IN THE SUPREME COURT OF NEW ZEALAND SC86/2017

GRAHAM THOMAS ROWE

Appellant

v

THE QUEEN

Respondent

Hearing:	20 February 2018
Coram:	Elias CJ William Young J Glazebrook J O'Regan J Ellen France J
Appearances:	S J Zindel and H Cuthill for the Appellant B J Horsley and P D Marshall for the Respondent

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CRIMINAL APPEAL

MR ZINDEL:

If Your Honours please, counsel's name is Zindel and I appear with Mrs Cuthill for the appellant.

ELIAS CJ:

Thank you, Mr Zindel, Ms Cuthill.

MR HORSLEY:

Tēnā koutou e ngā kaiwhakawā ko Horsley māua ko Marshall e tū nei mo te Karauna. May it please, Your Honours, Horsley and Marshall for the Crown.

ELIAS CJ:

Thank you Mr Horsley, Mr Marshall.

Yes, Mr Zindel.

MR ZINDEL:

Yes, Your Honours. This is a case involving a sunny Saturday morning in Kaiteriteri Beach, a very popular beach in the Nelson area, rather different weather from today, I imagine, in Nelson, where it was very busy, as Kaiteriteri Beach is in January, and hot, and at the main beach the appellant took five photos which the evidence in the trial is capable of indicating was surreptitious, although there was some debate about whether that was truly so. And the five photographs you'd have seen in the additional materials, volume 2, pages 25 and 26, and there's the first three photos which are taken near the water's edge, and at least the third photo on page 25 in the additional materials volume 2 bundle has the appearance of being posed –

ELIAS CJ:

Sorry, I've looked at these electronically and I'm trying to find them on additional bundle.

GLAZEBROOK J:

Yes, I looked at these electronically as well and I haven't got the electronic…

MR ZINDEL:

It's called, "Additional materials volume 2," Ma'am.

ELIAS CJ:

Oh, it's that one, okay.

MR ZINDEL:

And this is the gravamen as it were, of the case, pages 25 and 26.

ELIAS CJ:

We just can't see the labels on them to say that they've…

MR ZINDEL:

The additional materials volume 2, Ma'am, is on the front page.

ELIAS CJ:

Yes, thank you.

MR ZINDEL:

And page 25 has a photo of the girls, or the three girls and two girls, at the water's edge, it appears, and the third photo on page 25 has the appearance of being posed, and apparently one of the parents was photographing the girls at the same time. And then turn the page to page 26 and that's a photo which, two photos, which were taken past the estuary, so rather further away from the photographer, and the appearance of the girls is that they're not appreciating that anybody's taking their photograph, and that's the evidence in the trial, that they were oblivious to the attention.

So why the appellant would take photographs like that of course raises concerns, whether it's recherche du temps perdu or whatever, the appellant was confronted by an off-duty policeman, the photographs were looked at, the five photographs he took that morning, which he said were – took about five minutes or so, or he was watched for 20, and then his computer was seized and examined and the computer had no objectionable images, had no nude images, even, about 8000 images, and perhaps a quarter of those were of girls, teenage girls, up to the age of 40, I'm told by my learned junior. The other 6000 photographs were bridges and roads and things that accompanied

his tour around the country. So we have a situation where we have no apparent possession of child pornography, no evidence of any file-sharing, dissemination, and he disclaimed any such intention. And he also disclaimed, for what it's worth, any sexual motive, nothing malicious intended. But, of course, the jury could always have taken a contrary view and it was put to him in cross-examination that he may have had a motive like that.

And just other factors in relation to the case, there was quite an exceptional admission of facts about the appellant's libido being low, for what's that worth, and also in relation to him having been trespassed from the area in 2012 for two years. The trespass notice had spent but that had occurred, although in cross-examination he disputed whether he'd been trespassed for taking photographs, but that was in the admitted facts so that can't be taken any further.

