Williams);

(b) an action that was described by one of Mr Vella's companions, Mr Farragher, as "like a hip throw";

(c) a number of individuals squeezing together in what was described as a "bottleneck" at the door, with some of them, including Mr Vella, falling to the ground (a version given by the Duty Manager, Mr Matthews);

(d) the appellant's hold on Mr Vella being released, due to interference by other patrons, after which they fell to the ground together (a version given by Ms Mabby who was working in the bar);

(e) after Mr Vella's friends pulled the appellant off him, Mr Vella tripped or fell (a version given by the appellant in an interview with police).

[7] The prosecution case was not confined to (a) or (b). It was in more general terms, namely that the appellant "deliberately propelled Mr Vella's body head first onto the floor". It was not particularised as a push, a throw, a tackle or any other specific action.

The first ground of appeal – inadmissible opinion evidence

[8] Mr Vella suffered lacerations to his nose, between his eyebrows and to his lower lip. He also suffered a chipped tooth. The appellant's trial counsel admitted that the laceration to Mr Vella's nose amounted to grievous bodily harm because, without treatment, it was likely to result in serious disfigurement. A medical practitioner was called by the prosecution to give an opinion about the force required to cause the injuries. The doctor's witness statement simply said that Mr Vella's injuries were consistent with his head being forced to the ground. His evidence was opened on the basis that he would be giving an opinion about the force required to cause those injuries.

[9] Dr Holroyd gave such evidence. He explained that a laceration needed friction to tear the skin, and that substantial force was required to tear the skin and then to split it along its plane. Having said that a substantial amount of force was required, Dr Holroyd then continued, without any prompting, to give evidence which had not been previewed. He volunteered:

> "The – the other concerning thing with these injuries were the fact there were no other associated injuries to the palms of the patient, such as pin abrasions, nor to his elbows or knees like a protective mechanism to brace his fall. …that in itself says the first point of contact of his body would be his face, and that is consistent with a fall, **probably assisted in nature, without being able to free your arms to protect yourself to fall**. Further adding to this is this patient was reported to me as to being a rugby league player of a semi-professional level. **I think it is unlikely being that person you would be unaware of how not to protect yourself in a fall.** I think that summarises my evidence, your Honour." (emphasis added)

[10] Dr Holroyd was then asked by the prosecutor to consider competing versions and to give an opinion as to whether the injuries were consistent with those versions. The first scenario was someone forcing Mr Vella's head to the ground. Dr Holroyd indicated that to suffer a friction force to get a laceration while being forced there would need to be some "fall momentum to cause the traction and friction pressure on the skin to tear it". He was then asked about the scenario of Mr Vella being held in a headlock, and then someone putting his hand behind the neck and then forcing his head to the floor. This scenario was not made terribly clear by the question, and no witness gave an account of Mr Vella being held in a headlock whilst his head was forced on to the floor. The suggested scenario was probably intended to convey force being applied to the neck and head after a headlock was released. In any event, Dr Holroyd said the injuries were consistent with the suggested scenario.

[11] The next suggested scenario was Mr Vella being held in a headlock and a group of people falling on top of the appellant, with them all falling over onto the ground on top of Mr Vella. Dr Holroyd thought that was possible, and went on to say that the lack of any abrasion injuries to Mr Vella's forearms or hands or knuckles meant that he did not brace his fall. That suggested that his arms had been restrained whether by one person or many.

[12] The third scenario was of Mr Vella being held in a headlock, which was then let go with him falling forward on his own. Dr Holroyd said that this was "a remote possibility". His explanation was that Mr Vella had played rugby league at a semi-professional level and it was unlikely that such a person would be unaware of how not to protect himself in a fall. Dr Holroyd thought that there would have been some protective mechanism such as turning his face to the side, putting his arm out or rolling onto a shoulder first, but there were no abrasions to Mr Vella's shoulders or forearms. Therefore, he thought that the version advanced by the appellant in his record of interview was a "remote possibility".

