SUPREME COURT OF QUEENSLAND

CITATION:	*R v Reed* [2014] QCA 207
PARTIES:	**R** **v** **REED, Troy William** (appellant)
FILE NO/S:	CA No 287 of 2013 SC No 43 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	26 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	19 June 2014
JUDGES:	Margaret McMurdo P and Gotterson JA and Henry J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER CASES – where the appellant complained the trial judge wrongfully admitted evidence of "prior uncharged injuries" into evidence – where evidence was admitted as relevant evidence of domestic relationship – whether the evidence was admissible CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – APPEAL DISMISSED – where the appellant complained the trial judge erred in directing the jury about the use that could be made of "uncharged injuries" – where the trial judge warned against the use of the evidence as evidence of propensity – where the trial judge failed to give an accompanying direction as to the purpose to which the evidence could be put – whether that failure constituted error APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – PROVISO APPLIED IN PARTICULAR CASES – where the prosecution case was

strong – whether regard could be had to the jury's verdict – whether the proviso should be applied

Criminal Code 1899 (Qld), s 668E(1A)
Evidence Act 1977 (Qld), s 132B

Baiada Poultry Pty Ltd v The Queen (2012) 246 CLR 92; [2012] HCA 14, considered
Gilbert v The Queen (2000) 201 CLR 414; [2000] HCA 15, applied
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, applied
R v Self [2001] QCA 338, considered
Roach v The Queen (2011) 242 CLR 610; [2011] HCA 12, applied
Shepherd v The Queen (1990) 170 CLR 573; [1990] HCA 56, applied
Wilson v The Queen (1970) 123 CLR 334; [1970] HCA 17, applied

COUNSEL: V Keegan for the appellant
M R Byrne QC for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Henry J's reasons for dismissing this appeal against conviction.

[2] **GOTTERSON JA:** I agree with the order proposed by Henry J and with the reasons given by his Honour.

[3] **HENRY J:** The appellant pleaded not guilty to assault occasioning bodily harm (count 1) and murder (count 2). He was convicted after a five day trial and sentenced to 12 months imprisonment and life imprisonment respectively.

[4] He appeals his convictions on three grounds:

> "(1) The verdicts of the jury were unreasonable and cannot be supported having regard to all of the evidence.
>
> (2) The learned trial judge erred in allowing relationship evidence based on prior uncharged injuries to be led.
>
> (3) The learned trial judge erred in directing the jury about the use that could be made of prior uncharged injuries."

[5] Ground 1 was not pursued by the appellant's counsel, although it was not formally abandoned. Ground 2 went to the admissibility of evidence of facial grazing injuries to the deceased child. Ground 3 was concerned with the adequacy of the trial judge's directions to the jury about the use it could make of injuries to the child additional to the injuries allegedly constituting the bodily harm in count 1 and the cause of death in count 2.

Review of the Evidence

[6] The deceased, PM, was just over 16 months old at the date of his death. PM and his mother, SC, resided in Townsville with the appellant, a soldier.[1] Ms SC commenced a relationship with the appellant six months prior to PM's death. PM was occasionally in the sole care of the appellant while Ms SC was at work.

Assault occasioning bodily harm

[7] The offence of assault occasioning bodily harm involved the infliction of bruising to PM's backside, extending up to the small of his back and down to the back of his thighs, on 7 April 2011. The bruises were observed and photographed on 8 April 2011 by an employee of the child care centre PM attended. When one of the child care workers spoke with the appellant about the bruising he said PM had slipped from his highchair onto a pop up toy.[2] The "highchair" in question was a child's booster seat atop an ordinary chair.

[8] The appellant offered a similarly innocent version of events to Ms SC on the same day[3] and later, after PM's death, when interviewed by police.[4] It was an implausible explanation for the nature and extent of the bruising shown in the photographs taken by the child care centre. A paediatrician opined at trial that the number and distribution of bruises could not be accounted for by a fall onto a pop up toy and were caused by multiple applications of force.[5]

Events culminating in death

[9] During the first half of the following week the appellant was hospitalised with flu like symptoms and remained on leave at home for the rest of that week.[6] The prosecution alleged the appellant inflicted further injury upon PM later in that week on Friday 15 April 2011 and Saturday 16 April 2011.

[10] Ms SC gave evidence that PM did not have any injuries when she left for work on the morning of Friday 15 April 2011.[7] During that day the appellant called Ms SC and informed her PM had fallen off a bed and hit his head on the bedside table.[8] Ms SC returned home around 9.00 pm that evening. She observed PM sleeping in his bedroom but did not see his face.[9] The following morning, Saturday 16 April 2011, Ms SC saw grazes on PM's face.[10] She left for work that day at about 12.30 pm.[11]

[11] Later during the afternoon the appellant telephoned her telling her PM was sick, had been knocked over by the family dog during the afternoon and received a couple of bruises to his stomach.[12] PM died later that day and Ms SC did not see him again until she saw his dead body at hospital that night. She then saw bruises she had not

