R v. Clark [2007] QCA 168 (25 May 2007)

SUPREME COURT OF QUEENSLAND

CITATION:	*R v* ***Clark*** [2007] QCA 168
PARTIES:	**R** **v** **CLARK , Steve Jay** (appellant/applicant)
FILE NO/S:	CA No 9 of 2007 DC No 175 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	25 May 2007
DELIVERED AT:	Brisbane
HEARING DATE:	18 April 2007
JUDGES:	Jerrard and Keane JJA and Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where appellant responsible for securing complainant's harness on ride – where complainant fell from ride – where appellant convicted of unlawfully causing grievous bodily harm – whether jury were entitled to conclude that failure to secure harness constituted criminal negligence under s 289 *Criminal Code* (Qld) – whether learned trial judge erred in failing to rule the appellant had no case to answer CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – CONSIDERATION OF SUMMING UP AS A WHOLE – whether summing up was unbalanced CRIMINAL LAW – APPEAL AND NEW TRIAL AND

INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – EXPRESSION OF JUDGE'S OWN OPINION – PARTICULAR CASES – where prosecution led evidence that appellant had stated he was affected by alcohol and drugs – where learned trial judge commented on how jury could use evidence – whether comments improper

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – whether jury properly directed in relation to s 289 *Criminal Code*

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – GENERALLY – where appellant sentenced to two years and eight months imprisonment – where deterrence not relevant – where sentence justified on basis of harm caused to complainant – whether appropriate basis for sentence – whether sentence manifestly excessive

Criminal Code Act 1899 (Qld), s 289, s 320

R v Amituanai [1995] QCA 80; (1995) 78 A Crim R 588, applied
R v Bateman (1925) 19 Cr App R 8, cited
R v BBD [2006] QCA 441; CA No 166 of 2006, 3 November 2006, distinguished
R v Reid [2006] QCA 202; CA No 9 of 2006, 9 June 2006, applied
R v Willmot (No 2) [1985] 2 Qd R 413, applied
Stuart v The Queen [1974] HCA 54; (1974) 134 CLR 426, applied

COUNSEL: A Collins for appellant
D L Meredith for the respondent

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

[1] **JERRARD JA:** In this appeal I have read the reasons of Keane JA, and agree with His Honour that the directions the learned trial judge gave to the jury sufficiently described the very high level of negligence required to be shown by the prosecution before there could be a conviction.

[2] The learned judge explained to the jurors that it was not part of the prosecution case that Mr **Clark** was under the influence of alcohol or marijuana at the time of the incident, and that the evidence of his statements that he was “hung over”, by reason of the prior consumption of alcohol and marijuana the night before, was led as an explanation as to why he made the mistake of believing he had attached the running slings to the complainant, when in fact he had not. The appellant made some complaint about that direction, but it was a necessary

explanation to the jury of why the evidence was led. The learned judge made it clear that, while it was a matter for the jury, if they were satisfied that his self description of being "hung over" was accurate, they might take the view that when he went on the job that morning, he was at less than full alert for it. As the judge remarked, that in turn might provide an explanation as to why he may not have attached the two critical running slides to the complainant's gear, with the result that she fell a very long way and suffered permanent injury.

[3] As to the asserted absence of evidence of a very high level of negligence, if the jury accepted that the statements about being "hung over" were made as described, they showed an awareness by Mr **Clark** that he could be a risk to the clients' safety that day. It was therefore open to the jurors to conclude that for the appellant to proceed thereafter with his employment as he did, and then to fail to secure the complainant properly, did show "such disregard for the safety of others as to amount to a crime against the State and conduct deserving of punishment," as I wrote in *R v BBD*[1]. The jurors could conclude that that conduct amounted to recklessness involving grave moral guilt and deserving of punishment, that being the concept of criminal negligence put to them by the learned trial judge. That concept was a description of the departure from the standard of care that was necessary, and the description was sufficient to justify the conviction. If the jury accepted that he made those statements, to which two witnesses swore, then they could conclude he had deliberately taken a risk which could result in death or serious injury to another.