[13] The appellant submits that this unexpected opinion evidence was inadmissible, harmful to his defence and was clothed with "a cloak of independence and apparent authority". It was an opinion which supported a particular method of coming into contact with a concrete floor and not others. Such an authoritative opinion coming from a medical expert was apt to tilt a finely balanced case in favour of a conviction, and resulted in a miscarriage of justice.

The second ground of appeal – new evidence of the complainant tripping

[14] At trial Mr Vella said he could not remember anything that happened at the nightclub after the appellant had full control of him in a headlock. The next memory he claimed to have was waking up in Proserpine Hospital. But the records

from the Proserpine Hospital upon his admission, taken by the triage nurse, Ms Soden, recorded an account of Mr Vella having been in a scuffle with security and having "tripped and fell head first into concrete". This record formed part of the Police Brief, but the solicitors who acted for the appellant at his trial (not his present solicitors) did not notice it. The appellant was granted leave to add a second ground of appeal, namely that a miscarriage of justice occurred in that evidence of a statement made by the complainant on his admission to the Proserpine Hospital, shortly after he suffered the relevant injuries, to Nurse Soden, was not in evidence at the trial.

[15] Nurse Soden provided an affidavit upon which the appellant sought to rely in this appeal and she was cross-examined. Because the relevant note in the hospital records and her evidence is not "fresh evidence", the appellant's case on this ground depends upon establishing that this evidence should be received as "new evidence".

The issues

[16] The substantial issues on appeal are:

1. Was inadmissible opinion evidence given by Dr Holroyd?
2. Did its admission lead to a miscarriage of justice?
3. If so, was the miscarriage not substantial so as to engage the proviso?[1]
4. Should the medical records from the Proserpine Hospital made by Nurse Soden be allowed as "new evidence" in support of ground two?
5. If so, was there a substantial miscarriage of justice in that evidence not being in evidence at the trial?

Issues 2 and 3 require a fuller summary of the evidence given at trial.

The evidence of lay witnesses

[17] A number of witnesses were called. Some were unable to give evidence about the incident. Some saw some of the activities which preceded the incident. Some witnesses gave their recollections of the circumstances in which Mr Vella came to be injured. Their versions conflicted. However, some common themes emerged. The incident happened very quickly and in somewhat chaotic circumstances.

[18] Mr Cadwallader, a security guard at the hotel did not see the incident but described the manner in which the appellant was holding Mr Vella. He stated that the appellant had one arm over his shoulder and the other under his armpit.

[19] Mr and Mrs Williams were at the hotel. Mr Williams had only one drink that evening and was standing a few metres away from where the incident occurred. According to Mr Williams, Mr Vella was held in a headlock by the appellant. Mr Vella managed to free himself from the appellant's grasp. Mr Williams said that the appellant then used his weight to push Mr Vella forward and downwards causing his head to hit the floor.

[20] Mrs Williams was standing beside her husband when the incident occurred. She had only had one or two drinks during the course of the evening. Mrs Williams did

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1 *Criminal Code*, s 668E(1A); *Weiss v The Queen* (2005) 224 CLR 300.

not witness any of the events leading up to the incident. She recalled observing the appellant grabbing Mr Vella on the back of the neck and forcing his head into the floor.

[21] Ms Mabby, a hotel employee, described the appellant holding Mr Vella in an "arm hold". While the appellant was escorting Mr Vella out she witnessed other patrons interfere with the appellant causing him to release Mr Vella. According to Ms Mabby, at this point the appellant, Mr Vella and a number of other individuals fell to the ground.

[22] The hotel's duty manager, Mr Matthews, described the appellant as holding Mr Vella's arm to one side with the "other arm over the top of him." He described this as ushering Mr Vella out. In the process there was a "bottleneck" at the door. This caused a number of individuals to be "squeezed together" causing them to fall "over on top of each other".