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1 R153 LL3-4.
2 R142 L10.
3 R155 LL17-28; R177 L25.
4 R478 L23.
5 R201 LL4-13.
6 R356, 362.
7 R158 L17.
8 R158 LL22-24.
9 R158 L9; R158 LL29-33.
10 R156 LL1-7; R158 LL12-15; R158 LL35-38.
11 R181 L41.
12 R196 L16-R197 L43.

seen earlier. She testified the appellant told her he did not know how the bruising happened.[13]

[12] At approximately 7.30 pm on Saturday 16 April 2011 paramedics were called to the appellant's home. Upon arrival paramedic Shannyn Bourke witnessed the appellant performing CPR on PM.[14] Another paramedic, Grant Furlong, testified the appellant was doing compressions using two hands, when he should have been using one hand.[15] PM appeared lifeless, was not moving or breathing and his skin was very pale and mottled, suggesting a lack of oxygen.[16] There was vomit around PM's head and on the floor near him.[17] PM was placed in the ambulance and the paramedics attempted resuscitation but he was unresponsive.[18]

[13] On full examination, Mr Bourke observed a large amount of small bruises covering almost the entirety of PM's abdomen, some bruises to his legs and an abrasion and bruising to his head.[19] Mr Bourke asked the appellant whether PM had some form of fall or trauma and the appellant responded, "I don't know. I haven't noticed anything."[20] The appellant did tell him a mark to the forehead was caused by PM falling out of bed the night before.[21] When Mr Bourke specifically asked, "What are the marks on the abdomen from?" the appellant initially denied noticing the bruising.[22] However, at a later point Mr Bourke heard the appellant say words to the effect of, "Oh, I've noticed. They started developing this afternoon, or earlier today."[23]

[14] The appellant told another paramedic, Ricardo Reynaga:

> "I fed him his bottle. I was getting him ready for bed when I noticed he was having trouble breathing. He then stopped breathing... He's had a chest infection for about a week and he's been on antibiotics. … He had a fall out of bed yesterday afternoon but he seemed ok…"[24]

[15] On arrival at the hospital the appellant advised Mr Furlong that PM had been unwell for approximately one week and he seemed to have been getting a little bit better earlier that morning. The appellant explained later in the day he bathed PM and fed him some toast or bread, which PM vomited up.[25]

[16] At the hospital the appellant told a nurse, Jade Hudson, he had heard PM having difficulty breathing over the baby monitor, so he brought him out to the living area and called the ambulance.[26] Nurse Hudson gave evidence that the appellant repetitively asked whether he performed CPR correctly, stating, "Did I do CPR properly? This is my fault. Did I do CPR properly?"[27] She asked about the grazes on PM's face and the appellant stated PM had fallen out of bed the day before.[28]

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13 R182 LL19-23.
14 R207 LL18-35.
15 R224 LL13-31.
16 R208 LL15-17.
17 R208 LL33-35.
18 R209 LL1-4; R211 LL44-45.
19 R209 LL39-46.
20 R210 LL21-25.
21 R210 L30; R219 LL27-29; R231 LL37-39.
22 R210 L32.
23 R210 LL30-37.
24 R231 LL32-36
25 R219 LL12-19.
26 R235 LL23-30; T2-65 LL26-28.
27 R236 LL38-39.
28 R237 LL6-7.

[17] PM exhibited no signs of life at hospital. He was kept on ventilation briefly before death was declared.[29]

The deceased's injuries

[18] The examining forensic pathologist, Dr Williams, initially certified PM's cause of death as being head and abdominal injuries however after reviewing the results of neuropathological examination he concluded death was caused by abdominal injuries.[30]

[19] Dr Williams found bruising to the base of both lungs, the diaphragm, the adrenal gland and the large and small bowel.[31] The large bowel was also torn, causing leakage of faeces and peritonitis. Dr Williams opined significant force must have been applied to the abdomen to cause bruising to the lungs.[32] He found the bowel was bruised and torn as a result of being crushed against the spine during the application of significant force to the abdomen.[33] He explained the force to the abdomen and bowel had lifted up the diaphragm, which was slammed against the base of the lungs, thus bruising the diaphragm and lungs.[34]

[20] There were fractures on both the right and left of the back of PM's head with a 17 centimetre long skull fracture extending from the left side of the head across the back of it.[35] The skull fracturing was caused by severe trauma to the head,[36] possibly contact with a hard surface forcefully applied,[37] resulting in a subdural haemorrhage.[38] There was a 15.5 centimetre bruise inside the scalp, overlying an area of skull fracture.[39]

[21] On the exterior of PM's body there were approximately 50 distinct bruises to the front of the abdomen, areas of bruising and abrasions to the back and bruising to each shoulder, the chest and left knee.[40] The face bore abrasions to the left forehead, tip of the nose and left cheek.[41] There were bruises to the right forehead, right eye, right ear, right cheek and the chin.[42] An optic nerve was bruised and the left side of the head was mildly swollen.[43]

[22] Dr Williams opined the many exterior bruises to the abdomen were likely caused by repeated applications of force to the area.[44] During cross-examination Dr Williams rejected the suggestion the bruises to the abdomen did not necessarily result from multiple applications of force.[45] Forensic pathologist Dr Ansford reviewed Dr Williams' work. He gave evidence that the multiple bruises to PM's abdomen could have