[4] Where I respectfully differ from Keane JA and Lyons J is that I consider it was necessary for the prosecution to show the appellant deliberately took a risk of which he was aware, and that the evidence did show that. I accept that, as Keane JA writes, the *Code* does not use terms such as "disregard for the safety of others", or "recklessness", or "gross moral guilt", or "conduct amounting to a crime against the State and deserving of punishment." But those are expressions judges have used to convey the very high degree of failure to take care for the safety of others which is a crime. Without the evidence of the appellant's own description of his condition that day, I would have considered the prosecution had not established that very high degree of neglect. With that evidence which the jury could accept, it was open to them to be satisfied beyond reasonable doubt of his high degree of risk taking.

[5] **KEANE JA:** On 11 December 2006, the appellant was convicted upon the verdict of a jury of one count of unlawfully causing grievous bodily harm in contravention of s 320 of the *Criminal Code 1899* (Qld). The appellant was sentenced to two years and eight months imprisonment, and it was ordered that he be released on parole on 11 April 2008.

[6] The appellant seeks to appeal against his conviction on a number of grounds. He also seeks leave to appeal against his sentence on the ground that it was manifestly excessive.

[7] I shall discuss the appellant's grounds of appeal after first summarising briefly the case at trial.

The Crown case

[8] The complainant was an English tourist. On 29 May 2004, when she was visiting Cape Tribulation, she suffered permanent and disabling injuries when she fell

20 metres from a platform of a "flying fox" ride operated by Jungle Surfing Canopy Tours. The complainant's injuries included brain damage and fractures of her ribs and pelvis. It was admitted by the appellant that the complainant had suffered grievous bodily harm as a result of her fall.

[9] The flying fox ride operates between platforms built around the trunks of high trees in the rainforest. Two steel cables run between the platforms. A sling and pulley mechanism attached to the cables enables riders to slide by virtue of gravity from platform to platform. Riders wear a safety harness connected to the running slings by sashes attached by self-locking D spring clips known as Karabiners. A running sling is connected to each cable; the two slings are joined by a Karabiner and that Karabiner is connected to another at the rider's waist. While engaged in viewing the sights from a platform, riders are attached to a tree by a safety lanyard. When a rider wishes to move from one platform to the next, the safety lanyard is detached from the tree, the rider is securely attached to the running slings and the rider leaves the platform by sliding down a ramp. The rider's descent down the steel cables between the platforms can be controlled by a belay device.

[10] While these operations may sound complicated, it was common ground that the operation of securing a rider in harness before moving off a platform is a simple one. The essential operation to secure the rider to the running slings and thereby ensure the rider's safety is the locking of the Karabiner clip at the rider's waist.

[11] It was common ground that the appellant was the employee of Jungle Surfing Canopy Tours who, as the complainant's "guide", was responsible for securing the attachment of the complainant's safety harness before she moved off platform 2. It was his duty to ensure that the Karabiner lock was closed at her waist before he told her to move off platform 2. The complainant fell from the cables while attempting to slide down from platform 2.

[12] The Crown's case against the appellant was that, in contravention of s 289 of the *Criminal Code*, he failed to use reasonable care and take reasonable precautions in the management of the flying fox to avoid danger to the complainant's life, safety or health in that he failed to securely attach the complainant's harness to enable her to descend in safety. It was this failure that made the doing of grievous bodily harm to the complainant unlawful, and thus a contravention of s 320 of the *Criminal Code*.

The evidence

[13] Ms Farcich, who was riding the flying fox with the complainant when the complainant fell, said that immediately after the complainant fell she saw the two slings of the complainant's harness hanging separately. The two slings should have been connected by a Karabiner. The Crown invited the jury to draw the inference that the lock on the complainant's harness had not been properly secured by the appellant before the complainant was allowed to commence her slide from platform 2 to platform 3.

[14] The Crown called evidence from Mr Johnston, who was experienced in the operation of this kind of equipment, that the Karabiner lock was unlikely to become detached accidentally once it had been properly secured. The owner of Jungle Surfing Canopy Tours, Mr Walsh, and Mr Samuels, the other guide working on the ride at the time of the accident, gave evidence that the Karabiner lock could become detached accidentally if it received a strong

hit. The weight to be accorded to the evidence of these witnesses was, of course, a matter for the jury.