So what we have, then, is the appellant taking photographs that are not close-up photographs of private areas, one could say, but nevertheless are accompanied by an element of zoom, telephoto lens, and has the girls squarely in the centre of the photographs. And their age also gives concern because they appear to be 12 to 15. There's no verification of their ages in the evidence, but that appears right.

So the argument for the appellant is if somebody takes photographs of what may ordinarily be seen in public, that should not be an offence. If the subject matter of the photographs accord with their – to use the phrase of the associate professor in the article by Moreham in *Privacy in Public Places*. If the subject matter of the photographs exercised self-presentation efforts, if they put up a self-presentation barrier and as long as there's no attempt to go behind that barrier or to circumscribe those efforts then my submission no offence is committed. So I draw a distinction between watching someone on the beach, zooming up on someone on the beach, even closely zooming up on someone on the beach, versus somebody who might look or photograph or use another device like a handheld mirror and try and get through that self-presentation barrier, for example, by peering under a desk at somebody or

taking advantage of the subject matter's confusion or drunkenness to do up-skirt or down-blouse type observation or photograph.

So in a nutshell, I'm arguing that what you can see ordinarily in public without any element of the subject matter being exploited should be able to be viewed or photographed. And of course there are a number of subtleties about all this, about the right to privacy generally in a public place –

ELIAS CJ:
Do you need to go as far as saying that, that it should be able to be photographed? Isn't your argument simply that it doesn't form this offence, it may be that you shouldn't be able to, and there may be some other offence that has been committed or some other wrong that's been committed? Why do you need to say it's – do you need to go as far as you're going?

MR ZINDEL:
Well, I don't need to I suppose, Your Honour. The aspect of breach of privacy comes into the Annas test, so I thought I'd try to address it because there's a reference to insulting behaviour being to affect dignities through modesty of privacy, so I'm just trying to deal with the privacy aspect that really there's no privacy for what you voluntarily decide to put out there. Another complication is that there are minors, under 18s, so we have children values as well, as may be seen in the JK Rowling case, the *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481 case that the Crown has cited, and that's a valid concern that they're children – but children, particularly teenagers, have also got certain privacy rights as to how they display themselves to the public. And if the teenagers in question choose to wear bikinis and to stand up and be photographed by their parent, in my submission that takes away some of the breach of privacy sting which would be part of the section 126 charge.

There are subtleties, as I was saying, in relation to if you were in a situation of extremity, if for example you've just come out of a car crash or something and some journalist decides to take a photograph of you in a trauma situation,

then considerations of decency might dictate that just because it's able to be seen that it shouldn't be allowed to be at least photographed or, more particularly, that it shouldn't be disseminated further. Because the Courts make a distinction between observation, photography and further dissemination, because the privacy intrusion is potentially larger the more you make of a record and the more you disseminate it.

But the potential for photography and dissemination in our society is just increasing exponentially with technology, the iPhone and so on, and anybody who's at the beach must be taken to realise that they could be snapped or zoomed in on by anybody, and then to adjust their behaviour accordingly; if they don't want to be they wouldn't wear those clothes on the beach. I'm not saying it's not a breach of privacy to a degree, but it shouldn't be a criminal aspect for section 126. So that's the basic submission.

I'm also arguing that photography without more is not an act. My friends for the Crown indicate that photography has a whole number of technical aspects that go into taking a photograph, and of course there are physical acts which go into the process of photography, but in essence the taking of a photograph is just the same as what you can see. So in my submission the Court of Appeal in *R v S* CA273/91, 20 December 1991 was correct that photography added nothing more and wasn't an act in itself, at least not a criminal act. I mean, if you observe visually you're also, if you wanted to analyse it, you could say that's a number of different aspects of an act as well, you might have to put down your *National Geographic*, you might have to shield the sun from your eyes, you might have to look, focus and so on. So looking is also an act, and I would say that photography's no more of an act than looking.