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29 R238 LL44-47.
30 R252 L1.
31 R248 L15 – R249 L23.
32 R248 LL18-25.
33 R248 LL36-46 – R249 LL1-6.
34 R249 LL8-20.
35 R245 L35.
36 R245 LL39-40; R246 LL8-9.
37 R247 LL20-21.
38 R245 LL45-46.
39 R247 LL23-27.
40 R24 L41 – R245 L28.
41 R244 L22.
42 R244 L30.
43 R244 L 24; R250 L5.
44 R242 L5.
45 R255 LL32-38.

been consistent with one application of force, but considered multiple applications of force were more likely and that "there are probably more bruises there than could be accounted for by one application."[46]

Timing of the injuries

[23] Dr Williams opined the skull fracture was inflicted within 24 hours of death, although he favoured it having occurred several hours before PM's death.[47] It would be readily apparent to a lay observer of the photographs which were exhibits on the trial that the grazes and wide array of bruises on the exterior of PM's body by the time of his death were recent, probably inflicted during the Friday and or Saturday. There was no evidence ageing them more specifically. The fatal internal abdominal injuries were so serious they are unlikely to have been of longer standing than any of the other apparently recent injuries but again there was no expert evidence of their specific age.

[24] Thus the skull fracture may have been caused in the same or a separate episode from that in which the fatal internal abdominal injuries were inflicted. While it probably occurred on the Saturday, it might possibly have occurred on the Friday evening. Further, because bruising does not always appear instantaneously it does not necessarily follow from the fact Ms SC did not see bruising on PM's face on the Saturday morning that the events which caused that bruising were yet to happen.

The appellant's interview

[25] The defence did not go into evidence at the trial but the appellant's recorded interview with police was tendered in the prosecution case.

[26] In his interview the appellant explained he had been home recovering from flu like symptoms in the days preceding PM's death[48] and PM had been sick and not sleeping well.[49] The appellant said that on the Friday afternoon, the day before PM's death, PM was crying, unsettled and throwing tantrums[50] during which he banged at a door, threw his bottle and threw himself on the ground.[51] Later in the afternoon after 5 o'clock,[52] on the appellant's account, PM was on a bed with him watching television when PM threw another tantrum.[53] The appellant claimed PM was hitting the bed and moving as if to leave the bed when he fell off it, striking his head on the bedside table as he fell to the floor onto a laptop computer and some textbooks.[54] The appellant explained that as a result of the incident PM had some grazing to his forehead and nose and there was swelling under his eye.[55] There were such injuries ("the facial grazing injuries") visible on PM's face in the post mortem photographs tendered at trial. The admissibility of those injuries is the focus of ground 2 on this appeal.

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46 R269 LL1-13.
47 R247 LL9-11.
48 R362 L46.
49 R372 L56.
50 R366 LL10-25.
51 R367 LL20-30.
52 R390 L32.
53 R361 L19, R370 L5.
54 R361 L20; R368 L58; R369 L50 – R370 L19; R370 L42.
55 R368 L38.

[27] The appellant told police in his recorded interview that on the Saturday PM was tired and unhappy and still seemed lethargic after waking up from an afternoon nap at about 3.00 pm.[56] At about 4.00 pm, according to the appellant, he and PM were outside when the family's pet dog bit at some clothes the appellant was tending to at the clothesline.[57] The appellant said he kicked the dog, which ran off around a corner of the back of the house and collided with PM, who was walking towards the corner in the opposite direction.[58] The appellant said he heard the collision between the 30 kg dog and PM and went around and saw PM sitting on his backside on the grass, presumably after being knocked over by the impact.[59] The appellant's counsel later submitted to the jury that PM may have received his fatal internal abdominal injuries in this collision and his skull fracture might have occurred if the collision caused PM's head to strike the outside wall of the house before he then fell down.

[28] The appellant said he picked PM up, took him inside, bathed and dressed him and PM then vomited a clear substance.[60] The appellant explained he cleaned PM and put PM to bed with his bottle.[61] He said PM was restless and when he heard coughing on the baby monitor he went to PM's bedroom and discovered PM had vomited again.[62] The appellant tidied up, bathed PM and returned him to bed.[63] He said it was when bathing PM on this second occasion that afternoon that he noticed blotchy bruising to PM's abdomen.[64]

[29] The appellant said when next he checked on PM "he just wasn't right".[65] The appellant said he rang the ambulance and followed instruction to clean PM's airways but PM was not breathing and he tried to administer CPR until the ambulance arrived.[66] The appellant's counsel later argued PM's fatal internal abdominal injuries might also have been caused by the appellant's inexpert performance of CPR.[67]

Ground 1: Unreasonable Verdicts

[30] In light of the above review of the evidence, it is unsurprising ground 1 was not pursued in submissions on the appeal.

[31] It was open to the jury to conclude the injuries to PM's backside, which attracted the charge of assault occasioning bodily harm, and the fatal internal abdominal injuries, which attracted the charge of murder, were not caused in the rough and tumble of child's play or a domestic accident of the kind that might have gone unnoticed by those charged with his care. It was likewise open to the jury to conclude the incidents resulting in those injuries had not occurred while PM was in the care of his mother or of child care workers and rather had occurred while he was in the sole care of the appellant.