[15] There was also evidence that the complainant was not a person likely to have attempted suicide by deliberately detaching the Karabiner lock. The Crown invited the jury to draw the inference that the complainant did not deliberately undo her Karabiner lock before she commenced her slide from platform 2 to platform 3.

[16] The Crown adduced evidence from witnesses Egginton and Murley to the effect that the appellant was hung over from the consumption, on the previous night, of alcohol and marijuana. He was alleged to have said at breakfast words to the effect that he felt "drunk and stoned from the previous night", and that "It's a good thing that ... the punters don't know ... what state I'm in taking them up".

[17] The appellant was interviewed on 11 June 2004 by Mr Coggins, an Inspector under the *Workplace Health and Safety Act 1995* (Qld). The record of that interview was tendered in evidence. In that interview, the appellant said that before the complainant set off from platform 2 he attached the two running slings to the complainant's harness, and that he believed that he had attached the Karabiner lock at the waist of the complainant before she moved off. He could not explain how the lock had become detached if, indeed, that is what happened.

[18] The appellant did not give or call evidence at trial.

The grounds of appeal against conviction

[19] The grounds of appeal may be summarised as follows:

1. No reasonable jury could have been satisfied beyond reasonable doubt of the appellant's guilt.

2. The jury were not properly directed in relation to s 289 of the *Criminal Code*.

3. The learned trial judge failed properly to put the defence case to the jury.

4. The learned trial judge failed to direct the jury in the terms referred to in *R v Bateman*[2] as approved by this Court in *R v BBD*.[3]

5. The learned trial judge failed to direct the jury about the concept of "recklessness" and the degree of recklessness required to support a conviction, and in failing to direct the jury that any negligence on the part of the appellant was due to inadvertence rather than a deliberate or reckless decision to expose the complainant to danger.

6. The learned trial judge made improper comments on the evidence.

7. The learned trial judge erred in failing to rule that the appellant had no case to answer.

[20] Before I turn to discuss these grounds of appeal in turn, it is desirable to make some observations about s 289 of the *Criminal Code*.

[21] Section 289 of the *Criminal Code* is relevantly in the following terms:

"It is the duty of every person who has in the person's charge or under the person's control anything ... whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty."

[22] The first point to be made about the provisions of s 289 of the *Criminal Code* is the obvious one that they appear in a piece of legislation designed to codify the criminal law for Queensland: they are not to be understood as a prescription directed to providing a basis for the payment of compensation to those injured by a breach of duty; rather, they are directed to providing a basis for the punishment of those who have committed a crime against the state.

[23] The second point to be made about the language in which s 289 is cast is that the duty, breach of which is a crime against the state deserving of punishment, is a duty to use "reasonable care and take reasonable precautions to avoid" danger to life, safety and health. Of course, whether or not a person has failed to use "reasonable care and take reasonable precautions" is a classic jury question. For present purposes, however, the point is that a contravention of the duty imposed by s 289 does not depend upon an intention to cause harm: the gravamen of the contravention lies in the failure to use "reasonable care and take reasonable precautions to avoid" danger to life, safety and health. Whether there has been a failure in this sense on the part of an accused person does not depend upon an intention to cause harm but upon a failure to take reasonable steps to avoid danger. What is reasonable in this context inevitably depends upon the nature of the danger and the extent of the opportunity of the accused person to ensure that the danger does not lead to injury to life, safety or health. In some cases, the danger will be extreme and obvious; in such cases, deliberate and active diligence will be required to discharge the duty of reasonable care imposed by the section. In other cases, the danger may be relatively slight or remote; in such cases, it may be that only conscious disregard of the danger will amount to a failure to exercise reasonable care worthy of punishment as a crime.

[24] With these considerations in mind, I turn to the appellant's grounds of appeal.

Ground 1

[25] The appellant did not seek to support the first ground of appeal by argument in the written submissions which were filed on his behalf. In oral submissions on the hearing of the appeal, however, Mr Collins of Counsel, who appeared for the appellant, essayed an argument that the jury could not have been satisfied that the appellant had failed to discharge the duty imposed on him by s 289 of the *Criminal Code*.