O'REGAN J:
Well, except it's making a record of what you're seeing isn't it? And it does involve some physical action on your part.

MR ZINDEL:

It's true, Your Honour, there's additional physical action. I suppose the significance of photography is that it's the record as such, that it is a greater privacy intrusion potentially, because somebody has that image and potentially could disseminate it, although the dissemination would be a subsequent act in my submission.

Of course, the whole area of photographs is very influx. Europeans recognise the right to your image influenced, probably, by Article 8 of the European Convention, and the Crown's submissions at footnote 65, there's even a reference there to the indecency of the image, so it's in some sense to use any photograph could be regarded as indecent in European or even Canadian case law, in part.

I don't think the English or New Zealand law has got to that point but obviously the right to privacy is recognised in cases like the J K Rowling, the *Murray* decision.

ELIAS CJ:

What was the charge there?

MR ZINDEL:

That was a civil case, Your Honour.

ELIAS CJ:

Yes.

MR ZINDEL:

Yes.

ELIAS CJ:

So it's really – I'm not sure why you're dealing with the whole horizon here and not closing in on the terms of the offence.

MR ZINDEL:

All right, understood, Your Honour. I'll keep it more narrow. I think I was pitching at straw horses.

ELIAS CJ:

Well, you're giving background, I suppose.

MR ZINDEL:

All right.

What I've said so far is that there's – photography is no more of an act than looking – I take Justice O'Regan's point that it's more physically to do but in my submission it's no more than looking. The issue about photography is to do with the permanence of the record and whether that's an invasion of privacy.

My next point that I'm going to develop is that what occurred was not an indecent act anyway. Probably that's of most concern, is that in no circumstances could the taking of photographs of people in such circumstances be regarded as an indecent act, and I appreciate that the Courts have tended to leave questions of what is indecent to the jury as custodians of community values and so on. But there is a filter required. It's not – such images are not capable of being indecent when they are public images with people wearing what they choose to wear. There's no attempt to be sneaky or furtive or to use technology in an extreme way. I take your point that the evidence on one view of the evidence indicates that the appellant was taking photographs in a sort of slightly furtive way, but he was also some distance away from the girls. So on any view of it, he couldn't have been seen or wouldn't have been seen by them.

GLAZEBROOK J:

What do you make of that? What's your submission on that or the point you're making?

MR ZINDEL:

That – well, he obviously wasn't intending to insult them because they're oblivious to his attention.

GLAZEBROOK J:

But we're looking at indecent or are we moving on to intention to insult?

MR ZINDEL:

Perhaps we are. No intent to insult them and by not getting up close and personal to them he wasn't intending to be insulting or offensive to other people either. It just happened that this off-duty policeman saw him do it.

O'REGAN J:

So are you accepting that if you take a photograph openly, like if you're a newspaper photographer or something, that's okay but if you take it furtively it's not? Are you accepting that? Is that what you're saying?

MR ZINDEL:

Not necessarily, Justice O'Regan. If a photographer was to get close and take an open photograph of somebody, that could be quite offensive. It may be less offensive to take a –

O'REGAN J:

Yes, but I think we're jumping ahead. The Crown submission seems to be it's indecent because it's being done furtively and with a, you know, zoom lens from afar, or at least that seems to be part of the argument that makes it indecent. Are you saying it wasn't furtive here or are you saying it doesn't matter?

MR ZINDEL:

It's an aspect but it doesn't make it indecent because it's furtive. It goes both ways, it cuts both ways.

O'REGAN J:

I mean, he was observed by a police officer for five minutes so it doesn't seem he was that furtive.

MR ZINDEL:

No. Well, 20 minutes, the sergeant said.

O'REGAN J:

Twenty minutes, yes.

MR ZINDEL:

He wasn't in his caravan or anything.