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56 R373 L34-R374 L30.
57 R374 L50.
58 R374 L50-375 L2.
59 R375 LL28-49.
60 R376 L1.
61 R376 L7.
62 R377 L20.
63 R377 L22.
64 R407 L39 – R408 L23.
65 R377 L37.
66 R377 L53.
67 T2 LL41-45.

[32] The appellant's counsel at first instance argued the prosecution could not exclude the hypothesis the injuries were caused in accidental circumstances, such as a fall from a highchair onto a toy or a collision with the family dog or an inept attempt at CPR. However, the nature and severity of the injuries meant it was open to the jury to conclude they had not been caused by such mishaps. The inference that the appellant deliberately inflicted them was well supported by the evidence.

[33] Proof of the charge of murder also required proof of the mental element that the appellant at least intended to do grievous bodily harm to PM. This was not a case in which the appellant or a psychiatrist or a psychologist provided any evidence that at the time of inflicting the injuries the appellant was in such a mental state of upset or disorder as to undermine the obvious interference arising from the nature of the internal abdominal injuries. The infliction of those injuries required such severe force to PM's body that the jury could infer an intention to at least do grievous bodily harm to him.

[34] On the whole of the evidence, it was clearly open to the jury to be satisfied beyond reasonable doubt that the accused was guilty of both counts. The verdicts were not unreasonable.

Ground 2: Error in allowing evidence of facial grazing injuries?

[35] Ground 2 complains of the wrongful admission into evidence of "prior uncharged injuries".

[36] It was confirmed in submissions the injuries with which ground 2 was concerned were the facial grazing injuries. They were the injuries seen by Ms SC on the morning of PM's death and photographed and observed post mortem. They were seemingly the same injuries the appellant told police had been caused in an accident late on the afternoon before PM's death when PM's head hit the bedside table as he fell from a bed.

[37] A note of caution ought be sounded about ground 2's reference to the facial grazing injuries as "uncharged". It should not be assumed from the ground's reference to "uncharged" injuries that all of the injuries observed post mortem, except for the facial grazing injuries, were caused in the course of the commission of the charged act, namely the infliction of the fatal internal abdominal injuries. Such an assumption might arise from the appellant having told the police the facial grazing injuries were caused on the Friday afternoon and from Ms SC's evidence she had noticed those injuries and no other injuries on the Saturday morning. From these facts one possibility might be that all of the other injuries detected on PM by the time he died were caused on the Saturday as part of a single episode during which the fatal internal abdominal injuries were inflicted. However, as explained in the above review of the evidence, it is also possible they were caused in a number of separate recent episodes. Various combinations are possible, with the constant being that the injuries found on PM at the time of his death were all recently occasioned.

[38] At the outset of the trial objection was taken by the appellant's counsel (who was not counsel on the appeal) to the evidence of facial grazing injuries. It was submitted the evidence was inadmissible because the appellant's account of the innocent causation of those injuries could not be excluded. That was not a legitimate basis to exclude the evidence unless it was incapable of supporting an

inference the non-fatal injuries were deliberately inflicted by the appellant. If it was capable of supporting such an inference then the evidence about a particular category of those non-fatal injuries was not rendered inadmissible merely because the appellant proffered a competing innocent explanation for it.

[39] In deciding whether any of the evidence of a recent non-fatal injury had that capability it would have been artificial to consider discrete injuries, such as the facial grazing injuries, in isolation, rather than considering the non-fatal injuries collectively. That is because the inherent improbability of the non-fatal injuries being the result of unwilled acts becomes more obvious when the constellation of recent injuries is considered in totality. Considered in isolation it is conceivable that one or more surface bruises or abrasions might have been caused in accidental circumstances. However, when the recent non-fatal injuries to PM's body are considered in totality the tipping point against innocent explanation for all of them is soon passed. Even allowing for the possibility that some of the non-fatal injuries might have been caused accidentally, an obvious inference arising is that the collection of apparently recent non-fatal injuries to PM was, in the main, the result of recent deliberate physical violence. The evidence supports that inference in a manner akin to strands of a cable rather than as indispensible links in a chain. The evidence of facial grazing was capable of supporting that inference in combination with the other evidence. The fact it was not indispensible to drawing that inference or the possibility the jury might not ultimately accept it as providing that support was no bar to its admissibility.

[40] Accepting then that the evidence was capable of supporting an inference that the recent non-fatal injuries were the result of the appellant's deliberate physical violence, how was that violence relevant to proof of the charges?

[41] At first instance, the prosecution submitted the evidence was admissible because it showed antipathy to PM and rebutted accident ("the first basis of admissibility"). The prosecution also submitted the evidence was admissible as relevant evidence of the "domestic relationship" between the appellant and PM pursuant to s 132B(2) *Evidence Act* 1977 (Qld)[68] ("the second basis of admissibility").