[26] It is, I think, evident that the jury were entitled to be satisfied beyond reasonable doubt that no hypothesis consistent with the Karabiner lock being secured before the appellant allowed the complainant to set off from platform 2 could explain the complainant's fall. Recognising that this was the case, the submissions of the appellant's counsel sought to characterise the failure by the appellant to ensure that the lock was secure as one of honest forgetfulness or inadvertence falling short of criminal negligence. Mr Collins argued that, if it be accepted that the appellant omitted to secure the Karabiner bolt before allowing the

complainant to set off from platform 2, that was an act of inadvertence, rather than an act of culpable disregard for the life, safety or health of the complainant. Mr Collins emphasised the need for demonstrated disregard for the complainant's safety.

[27] In my respectful opinion, this submission does not pay sufficient regard to the language of s 289 in which the word "disregard" does not appear. More importantly for present purposes, the submission fails to acknowledge the serious nature of the responsibility of the appellant towards the complainant in the circumstances of this case. The complainant was exposed to obvious danger of very serious harm if a simple precaution was not taken for her safety. The appellant was responsible for taking that precaution which was necessary to ensure the safety of the complainant. To say this is not to say that the appellant was under an absolute legal duty to ensure the safety of the complainant. The appellant's responsibility was to exercise reasonable care, but this responsibility was easily discharged so long as he was attentive to it. Reasonable care for the complainant required that he be attentive so as to ensure that she was buckled up. There was no reason at all why he should not have given the complainant the necessary attention: he was not subject to any distractions; and he was under no time pressure in relation to the discharge of his responsibility. In the light of these circumstances, it is simply wrong to say that the appellant's failure was merely the matter of a moment's inattention.

[28] In the circumstances of this case, the jury were entitled to conclude that the exercise of reasonable care on the appellant's part for the safety of the complainant required him to ensure that the complainant was securely buckled up before she was allowed to move off platform 2. To the extent that it may have been the case that the appellant honestly forgot to secure the complainant's Karabiner lock, the jury were entitled to conclude that, in truth, he was heedless of the responsibility which required him to be heedful of the serious danger to which the complainant was exposed. This ground of appeal should be rejected.

Ground 3

[29] The appellant argued that the learned trial judge's summing up was unbalanced. In particular, he complains that the summing up "amounted to a formula to convict".[4] This hyperbole was not warranted by any part of the summing up which put the case advanced by each side in measured terms. This ground of appeal should not be accepted.

Ground 6

[30] The appellant also argued that the learned trial judge made improper comments about evidence that the appellant may have been adversely affected by alcohol or cannabis. The prosecution led evidence that the appellant said he was hung over the morning of the incident in question. The learned trial judge, after drawing the jury's attention to the fact that such evidence did not form part of the prosecution's case, commented:

"you must ... be satisfied that the witnesses are truthful ... that what he said was true ... if people say something like that about themselves ... sometimes that is the best evidence of whether a person is hungover ... But, as I say, it’s a matter for you, and it is the only way in which you may use the evidence."

[31] The learned trial judge's comments in this regard were no more than a comment to the effect that if, in fact, the appellant did make the statement attributed to him, there was no

reason to disbelieve it. That was a statement of the obvious, and was unlikely to enure to the prejudice of the appellant.

Grounds 2, 4 and 5

[32] These grounds can conveniently be dealt with together. The appellant argues that the learned trial judge failed to direct the jury that before the appellant could be convicted it was necessary that they be satisfied that the appellant had "showed such a disregard for the life and safety of others as to amount to a crime against the state and conduct deserving of punishment".[5] The appellant also complains of the absence of a direction about the concept of "disregard" and of a failure to compare it with "recklessness".