[23] In stark contrast to witnesses who described Mr Vella falling to the ground, was the evidence of his friend, Mr Farragher, who, like Mr Vella, had been drinking that afternoon and evening. He acknowledged that he was intoxicated after having had between six and seven drinks that afternoon and, to the best of his recollection, another few drinks at Magnums. He said that he "wasn't that drunk". According to Mr Farragher, Mr Vella was placed in a headlock and dragged toward the exit. During this process Mr Farragher observed the appellant push Mr Vella's head into the ground, using his right hand to push him forward and downward. He described this motion as "like a hip throw". No other witness described the appellant's actions in terms of a throw.

[24] A member of Mr Vella's party, Mr Miller, did not see the actual incident. However, he did observe the appellant grab Mr Vella, placing an arm around his neck and his other around his body as he forced him to the exit. Mr Miller said he did not get a clear view of the actual incident due to the convergence of people to the spot where Mr Vella and the appellant were.

[25] Other witnesses gave similar descriptions of a convergence of individuals. Mr Adams, a security officer, was involved in removing Mr Green. He said they were in front of the appellant and Mr Vella. His evidence was that as they were escorting Mr Green and Mr Vella out the rest of their mates converged on the exit. He stated that "It was just chaos. They just looked like they were coming to attack us".

[26] In summary, the evidence of lay witnesses described a chaotic scene and something of a bottleneck occurring near the doorway. Of those witnesses who claimed to have seen the incident, descriptions varied from a forceful push by the appellant to the back of Mr Vella's head and neck (Mr and Mrs Williams), to a hip throw (Mr Farragher) to the injury having been sustained when one or more people fell on top of the appellant and Mr Vella after the appellant had released a headlock.

[27] A CCTV recording became an exhibit, but its contents were inconclusive as to how Mr Vella came to strike the ground.

The appellant's record of interview

[28] The appellant participated in a record of interview with police on 11 February 2012. In that interview the appellant stated that he had placed his right arm around of Mr Vella's neck, forming a type of headlock. He admitted that usually when

evicting a patron two guards would be involved and a wristlock used. However, because other guards were busy evicting other members of Mr Vella's group he was left to evict Mr Vella on his own.

[29] The appellant described Mr Vella struggling all of the way to the exit. The scene, according to the appellant, was chaotic with "people everywhere pushing each other". As the appellant reached the door some of Mr Vella's friends "pulled him away" from Mr Vella and it was in this process that Mr Vella "tripped or just fell down".

Was inadmissible opinion evidence given by Dr Holroyd?

[30] No objection is taken to that part of Dr Holroyd's evidence which was previewed in his witness statement and opened, namely that a substantial amount of force was required to cause the injuries and that the injuries were consistent with Mr Vella's head being forced to the ground. The appellant's complaint relates to evidence that was not previewed and which was, in effect, volunteered by Dr Holroyd. The general submission is that such opinion evidence did not meet the requirements for the admissibility of expert opinion evidence. In particular: (a) the opinions expressed by Dr Holroyd were not the subject of expertise and, if they were he had no relevant expertise; and (b) the basis of the opinions expressed by him were not identified or explained.

[31] The basis for an expert opinion must be identified. The expert's evidence "must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded."[2]

[32] In some circumstances, for example where a specialist medical practitioner expresses a diagnostic opinion in his or her relevant field of specialisation, such a requirement may require little explicit articulation or amplification.[3] Here, however, Dr Holroyd was not expressing a diagnostic opinion, and some of the critical opinions which he expressed were not explained. For example, his opinion which I have earlier emphasised that the fall was "probably assisted" was not explained. His opinion that Mr Vella had been unable to free his arms to protect himself was based upon a theory that someone with experience as a semi-professional rugby league player would know how to protect himself in a fall. He did not canvass, let alone expose his reasons for excluding, other possible reasons as to why the injuries might have been suffered if one or both of Mr Vella's arms had been free to protect himself.