First basis of admissibility (propensity)

[42] The first basis of admissibility advanced by the prosecution below was premised on legitimate propensity reasoning. The apparent overall degree of recent violence done to PM by the appellant evidenced a violent pre-disposition or propensity towards inflicting violence upon PM. As Thomas JA explained of similar evidence in *R v Self*,[69] it showed "a recurring antipathy or animosity towards the child which might properly assist a jury to infer intent to cause grievous bodily harm". In tending to support the inference the appellant intended to cause grievous bodily harm in inflicting the fatal injuries, this evidence also tended to exclude the hypothesis the fatal injuries occurred accidentally.

Second basis of admissibility (relationship)

[43] The second basis of admissibility by the prosecution below was as relevant evidence of the domestic relationship between the appellant and PM. Evidence of this kind

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68 R117 L37.

69 [2001] QCA 338, [31].

was relevant to give proper context to the jury's consideration of the fatal injuries. Such context is sometimes relevant where a crime of violence is alleged to have occurred between an accused person and victim in a domestic relationship, be it spousal or parental in nature.

[44] Thus in *Wilson v The Queen*,[70] where the High Court in the appeal of a man convicted of murdering his wife considered the admissibility of what was said by the deceased to him in the course of an earlier quarrel, Menzies J explained:

> "Any jury called upon to decide whether they were convinced beyond reasonable doubt that the applicant killed his wife would require to know what was the relationship between the deceased and the accused. Were they an ordinary married couple with a good relationship despite differences and disagreements, or was their relationship one of enmity and distrust? … The evidence is admissible not because the wife's statements were causally connected with her death but to assist the jury in deciding whether the wife was murdered in cold blood or was the victim of mischance. To shut the jury off from any event throwing light upon the relationship between this husband and wife would be to require them to decide the issue as if it happened in a vacuum rather than in the setting of a tense and bitter relationship between a man and a woman who were husband and wife."[71]

[45] In the present case, if the non-fatal injuries were inflicted by the willed acts of the appellant, such non-fatal injuries rendered more explicable the otherwise surprising inference to which the nature of the fatal injuries gave rise, namely, that they were deliberately inflicted upon a defenceless infant. If the fatal injuries were considered in isolation, the hypothesis they may have been caused in some forceful domestic mishap might gain more credulity than truly warranted were it known the relationship between the appellant and PM had involved other recent infliction of violence.

[46] In Queensland, evidence which is relevant in cases of alleged crimes of violence[72] in this contextual way is admissible pursuant to s 132B(2) of the *Evidence Act* 1977 (Qld), which provides:

> "Relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding."

In this case the non-fatal injuries to PM were capable of providing evidence of the history, albeit the recent history, of the appellant's relationship with PM.

[47] An incident of relying upon the evidence of non-fatal injuries in this way, as relevant history of the domestic relationship, is that it happens to show the appellant apparently had a propensity towards inflicting violence on PM. While use of that propensity as circumstantial evidence in proof of the charge could be relied upon for the first basis of admissibility discussed above, it is not relied upon for this second basis of admissibility. In *Roach v The Queen*[73] the plurality of the High Court

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70 (1970) 123 CLR 334.

71 Ibid, 344.

72 Defined in the *Criminal Code*, chapters 28 to 30.

73 (2011) 242 CLR 610, 624-625 ("*Roach*").

explained the relevance of the history of a domestic relationship is not confined to showing an accused's propensity and is relevant in rendering intelligible or explicable alleged conduct which in the absence of such context would appear improbable or to have "occurred out of the blue".

[48] Evidence admissible pursuant to s 132B may be excluded pursuant to s 130 "if the court is satisfied that it would be unfair to the person charged to admit that evidence". In *Roach* the High Court found it is that test and not the exclusionary rule in *Pfennig v The Queen*[74] that applies as a basis to exclude evidence that is otherwise admissible under s 132B.[75] When the evidence of facial grazing injuries was objected to at the outset of the trial it was not submitted it ought be excluded because it would be unfair to admit it. That is unsurprising given the appellant apparently accepted the admissibility of evidence of much worse injuries to PM than the facial grazing. For example, it was not suggested the potentially prejudicial evidence of another much more serious head injury, the skull fracture, was inadmissible.

Was there error in allowing evidence of the facial grazing injuries?

[49] The learned trial judge made no finding in respect the first basis of admissibility advanced. He concluded the evidence was admissible by reason of the second basis, pursuant to s 132B(2). His Honour said, inter alia:

> "Here there is evidence of an injury. It is, in my view, a matter for the jury what it can make of it, in the circumstance of the evidence that ultimately comes before it. Injuries sustained to the face and head, evidenced by the scrapes, can be, in the circumstances, probative of a history of a domestic relationship where the defendant offered violence, particularly, if the defendant's explanation is not accepted by the jury either in light of the evidence that will be lead in relation to that, and other evidence in relation to counts one and two."[76]

[50] His Honour's admission of the evidence on the second basis was orthodox. There was no error. The evidence was properly admitted. Ground 2 must fail.

[51] If there was any potential for controversy in respect of the evidence of the facial grazing injuries it lay not in its admission into evidence, but in how the jury were told they could use it. While not a ground of appeal, the appellant's counsel complains the trial prosecutor's submissions to the jury appeared to urge the use of the evidence of facial grazing in a way consistent with the first basis of admissibility, a basis the evidence had not been admitted on.