[33] The appellant placed heavy reliance upon the decision of this Court in *R v BBD*.[6] That was a case where the jury had sought further directions from the trial judge regarding the effect of the judge's directions upon the law relating to criminal negligence. Jerrard JA said:

"The majority decision in *R v Scarth* [1945] St R Qd 38 approved the application in Queensland of the common law test for criminal negligence. In *Evgeniou v The Queen [1964] PGHCA 1;* (1964) 37 ALJR 508 McTiernan and Menzies JJ wrote that:

'[T]o constitute a breach of s 289 [of the *Code*]; there must be negligence according to the standard of the criminal law, which may be described shortly as recklessness involving grave moral guilt.' ((1964) [1964] PGHCA 1; 37 ALJR 508 at 509)

The jury in this case clearly had difficulty understanding what at least the first of those latter two concepts meant; it would have been appropriate to repeat to them the description from *R v Bateman* (1925) 19 Cr App R 8, describing criminal negligence as negligence showing 'such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.'"[7]

[34] It is well-settled that, in instructing a jury in relation to the legal elements of an offence, it is distinctly preferable for a trial judge to adhere to the language of the *Criminal Code* and to refrain from attempting to paraphrase the language of the Code save where the jury seek assistance in relation to the interpretation of the statutory language.[8] *R v BBD* is readily distinguishable from the present case in that *R v BBD* was a case where the jury sought assistance in this regard: this case was not. Some further consideration of that decision is necessary here to demonstrate a further important point of distinction.

[35] In *R v BBD*, a grandmother was supervising two of her young grandsons playing with a forklift outside her house. She went inside for a moment to answer an urgent call of nature and, while she was inside, the younger boy was trapped under the forklift and seriously injured. The boys' grandfather had instructed them how to drive the forklift the previous evening over about an hour. On the morning of the accident, the boys' grandfather had allowed them to drive back and forth on the driveway. Later, they asked their grandfather if they could drive it again and he allowed them to do so. The grandfather left the property in his truck and the boys' grandmother continued to watch them. They were driving backwards and forwards very slowly and turning when the grandmother went inside the house.

[36] In these circumstances, all members of this Court held that the trial judge erred in failing to instruct the jury that they had to be satisfied "that any want of due care by the appellant

was ... so serious that it deserved punishment as a crime".[9] A majority of the Court was of the view that the facts of the case could not support a finding of criminal negligence. Accordingly, the view of the majority was that a verdict of acquittal should be entered. That view was expressed in terms of the insufficiency of the Crown case in terms derived from *R v Bateman*.[10] Having regard to the facts in *R v BBD*, one can understand why the majority of the Court reached that conclusion and expressed it in that way. The grandmother had good reason to think that the boys were not in immediate danger: they had been given instruction and had been playing for a considerable period of time without incident. This was not a situation where serious injury was clearly imminent, much less inevitable, if the grandmother ceased her supervision for a moment. It is understandable why, on these facts, the view was taken that the grandmother could have been guilty of a breach of the duty in s 289 only if she deliberately disregarded the relatively minor risk to the boys' safety of their continuing to play on the forklift. In ceasing to supervise the boys for a moment, the grandmother was distracted by her own needs. In that case, the grandmother did not deliberately ignore the danger: her conduct was not so unreasonable a response to risk as to enable her conduct to be regarded as a crime deserving of punishment. In the present case, however, the position was dramatically different: the complainant would inevitably suffer death or serious injury if the appellant failed to attend to securing the Karabiner lock. Attending to that matter was essential to the appellant's duty to take reasonable care for the complainant's safety.

[37] The learned trial judge was required to instruct the jury as to the law relevant to the charge. The law is expressed in the language of the *Criminal Code*. Generally speaking, authority and principle support the observations of P D McMurdo J in *R v BBD*[11] where his Honour said:

"In Queensland, where recklessness is not an express element of an offence ... it is unnecessary, and in my respectful view, conducive to unnecessary complication to direct a jury that they must find recklessness. What is essential is that a jury understands that the prosecution must prove that the defendant’s default was so serious that it should be regarded as a crime and deserving of punishment."[12]