[33] The respondent's submissions note that the doctor did not "factor into his opinion the role the complainant's intoxication might have played in his ability to react to being unexpectedly propelled towards the concrete surface, nor did the opinion take into account the fact the complainant might have been disoriented, as a consequence of the neck hold previously placed upon him by the appellant". This submission tends to highlight the absence of any reasoning in the opinion expressed as to why those other possible explanations could be discounted or excluded. The respondent's submission highlights that Dr Holroyd's opinion was based on certain unstated

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2 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 744 [85].

3 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at 604 [37].

assumptions about the nature of Mr Vella's intoxication or mental state, and did not explain the role which they may have played in his failure to brace his fall or to take other steps to protect himself in a fall.

[34] Of course, it was open, and appropriate, for Dr Holroyd to report the absence of injuries to the palms, forearms, shoulders and other places where injuries might have been sustained if Mr Vella had taken steps to brace his fall, provided these matters were disclosed in Dr Holroyd's witness statement. Incidentally, the absence of any evidence that he took steps to brace his fall suggests that his injuries could have been sustained with less force than would have been required had he taken steps to brace his fall. Dr Holroyd's observations about the absence of protective injuries were admissible. However, he went beyond reporting such observations to venture opinions about why no such protective injuries were sustained.

[35] No evidence was led of any particular expertise the doctor had to express opinions about whether it was likely that neither of Mr Vella's arms were free when he fell. No evidence was led that this was an area of expertise so as to satisfy the "area of expertise rule".[4] The only evidence given about the witness' expertise was that he had graduated as a medical practitioner in 2004 and had worked at the Proserpine Hospital. As the respondent submits, it is not uncommon in a criminal trial for a treating medical practitioner to offer an opinion as to the mechanism by which a particular injury was caused, and that such opinions are regularly led without objection.

[36] However, Dr Holroyd's evidence went beyond offering an opinion about the mechanism by which the lacerations were inflicted, namely by the traction and friction pressure on the skin causing it to tear. He ventured into expressing other opinions, without it being established that: (a) he had the knowledge and experience sufficient to entitle him to be held out as an expert who could assist the court; or (b) the field about which he was expressing an opinion was a field of "specialised knowledge", sufficiently recognised as credible by others capable of evaluating its theoretical and experiential foundations.

[37] The opinion that Mr Vella was unable to free his arms to protect himself during the fall was one which an ordinary person might entertain. It was not an opinion based on the application of a field of "specialised knowledge" in which the doctor was expert by reason of training, study or experience. It was in the nature of conjecture or speculation. The expressed opinion to the effect that he would not expect the injuries to be sustained unless Mr Vella's arms were restrained was not the expression of an expert opinion. The evidence did not satisfy the rules of admissibility for expert opinion.

[38] The critical opinion that the scenario given in the defendant's record of interview (and which found some support in the evidence) that after Mr Vella was released from the headlock he fell forward, was described by Dr Holroyd as a "remote possibility". His evidence did not explain why he consigned this scenario to such a status. The scenario was consistent with there being "some fall momentum to cause the traction and friction pressure on the skin to tear it". But Dr Holroyd did not explain why he reached the opinion that this scenario was a "remote possibility". The respondent's written submissions simply assert that Dr Holroyd "exposed his reasoning sufficiently for the jury to make an assessment as to the

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4 Freckelton and Selby "*Expert Evidence Law Practice Procedure and Advocacy*", 5th ed, Chapter 2.10.

validity of his opinion". I am unable to accept this submission. His opinion that Mr Vella did not attempt to break his fall with his hand was not apparently part of his reasoning in describing the defence scenario as a remote possibility. It was equally applicable to the other scenarios. The critical opinion that the defence scenario was a remote possibility was not sufficiently explained to be admissible.

[39] In summary, Dr Holroyd's evidence went beyond admissible opinion evidence. It was appropriate for him to report the absence of injuries that might have been occasioned if Mr Vella tried to break his fall. Their absence suggested that Mr Vella did not break his fall. It was not appropriate for an expert to speculate about the reasons for this where:

(a) those reasons were a matter for the jury to assess;

(b) the subject matter of the opinions was not an area of expertise in which Dr Holroyd had expertise;

(c) other competing reasons as to why Mr Vella did not break his fall were not canvassed, considered and excluded;

(d) the reasons for reaching the conclusion were not sufficiently explained.