ELIAS CJ:

I am just wondering – just really picking up on what Justice O'Regan says about the creating a record, whether that is capable of being the act in the section, because one view of this is that he was – he only took five photographs, but he was observing the girls for a long time. It's a bit like somebody using some binoculars to watch. I wonder is there a distinction between taking a photograph and observing somebody through binoculars?

MR ZINDEL:

Well, he was charged with the photographs.

ELIAS CJ:

Can we see the – I haven't looked at the actual charge.

MR ZINDEL:

The charge documents are in case on appeal page 9, 8 and 9.

ELIAS CJ:

Thank you. By taking photographs, yes. Thank you.

MR ZINDEL:

Conceivably, though, they're looking on the same analysis could be – if you regard photographs as an indecent act you could say the looking for 20 minutes could be an indecent act, but he wasn't charged with that.

Another aspect of my argument is on the intent issue, is that what we have is that if somebody is assessed to have a salacious intent, anything that follows that that person does could conceivably be indecent. So if a paedophile is talking to children, that could be indecent, or to use a modern example, if President Trump was talking to Billy Bush in that Access Hollywood tape about what he'd like to do to this soap opera actress when he meets her, but he gives her a chaste kiss when he arrives, that could still be indecent because of all the so-called locker room talk that occurred beforehand.

So what the appellant's argument is that one shouldn't try to reverse engineer behaviour and say, "Well, that's indecent because your mind is indecent about something." There's a risk that there's a certain circularity that's built up when you have somebody, for example, who has a collection of photographs and a quarter of them involve girls and he's taking photographs that one leads to the other that it becomes indecent because of the assessed intention, so I argue that there shouldn't be a reverse engineering. There shouldn't be a bootstraps approach. This should be a look at the indecent act as to whether it's objectively indecent to begin with. I think I gave a reference in my submissions later on to the fact that if you take photographs of old socks hanging on a washing line that wouldn't be indecent to 99.9 percent of the population but there might be some person who has a fetish about socks and that person may have such a view but that shouldn't affect the legal situation that it's not indecent. I suppose a more difficult question arises increasingly in multicultural society, for example, if a photograph is taken of a Muslim lady's arm, for example, and she wanted to have it covered and whether that's indecent. I suppose indecent comes down to community standards and it wouldn't be seen as indecent to photograph a lady's arm. But it might be indecent in Saudi Arabia.

So indecency, no doubt, is an evolving concept. The Crown indicates it's a wide concept. The Crown indicates you should look at time, place and circumstance. But what I'm saying is that it shouldn't include the motives of the person at that stage. Section 126 has got two aspects, of course, but looking at the indecent act, you should look at it in isolation.

If you look at our community standards, bikinis are accepted beachwear worn by girls young and old, and they may be inappropriate in a cathedral, they may well be inappropriate in a Muslim society for example, but they are in accordance with our community standards and they should not be regarded as indecent.

The provision, 126 indecent act is easy to apply when you've got, shall we say male behaviour, exhibitionism or whatever, and a person on the receiving end who's offended by it, easy. It's a bit trickier when, say, the female is made to do things, when it's interactive and controlled like the *Y v R* [2014] NZSC 34; [2014] 1 NZLR 724; or *R v S*, then you can say, "Well, you're taking part in this tableau, this interactivity. When you're the recipient of somebody else's conduct it's less easy to say that that's an indecent act. And in this case there's no evidence at all that he had any instrumental part in the poses that girls took. And as far as being able to infer an intent on the Annas test, if the tendency –

ELIAS CJ:
So what do you say the Annas test is? It just seems to be leave it to the jury.

MR ZINDEL:
Yes, that's what I thought too, Ma'am, with respect.

ELIAS CJ:
Well, are you adopting it.

MR ZINDEL:
I would say there has to be a filter for it, for sure. If I just…

ELIAS CJ:

Well, the problem with *R v Annas* [2008] NZCA 534, which of course is not a decision that binds us, but the problem with *Annas* is that it's a case I think we can all agree was one of indecency.

MR ZINDEL:

Sure.