[38] As I have said, where a jury experiences difficulty in applying the words of the *Criminal Code*, however, elaboration or explanation of the language of the code may be necessary; and that elaboration or explanation must, if it is to be helpful, be tailored to the issues of fact which arise on the evidence in the particular case. In the accurate exposition of s 289 of the *Criminal Code*, reference to the concept of "disregard", a term not used in s 289, and a comparison with the concept of "recklessness", are not essential requirements. Sometimes they will not be at all helpful to the jury. Whether or not such reference is helpful will depend on the facts of the particular case. As will be seen, the learned trial judge in this case did advert to the notion of "recklessness" in emphasising to the jury the high degree of culpability involved in criminal negligence. But whether or not that was helpful having regard to the evidence in the present case, what was essential was that the learned trial judge should ensure that the jury understood that they were required to consider whether the circumstances of the breach of duty were so serious as to amount to a crime deserving of punishment. To suggest to the jury that the Crown was obliged to prove, in addition to the facts which the jury evidently accepted, that the appellant's failure to secure the Karabiner lock involved deliberate disregard for the complainant's safety would have been quite wrong.

[39] The seriousness of the lack of care required to warrant a finding of criminal negligence was explained to the jury by the learned trial judge in the following terms:

"Let me make a few things clear to you. You may have heard of people being compensated for personal injury or property damage or loss by reason of somebody's negligence. You probably hear from time to time about cases coming before courts, before judges where somebody has been injured in a car accident and the driver of the car is sued for negligence and some damages are awarded. In such civil cases negligence is a basis for monetary compensation only. In such cases, to establish negligence the claimant must prove, that is the person who is injured, that it is more probable than not that loss was sustained through a breach of duty of care owed to that person by the driver, for instance. In this criminal case you cannot convict unless you are satisfied that [the appellant] breached the duty mentioned. In that way it is not dissimilar to a civil type of claim for damages, but that is the end of the similarity. Much more is needed to establish criminal negligence than is needed to establish the right to compensation. So I suppose, having talked to you about negligence claims for compensation, I am now going to tell you to put it out of your head and concentrate on what I tell you about criminal negligence and the concept of negligence in a criminal case.
...
In order to find someone criminally negligent, a very high standard is required of you and a very serious breach of duty is required before it can result in a conviction of a criminal offence. Let me tell you this:

'A very high degree of negligence is required before a defendant may be found guilty of criminal negligence. To convict, you must be satisfied beyond reasonable doubt that his conduct in failing to attach the two running slings to [the complainant's] harness so far departed from the standard of care incumbent upon him to use reasonable care to avoid danger to life, health and safety as to amount to recklessness involving grave moral guilt deserving of punishment.'

Let me simply remind you of that again:

'A very high degree of negligence is required before a defendant may be found guilty of criminal negligence. To convict you must be satisfied beyond reasonable doubt that his conduct in failing to attach the running slings to [the complainant's] harness so far departed from the standard of care incumbent upon him to use reasonable care to avoid a danger to life, health and safety as to amount to recklessness involving grave moral guilt deserving of punishment.'

You must bear that caution and that warning in mind."

[40] This direction was, in my respectful opinion, sufficient to bring home to the jury the gravity of the misconduct which is required for a finding of criminal negligence. Importantly, it brought home to the jury the point that they were concerned with whether the appellant's breach of duty was so serious as to involve grave moral guilt deserving of punishment as a criminal offence. There was no suggestion from the jury that they required further assistance or direction from the learned trial judge in the application of the language of s 289 of the *Criminal Code* to the facts of the case. Accordingly, I am of the opinion that there is no substance in these grounds of appeal.

Ground 7

[41] The appellant argued that the Crown case, at its highest, established only momentary inadvertence on the appellant's part which was insufficient to support the case of criminal

negligence. Accordingly, it is submitted that the learned trial judge erred in failing to rule that the appellant had no case to answer. In particular, it is said that the "level of inadvertence" did not rise to the culpable disregard essential to a case of criminal negligence.

[42] As will be apparent from what I have already written, I consider that this submission ignores the circumstances of this case. The serious consequences for the complainant of a failure to ensure that the complainant was securely attached to the flying fox rig were obvious. There was no suggestion that there were competing calls on the appellant's attention which may have distracted him from his duty to the complainant. There was no suggestion that the appellant was under pressure of time to move the appellant on. The task which the appellant was required to perform was very simple. There was no-one else who could be relied upon to perform that task.