Most importantly, Dr Holroyd's opinion that the defence scenario was "a remote possibility" was not explained and did not satisfy the rules for admissibility of expert opinion.

Did the inadmissible opinion evidence lead to a miscarriage of justice?

[40] The appellant correctly submits that the inadmissible opinion evidence of Dr Holroyd was harmful to his case. The opinion of Dr Holroyd described the defence theory as a remote possibility and discredited the appellant's version of events. It invested competing scenarios which might justify conviction with the authority of an expert. Although the opinions were not expressed in terms of scientific jargon, they carried the authority of an expert about a subject which was for the jury, not Dr Holroyd, to assess. The jury was apt to be impressed by his qualifications and the confident manner in which he expressed them.[5]

[41] Without Dr Holroyd's evidence, the jury was faced with competing versions of the incident. Dr Holroyd's evidence was likely to have had an effect on the jury in its attempts to decide which, if any, version of the incident should be accepted. Dr Holroyd's expert opinion that the appellant's version was a remote possibility was harmful to the appellant's case and to his credibility.

[42] It may be said that Dr Holroyd's theory that Mr Vella did not have either of his arms free to protect himself from a fall also cast doubt on the evidence of some prosecution witnesses who did not describe Mr Vella's arms as being restrained. However, the real prejudice of Dr Holroyd's inadmissible evidence was two-fold. First, it discredited the appellant's version of events. Secondly, it offered an apparent scientific solution to a jury quandary. It possibly relieved the jury from having to choose between prosecution witnesses, who variously described a push or a throw, and to simply conclude that because Mr Vella did not fall on his own after being released from a headlock, he must have been propelled by the appellant.

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5 *Makita (Australia) Pty Ltd v Sprowles* at [73], citing *Lewis v The Queen* (1987) 88 FLR 104 at 123-124.

[43] The respondent points out that the trial judge gave what it describes as the "orthodox" expert witness direction, based upon the Bench Book. It served to emphasise that Dr Holroyd's evidence did not have to be automatically accepted, and it was up to the jury to give such weight to his opinion as it thought appropriate. The trial judge had earlier, and uncritically, summarised Dr Holroyd's evidence. Nothing was said which lessened the harmful impact of his opinions about expected protective mechanisms and that the scenario favoured by the defence was no more than a remote possibility. This opinion was not described as speculative, unexplained and not based on the doctor's expertise. The orthodox directions in the summing up were unlikely to alter the harmful effect of the admission of the expert evidence upon the appellant's prospects.

[44] The evidence was not objected to by counsel who appeared for the appellant at trial. This precludes the appellant from contending that there was a "wrong decision on any question of law" in terms of s 668E(1) of the *Criminal Code*. It also raises for consideration whether there was no miscarriage of justice because "for rational forensic reasons"[6] trial counsel decided to not object to it. Still, a miscarriage of justice ground may be established despite the course taken by an accused person's counsel at trial in not objecting to certain evidence.[7]

[45] The respondent submits that even if Dr Holroyd's evidence was inadmissible, the failure to object to it is capable of being explained on the basis that it could have resulted in a forensic advantage. The respondent observes that Mr and Mrs Williams and Mr Farragher did not describe Mr Vella's arms being restrained at the point when his head made contact with the ground. Dr Holroyd's opinion about the arms being restrained was not consistent with their evidence. This may have cast doubt on the reliability of their evidence.

[46] A more substantial case to conclude that the failure to object was made for forensic reasons would exist if the relevant evidence had been previewed. The inadmissible evidence was volunteered after responding to legitimate questions about the force required to sustain the injuries and whether the injuries were consistent with versions of the evidence. Neither the prosecutor nor defence counsel might have reasonably expected that Dr Holroyd would go beyond responding to those questions and advance the opinions which he did.