ELIAS CJ:

So it's not really considering this sort of case. Well, what do you take from it?

MR ZINDEL:

Well, for a start it's –

ELIAS CJ:

Is there anything more than is in para 57?

MR ZINDEL:

Para 57 – oh, yes, that's one aspect, the loving parents example. But in looking at paragraph 43, which is on page 80 of the Crown bundles, it's useful I suppose, because we're dealing with a sexual-type case here – I mean indecency can be a wider concept than just sexual matters – but the (d)(iii) on page 80 then…

ELIAS CJ:

Well, this is simply the directions that were given to the jury.

MR ZINDEL:

That's right, but they were endorsed though by the Court of Appeal at para 59.

ELIAS CJ:

Well, that's on the intention to insult or offend. I thought you were talking about the indecency element.

MR ZINDEL:

Oh, I see. Well, yes, on the indecency element you're right, it's just paragraph 57, depend upon the circumstances, which is not massive guidance.

ELIAS CJ:

Well, what do you say it means, an indecent act, what's your thesis on that?

MR ZINDEL:

An indecency would have to be something where there was some attempt to get beyond or behind, to use that phrase again, the self-presentation values or barriers, efforts, and so…

ELIAS CJ:

Well, is that necessarily going to be indecent? I really don't find that – that may be what is an invasion of privacy, but is it indecent?

MR ZINDEL:

Well, because it reflects –

ELIAS CJ:

It would depend on the, well, depend on the circumstances.

MR ZINDEL:

It reflects community standards, I suppose. If a girl is in a bikini, the parents are comfortable with that, she's comfortable with that on the beach –

ELIAS CJ:

Well, if you take a photograph for example of somebody immediately after an accident where someone in the car has died, that may be a gross invasion of privacy, it may be an offence, but is it indecent?

MR ZINDEL:

Potentially though the width of indecency is such if it's below the propriety or – it doesn't have to be confined to sexual matters, indecency, as the Crown point out in their submissions.

ELIAS CJ:

Well, I must say I question that, well, not sexual, but some element or – because you have to construe this provision 126 in its context in the statute.

MR ZINDEL:

Yes. Well, that's true.

ELIAS CJ:

Which is crimes against morality and decency. And I would have thought – although perhaps this is a question for the Crown – there is linkage that needs to be explored between sections 125 and 126, because 126 is simply with the additional intent to insult or offend but on the Crown case this man could equally have been convicted under section 125 subject to the defence of reasonable belief that he wasn't being observed because it's the same act.

MR ZINDEL:

Yes, that's true. The contextual interpretation might suggest more of a sexual aspect to it.

ELIAS CJ:

Or something prurient.

GLAZEBROOK J:

Perhaps the better example may be a wardrobe malfunction that perhaps happens in the sea relatively frequently with skimpy bikinis and a photograph taken of the wardrobe malfunction.

MR ZINDEL:

On the TV this morning there was an ice dancer, I think, and they had a bit of a blur-out over …

GLAZEBROOK J:

That's right. A wardrobe malfunction that creates something that could be seen as indecent in the ordinary sense of the word.

MR ZINDEL:

Yes. So indecency to me – if you're looking for some sort of test from me it would be that somebody is captured in a way that they choose not to portray themselves as through a wardrobe malfunction or …

ELIAS CJ:

Or the act includes arranging them, as you suggest, and as we had in the *Y* case.

GLAZEBROOK J:

Although would taking a close-up photograph of the wardrobe malfunction, for example, the bikini top falling down, I think you gave examples of the buttocks cases, for instance.

MR ZINDEL:

Yes.

ELIAS CJ:

Well, I have to flag I have a query as to whether that is indecency and I'd like to hear argument on it.

GLAZEBROOK J:

Well, that's the taking of photo point but assuming just taking a photo for these purposes can be indecent, then it might follow that a photograph of a wardrobe malfunction could be indecent.