[43] It may be said that, at the worst, the appellant simply forgot to attend to his duty; but to say this is to ignore the reality that he failed to attend to his duty in circumstances where that failure meant that the complainant would inevitably suffer death or serious injury. The nature of the risk to which the complainant was exposed, and the crucial role of the appellant in minimising that risk, puts the appellant's failure to perform his duty in a different category from the failure of a busy employee to attend to some aspect of a routine task of little consequence in terms of the life and safety of other persons. For these reasons, I would reject this ground of appeal.

Sentence

[44] The appellant was 43 years of age at the time he was sentenced. He was sentenced on the basis that he had no criminal history.

[45] The appellant's principal point in relation to the sentence was that the circumstances of this case did not enliven considerations of general or personal deterrence. That may be accepted, but it does not appear that the learned sentencing judge approached the issue of sentence on the basis that considerations of general or personal deterrence were significant.

[46] Counsel for the appellant criticised the learned sentencing judge for focussing upon the serious injuries suffered by the complainant. This criticism fails to acknowledge that, where culpable negligence has caused grave injury, the function of vindication which the sentencing process performs justifies the imposition "of real punishment".[13] Courts cannot and should not ignore the serious harm to the victim and the suffering endured by her family. The gravity of the injury inflicted upon a victim of crime will usually be relevant to the level of sentence; in this case, that consideration was compelling.

[47] The appellant argued that the sentence imposed was excessive for a case of "mere inadvertence". This argument sought to suggest an analogy between this case and cases where an offence is truly a matter of momentary inadvertence.[14]

[48] This submission fails, once again, to appreciate the nature of the duty which the appellant owed the complainant. The appellant's responsibility in the safe operation of the flying fox ride was crucial, and obviously so. He failed to discharge that responsibility. To fail to ensure that each rider was safely buckled up was to fail in the essential respect in which he was solely and directly responsible for the safety of the complainant as a person in his care. It is quite wrong to seek to characterise this failure as "mere inadvertence" because it

ignores the heavy responsibility which the appellant bore for the complainant's safety. It was the very essence of that responsibility that the appellant be attentive to ensuring that the complainant was safely buckled up before she set off from platform 2.

[49] Happily there are no directly comparable cases to which reference can be made to establish a range for this kind of offence. There is no decision of this Court which demonstrates that the sentence was excessive. The sentence which was imposed was not beyond a sound exercise of the sentencing discretion in a case of negligently inflicted grievous bodily harm.[15]

Conclusion and orders

[50] The appeal against conviction should be dismissed. The application for leave to appeal against sentence should be refused.

[51] **LYONS J**: I have had the advantage of reading the reasons for judgment of Keane JA. I agree with the reasons and the orders proposed by Keane JA.

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[1] [2006] QCA 441.

[2] (1925) 19 Cr App R 8.

[3] [2006] QCA 441.

[4] Cf *Azzopardi v The Queen [2001] HCA 25;* (2001) 205 CLR 50

[5] Cf *R v Bateman* (1925) 19 Cr App Rep 8.

[6] [2006] QCA 441.

[7] [2006] QCA 441 at [2] (citation in brackets footnoted in original).

[8] *Stuart v The Queen [1974] HCA 54;* (1974) 134 CLR 426 at 437; *R v Willmot (No 2)* [1985] 2 Qd R 413 at 417 – 419; *R v Reid* [2006] QCA 202 at [68].

[9] [2006] QCA 441 at [3] per Jerrard JA, [15] per Mackenzie J, [51] per Philip McMurdo J.

[10] [2006] QCA 441 at [1] – [3] per Jerrard JA and at [18] per Mackenzie J.

[11] [2006] QCA 441 at [50] per Philip McMurdo J.

[12] See also *Andrews v DPP [1937] UKHL 1;* [1937] AC 576 at 582 – 583.

[13] *R v Amituanai [1995] QCA 80;* (1995) 78 A Crim R 588 at 599.

[14] *R v Gruenert; ex parte A-G (Qld)* [2005] QCA 154.

[15] Cf *R v Hoogsaad* [2001] QCA 27.