[47] After the evidence was given, defence counsel had the time to reflect upon it, and some reliance was placed upon it in his address. However, this does not mean that counsel made a rational forensic choice to not make an objection to evidence which was inadmissible. The forensic advantage which may have arisen from a failure to object would not have been very apparent at the time the evidence emerged. I am not persuaded that the appellant's trial counsel chose to not object to the evidence for rational forensic reasons. I am not persuaded that this is a case in which a "forensic tactic"[8] was employed.

[48] As a general rule, a party is bound by the conduct of his or her counsel, and counsel have a wide discretion as to the manner in which proceedings are conducted. Whilst a failure to object is relevant to the question of whether the reception of inadmissible evidence constitutes a miscarriage of justice, I am not persuaded that

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6 *Suresh v The Queen* (1998) 153 ALR 145 at 151 [23]; see also *Gately v The Queen* (2007) 232 CLR 208 at 232-233 [77].

7 *Gately*, ibid.

8 *Suresh v The Queen* (supra).

the circumstances in which the opinion evidence was given, and not objected to, means there was no miscarriage of justice.

[49] Expert evidence can have a decisive effect upon a jury's decision. Laws and practice directions require such evidence to be disclosed in advance of trial so that expert opinion evidence satisfies the conditions for admissibility and considered decisions may be made to object to it. In circumstances in which the relevant evidence was not previewed by way of disclosure or opening, and emerged in the form of opinions which were not necessarily responsive to the questions asked of the witness, the failure of trial counsel to object does not preclude a finding that a miscarriage of justice occurred. I conclude that a miscarriage of justice did occur.

Was the miscarriage of justice substantial?

[50] The evidence supportive of a conviction was far from overwhelming. The jury faced the difficult task of assessing a range of witnesses who gave different versions of the incident. The inadmissible evidence of Dr Holroyd, which effectively discredited the appellant's version of events, was likely to have had a significant effect on the jury. It may have been taken by jurors to relieve them of having to decide whether the deliberate propulsion of Mr Vella by the appellant was as Mr and Mrs Williams described it or as Mr Farragher described it or by some other means that no witness clearly saw. Dr Holroyd's evidence, having the authority of an expert, consigned the defence scenario to a remote possibility. The jury may have acted upon it in deciding to convict. Had the evidence not been given then the jury may have been unable to agree or have not been satisfied of the appellant's guilt beyond reasonable doubt. In the circumstances, there was a substantial miscarriage of justice.

[51] The result is that the appeal should be allowed.

Should the evidence of Nurse Soden be allowed as "new evidence" in support of the second ground of appeal?

[52] There is an important distinction between fresh evidence and new evidence. As McMurdo P stated in *R v Katsidis; ex parte A-G (Qld)*[9], fresh evidence is evidence which either did not exist at the time of trial or which could not then with reasonable diligence have been discovered. New or further evidence is evidence on which a party seeks to rely in an appeal which was available at the trial or which could with reasonable diligence have been discovered. As to the latter category, her Honour stated:

> "In determining an appeal which turns on new or further evidence there are strictly two questions: first, whether the court should receive the evidence and second, whether that evidence, if received, when combined with the evidence at trial requires that the conviction be set aside to avoid a miscarriage of justice. Frequently the two questions will conveniently merge."[10]

[53] In *Lawless v The Queen*[11], Mason J stated that it is not permissible for a court of criminal appeal to set aside a conviction if the newly adduced evidence, not being fresh evidence strictly so called, reveals "no more than a likelihood that the jury

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9 [2005] QCA 229 at [2] ("*Katsidis*").
10 At [4] citation omitted.
11 (1979) 142 CLR 659 at 675.

would have returned a verdict of not guilty". That authority, and others, were considered by Jerrard JA (with whom McMurdo P and White J agreed) in *Katsidis* who stated that the Court of Appeal must be either satisfied of innocence or entertain such a doubt that the verdict of guilty cannot stand. This is a higher burden than to show that there is "a significant possibility that a jury hearing that new evidence would have reached a different verdict"[12]. If a conclusion of guilt is still reasonably open, even accepting non-fresh evidence as true, a miscarriage of justice will not be shown.[13]