[52] For instance, in the course of his closing address the learned prosecutor made reference to "all these repeated injuries" and submitted "this is … systematic abuse, you may conclude, of this child…"[77] In reference to a photograph of the facial injuries and grazes, which the prosecutor appeared to accept were likely caused on the Friday night, it was submitted:

> "[Y]ou can use it in this way: it's evidence of his animosity towards PM. It's evidence of the true nature of the relationship between the parties…"[78]

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74 (1995) 182 CLR 461.
75 (2011) 242 CLR 610, 623.
76 R128 LL15-20.
77 T3 LL10-19.
78 T10 L25.

[53] In urging the jury to disbelieve the appellant's claims of household accidents being the potential cause of the injuries, the learned prosecutor submitted:

> "[Y]ou apply common sense and when somebody has a household accident it might raise your suspicion. When they have two, it might raise your suspicion more. When they have three, then it really sets alarm bells ringing."[79]

[54] The appellant's counsel complains such submissions encouraged the jury to engage in propensity reasoning as a pathway to concluding guilt. No such complaint was made below about the prosecutor's submissions and it was not suggested below that they warranted correction by some special direction of the trial judge.

[55] Defence counsel below may have considered specific correction unhelpful to the appellant in that the prosecutor's closing address had also said of the facial grazing injuries:

> "Well, you just look at that photograph and ask yourself from ... common sense – did this kid get those facial injuries from falling out of a bed? And I invite you to conclude not – you have to conclude that beyond a reasonable doubt. He's not charged ... with the facial injuries, that is, the grazing, but that evidence comes before you and you'll only be able to use it if you're satisfied beyond a reasonable doubt that he inflicted those injuries upon PM."[80]

[56] The prosecutor's submission that the jury had to be satisfied beyond a reasonable doubt the appellant inflicted the facial grazing was incorrect, for reasons explained below. That error favoured the appellant.

[57] In any event, even if the prosecutor's submissions were susceptible to the risk of being understood as urging the jury to engage in propensity reasoning, that risk was eliminated by the inclusion in the learned judge's directions to the jury, quoted below, of a specific warning against propensity reasoning.

Ground 3: Erroneous direction re use of uncharged injuries?

[58] Ground 3 complains the learned trial judge erred in directing the jury about the use that could be made of "uncharged injuries".

[59] The jury's consideration of the injuries to PM necessarily involved an understanding of the proper process involved in considering circumstantial evidence. The learned trial judge gave directions and a redirection to the jury explaining circumstantial evidence, including the need for it to support a rational inference of guilt and to exclude reasonable hypotheses consistent with innocence. No error is suggested in respect of those directions.

[60] In dealing with the combined evidence of injuries the learned trial judge said:

> "…I should give you a direction about … the use you can make of the evidence concerning the bruising to the buttocks, the legs and the low back in connection with the abdominal injuries and bruising spoken of and photographed which relate to the other count on the indictment, that is murder in count 2, and also the use that can be

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79 T12 L34.

80 T11 L45-T12 L3.

> made of the marks shown in exhibit 3, that is the facial injuries depicted on the left hand forehead, cheek and to the nose of PM which have sometimes been referred to as grazes, and also the use you can make of the evidence of the skull fracture. In all there are four categories of significant injury the prosecution has placed before you. The prosecution relies upon the evidence of the injuries, the subject of the count of unlawful assault occasioning bodily harm on or about 7 April and the evidence of the injuries relevant to the count of murder on or about 16 April and of the injuries I've referred to shown in exhibit 3 and of the skull fracture to demonstrate the nature of the relationship between the accused and PM.
>
> You will appreciate that there was a domestic family relationship involving not only Ms SC and the defendant, but also PM, who was the son of Ms SC. The prosecution relies upon the evidence of the various injuries as evidence of a history of a domestic relationship and submits to you that it involved one of violence perpetrated by the accused towards PM. But although the evidence of the alleged violence on these separate occasions comes before you as part of the prosecution case concerning an allegation of a history of violence in the relationship, I should remind you that you must give separate consideration to the charges in accordance with my earlier direction.
>
> Part of this requires that you only consider the evidence of the separate occasions if you find that evidence reliable. If you accept the evidence, you must not use it to conclude that the defendant is someone who had a tendency to commit the type of offence with which he is charged. So it would be quite wrong for you to reason that if you were satisfied that he did the acts on one of those occasions, then it is likely he committed the charged offence on another occasion or occasions."[81]

[61] The appellant focussed upon those directions, submitting they were deficient in that:

> "(a) the standard of proof to be applied was not adequately described;
> (b) the standard of proof ought to have been 'beyond reasonable doubt';
> (c) the inferences which may have been drawn were not identified;
> (d) the use the jury might make of the evidence was not made sufficiently clear."

[62] No such complaints were raised at trial. To the contrary, when the learned trial judge informed counsel before addresses of the above directions, each counsel appeared to agree they were appropriate.[82]

Standard of proof

[63] The nub of the appellant's first two complaints, regarding the standard of proof, is that the learned trial judge should have told the jury they could only use the evidence of recent non-fatal injury, such as the facial grazing, if satisfied beyond reasonable doubt that it was the product of a deliberate application of force by the appellant.[83]

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81 R310 L42 – R311 L25.