[54] In support of his second ground of appeal, the appellant sought to rely upon a nursing record completed by Ms Soden when Mr Vella was admitted to the Proserpine Hospital at around 10.30 pm on 4 November 2010. He had been transported by ambulance and Ms Soden recorded the following notes:

> "[Brought in by Queensland Ambulance Service] – coming out of night club with friends. Got into scuffle with security – tripped and fell head first into concrete. Laceration to nose ~~lip went thr~~. error ~~top took~~ Laceration to lower lip, front tooth chipped. [Loss of consciousness] for 10-15 sec. Witnessed by friends."

[55] Ms Soden's affidavit swore that Mr Vella said words to her on that evening to the effect of "I tripped and fell head first into concrete when coming out of a nightclub with friends and got into a scuffle with the security officer at the nightclub." I note that this seems to reverse the sequence of the scuffle and the injury. Ms Soden acknowledged under cross-examination that the reference to a loss of consciousness for 10 or 15 seconds may have come from another source. She acknowledged in her oral evidence before this Court that she could not recall the actual words that were used. However, she was definite that the reference to having "tripped and fell head first" came from Mr Vella and that if, instead, he had said "I was tripped", then she would have recorded the note differently.

[56] The appellant submits that the evidence of Ms Soden is "credible, cogent, relevant and plausible". These words are taken from *R v Condren ex parte Attorney-General*[14] in which Thomas J considered the reception of further evidence.

[57] The respondent submits that the evidence did not satisfy the stringent test for the reception of new evidence. Apart from anything else, it was improbable that Mr Vella was a reliable historian at the time he spoke to Nurse Soden.

[58] Hospital records, which became Exhibit 1 on the hearing of the appeal, record an assessment of Mr Vella's consciousness upon admission. He did not rate poorly. He obeyed commands and had normal power. The initial assessment had his eyes open to speech. On a five point scale in relation to verbal response (5) oriented (4) confused (3) inappropriate words (2) incomprehensible sounds and (1) none, he rated (4) and on subsequent assessments rated (5).

[59] I accept Ms Soden's evidence that she took care in recording the notes which she did and I find her evidence credible that Mr Vella, upon admission, stated that he had tripped and fallen head first into the concrete. The note is open to the interpretation that he simply tripped, without any force being applied to him. It also is open to the interpretation that he tripped when force was applied to him. The

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12 *Katsidis* at [19].

13 Ibid.

14 [1991] 1 Qd R 574 at 579.

entry does not illuminate whether he tripped in the circumstances described by one or more of the witnesses, some of which was supportive of the prosecution case and some of which were inconsistent with it.

[60] The evidence, if admitted, would be relevant. If Mr Vella accepted that he gave the account which Ms Soden says that he did it would open a potential inconsistency with his claim to have had no recollection of the incident.

[61] The evidence is not particularly cogent. On one view, it may call into question the reliability of the evidence of prosecution witnesses who did not describe a trip. But, as noted, it is not necessarily inconsistent with Mr Vella having tripped after being pushed or after coming into contact with other people who fell on him. The evidence raises a significant possibility that a jury hearing that new evidence would reach a different verdict. However, that is not sufficient. Even accepting the evidence as true, a conclusion of guilt would still be reasonably open. The new evidence is not evidence of innocence. It does not cause me to have such a doubt that a verdict of guilty cannot stand. It does not satisfy me that a miscarriage of justice occurred because the evidence of Ms Soden was not in evidence at the trial.

[62] I would refuse to admit the evidence as new evidence. As a consequence, the appellant has failed to establish his second ground of appeal.

Conclusion

[63] The reception of inadmissible opinion evidence which was potentially very harmful to the appellant resulted in a miscarriage of justice.

[64] I propose the following orders:

1. Refuse to admit further evidence in support of ground two.
2. Appeal against conviction allowed.
3. Conviction and verdict set aside.
4. New trial ordered.