82 R301 L18.

83 The complaint has no application to the earlier injuries constituting the bodily harm in count 1 because the jury was advised the elements of each count needed to be proved beyond a reasonable doubt.

[64] In *Shepherd v The Queen*[84] it was held a direction that facts must be found beyond reasonable doubt should not be given where it is unnecessary or confusing or where it is inappropriate to do so because the evidence is not indispensable to a finding of guilt. As earlier explained, evidence of recent non-fatal injury was not indispensable to proof of guilt in this case. Each non-fatal injury was part of an overall combination of recent non-fatal injuries which, considered collectively, could allow the jury to conclude that at least a substantial proportion of them were the product of a deliberate application of force. Such a conclusion did not require proof beyond reasonable doubt in respect of each recent non-fatal injury or generally. It was not indispensible to proof of guilt. It follows it was unnecessary for the learned trial judge to instruct the jury in the manner now submitted for. Such a conclusion is consistent with the reasoning of the plurality in *Roach* that the evidence of uncharged evidence of violence led pursuant to s 132B in that case did not require a direction to be given about the standard of proof to be applied to it.[85]

Inferences

[65] The appellant also complains the learned trial judge should have identified inferences that may have been drawn. That complaint is not apt to the purpose of the admission of the evidence of recent non-fatal injuries. That evidence was not before the jury for them to draw inferences of the kind they might have drawn had the evidence been before them on the first basis of admissibility discussed above. Its purpose was to provide context, not support inferences.

[66] An integral part of concluding the evidence could be used for that purpose was of course the inference that the injuries were caused by the deliberate conduct of the appellant. The need for that inference was adequately identified. The learned trial judge told the jury they could only use the evidence of injury if they considered it "reliable". Considered in context, this meant the jury could only use the evidence of the categories of injury mentioned if the inference that they were inflicted by the willed act or acts of the appellant was a reliable inference. Further, it was apparent from the directions considered as a whole that such an inference ought not be drawn if the injuries may have occurred in accidental circumstances.

Purpose of evidence

[67] The final complaint, about what use the jury was told it could put the evidence to, is more concerning. The evidence was only admitted by his Honour on the second basis of admissibility discussed above, namely, as evidence that the recent history of the domestic relationship between the appellant and PM involved violence. Consistently with that basis of admission of the evidence, and subject to the above-mentioned qualification as to the reliability of the evidence, his Honour correctly explained the jury could use the evidence as demonstrating that the nature of the relationship involved a history of violence.

[68] The High Court explained in *Roach* that, where evidence is admitted pursuant to s 132B, it is necessary that the trial judge give a clear and comprehensible warning against the misuse of the evidence as evidence of propensity and explain the purpose for which it is tendered.[86] Ironically, the evidence actually had the

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84 (1990) 170 CLR 573, 579.

85 (2011) 242 CLR 610, 626.

86 *Roach v The Queen* (2011) 242 CLR 610, 625.

potential for legitimate use as evidence of propensity but, to the appellant's advantage, it was not admitted on that basis. The trial having been so conducted – and it may have been conducted differently had the evidence been admitted on that basis – *Roach* required the jury to be warned against the misuse of the evidence as evidence of propensity and given an explanation of the purpose for which it was tendered.

[69] The learned trial judge expressly directed the jury against the misuse of the evidence as evidence of propensity, but what of the second requirement in *Roach*, that the jury be given an explanation of the purpose for which the evidence was tendered? His Honour's direction indicated the evidence could be used to demonstrate the nature of the relationship involved a history of violence. The direction fell short though, because it did not actually explain the purpose of putting that history of violence before the jury, namely to provide an informed context for the jury's consideration of the alleged offences.

[70] In one sense that omission benefitted the appellant in that he gained the advantage of a warning against using the evidence as evidence of propensity without the prosecution having the advantage of a clear explanation as to how the evidence could be used to the benefit of its case. However the second requirement in *Roach*, that the purpose of the evidence in question be explained in conjunction with a warning against its misuse as evidence of propensity, is obviously intended to enhance the force and comprehensibility of the propensity warning.

[71] This failure to direct in accordance with the second requirement in *Roach* was an error of law. It means a point raised by the appeal, that there was error in the direction to the jury about the use that could be made of prior uncharged injuries, might be decided in favour of the appellant. In such a situation the proviso in s 668E(1A) of the *Criminal Code* (Qld) provides the court may nonetheless dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred.[87]

Proviso applied

[72] The task of determining whether there was no substantial miscarriage of justice is undertaken on the whole of the record of the trial, including the fact that the jury returned a guilty verdict.[88] The court must make its own independent assessment of the evidence and determine whether, making due allowance for the natural limitations that exist in the case of an appellate court proceeding wholly or substantially on the record, the appellant was proved beyond reasonable doubt to be guilty of the offences of which he was convicted.[89]

[73] The significance to be given to the fact a jury has returned a guilty verdict will vary from case to case depending upon the nature of the error and what if anything might be taken from the jury verdict in the light of that error. For example in *Baiada Poultry Pty Ltd v The Queen*[90] the plurality considered the jury were not sufficiently directed about the need to be satisfied of an element of the offence, from which it followed the verdict said nothing about the force of the evidence on that element.

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87 Per s 668E(1A) *Criminal Code*.
88 *Weiss v The Queen* (2005) 224 CLR 300, 317.
89 Ibid, 316-317.
90 (2012) 246 CLR 92, 104-105.

[74] However, in the present case the error did not relate to any matter critical to a finding of guilt. The requirement to give the explanation that was erroneously omitted arose because this was a case in which the evidence showed propensity. A propensity warning was given here. This was not a weak or only moderately strong prosecution case, such that the jury was likely to be tempted to bolster the strength of the case by disregarding the warning and adopting propensity reasoning. The circumstances of the case were not such as to overwhelm the ordinary assumption that the jury acted in accordance with the warning direction.[91] Assuming the jury so acted, it could not have done more than have regard to the evidence of the uncharged injuries as providing an informed context for its consideration of the alleged offences – which was the purpose the jury should have been told it could put the evidence to. In the circumstances this is an appropriate case to have regard to the jury verdict as part of the review of the whole of the record of the trial

[75] I will not here repeat the review of the evidence already engaged in above and rather will focus upon the obvious force of the prosecution case. I do so without having any regard to the evidence for the purpose of propensity reasoning because the evidence was not admitted on that basis at trial. Had the evidence been admitted on that basis the appellant may have conducted the case differently during evidence at trial and the record now under review may therefore have been different.

[76] The circumstantial case that the appellant inflicted the backside bruising relevant to count 1 and the fatal internal abdominal injuries relevant to count 2 was compelling. The alternative hypotheses were that they were inflicted by some other person or occasioned accidently.

[77] There was no evidence to credibly suggest the injuries were caused while PM was in the care of his mother or the child care workers. Further, the appellant positively asserted the backside bruising happened while PM was in his care. The appellant's explanations to the police of PM's recent accidental episodes also showed a seeming acceptance that the injuries resulting in his death may have been caused while PM was in the appellant's care. In addition the chain of events on the Friday and Saturday culminating in PM's death effectively rendered it impossible that the fatal injuries occurred anywhere other than at home in the presence of the appellant. The only potential conclusions thus narrowed to the backside bruising and fatal abdominal injuries being inflicted accidentally while PM was in the appellant's care or to the appellant inflicting them.

[78] In respect of the charge of assault occasioning bodily harm, the appellant's explanation PM had fallen from his highchair onto a pop up toy was inherently implausible given the appearance of the bruising shown in the photographs taken by the child care centre. The expert paediatric evidence also contradicted that explanation. The only remaining inference is that the appellant inflicted the bodily harm injuries. The case that the appellant must have unlawfully assaulted PM, thereby doing him bodily harm, was strong.

[79] As to the fatal abdominal injuries the only potential innocent hypotheses arising on the evidence were that that they were caused by a collision with the family dog or by the appellant's attempts at CPR. Each hypothesis is inherently implausible. On the appellant's own account PM was already unconscious by the time he

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91 *Gilbert v The Queen* (2000) 201 CLR 414, 425.

commenced CPR, consistent with PM already being fatally injured. Further, the extensive external abdominal bruising, which is likely connected with the force inflicted to cause the fatal internal abdominal injuries, had already become apparent by the time the ambulance officers arrived and saw the appellant administering CPR. The extensive abdominal bruising was likely to have been caused by more than one application of force and the internal abdominal injuries required significant compressive force. These characteristics are inconsistent with a mere collision with the family dog.

[80] The inevitable inference to which the evidence gives rise, to the exclusion of innocent hypotheses, is the fatal abdominal injuries were inflicted by the appellant. The nature of those injuries and the significant force required to inflict them bespeaks an obvious intention to at least cause grievous bodily harm.

[81] It follows, even considering each count in isolation, that the prosecution case on each count was strong.

[82] The evidence of the violent nature of the appellant's domestic relationship with PM fortifies that conclusion. Even allowing for the possibility that some of the recent non-fatal injuries might have been caused accidentally, the obvious inference arising from the collection of apparently recent non-fatal injuries to PM is that they were, in the main, the result of physical violence by the appellant to PM. This relevant contextual evidence of the domestic relationship renders more believable the otherwise surprising allegations that a person caring for a defenceless 16 month old child would deliberately inflict such violence upon the child as to cause wide ranging bruising to the backside region in one instance and fatal abdominal injuries in another. It also causes an even less credulous view than that already discussed to be held of the claims of accidental domestic causes for the backside bruising and fatal internal abdominal injuries.

[83] I am satisfied on review of the whole of the record of the trial that, making due allowance for the natural limitations of that process, the appellant was proved beyond reasonable doubt to be guilty of both counts. This is not a case involving significant denial of procedural fairness or involving some other feature militating against the application of the proviso in the light of that finding. I consider that no substantial miscarriage of justice has occurred, notwithstanding the above discussed error in the learned trial judge's direction to the jury.

[84] The appeal should be dismissed.