MR ZINDEL:

That's right. Just like a photograph under the table because a person doesn't give her consent to be photographed in that way. It's not how she presents herself to the public if somebody tries to photograph her under a table.

GLAZEBROOK J:
Although that again assumes that your argument that just taking a photograph of what happened cannot be indecent, although dissemination of it might be possibly.

MR ZINDEL:
Well, my argument is that to take a photograph of what is ordinarily seen should not be seen to be indecent because our community standards allow you to dress in a certain way.

GLAZEBROOK J:
I thought your first argument was that a photograph isn't an act the same as…

MR ZINDEL:
Well, that's true. It's no more than the visual observation, that's right.

GLAZEBROOK J:
So that's the first layer of argument.

MR ZINDEL:
Yes.

GLAZEBROOK J:
And then the second layer of argument is that if it's a photograph of something that's ordinarily in public and not a wardrobe malfunction or something of that nature.

MR ZINDEL:
That's right. The drunken reveller example or the person that's caught unawares and it doesn't have to be a photograph. It can be a visual

observation as well, like the handheld mirror or binoculars or whatever. So I would say you have to have that, at least. So that's why I'm a little bit troubled by paragraph 57 in *Annas* that you can have no indecency where loving parents take a photograph of their naked child, but a photograph taken for obviously pornographic purposes could be indecent. I'm not quite sure how that "obviously pornography purposes" is meant to be played out. It seems to smack of trying to bring in the motive of the photographer once more. It would be an easier test to apply, at least, if you had some kind of bright line that as long as that person – a naked child is not indecent if the child and the parents are comfortable with that child being nude, for example, on the beach. If somebody chooses to take a photograph of the naked child, then that could potentially be child pornography down the line. But the actual taking – it's not an indecent act in itself, would be my submission. It's difficult at that level. I suppose the hardest case to reconcile for me is the *R v Rudiger* 2011 BCSC 1397, (2011) 278 CCC (3d) 524 decision where the, the voyeur provision in Canada, surreptitious, sexual motive, and breach of privacy, and this obvious pervert is taking really close-up images of children in a park, apparently in swimwear. They don't appear to be nude, but very close-up to the point that all the contours are showing of their genitalia and so on, and he's focused up to the maximum, and whether that's an indecent act because it's obviously, it obviously brings up unease and disgust, feelings of revulsion at the behaviour. But by the same token the children are clothed and it's as their parents are presenting themselves to the world, so, I find *Rudiger* the hardest decision to try and reconcile with my argument, it's a high watermark, I could say, of the Crown argument. The Crown argument seems to be that, well, everything's potentially indecent, you know, in this general rubric, and just leave it to the jury to decide because they're trusted. But the trouble with that is that the number of interactions in the world with technology are increasing and the potential for intrusion is vast. Like, just last month in Abel Tasman Park there was a local story of drone that was following a family around in the park, in breach of the concession, because you're not meant to have drones there. That was on Facebook, and there were comments about that in relation to the fact that, well, "Drones have followed me," or, "I've been sunbathing with my girlfriends and drones have been watching us," so there's a lot of this going

around and it's just uncertain what provisions should apply to try and control that behaviour. In my submission an indecent act is too blunt an instrument, it's the wrong tool. The correct tool would seem to be the regime which Parliament has introduced for intimate areas, or possibly some other provisions that might deal with technology, but not 126.

ELIAS CJ:

Well, one would have thought that if an indecent act is whatever a jury says it is, that you've got a problem with the New Zealand Bill of Rights Act 1990 in terms of prescribed by law.

MR ZINDEL:

Mmm, it all becomes very nebulous. It's very hard to guide behaviour when what you think might be acceptable behaviour is not to somebody else in an increasingly rights-based world, particularly in the area of breach of privacy.

ELIAS CJ:

Where do I find that *Rudiger* case?

GLAZEBROOK J:

There's a terrible copy at 199 of the appellant's bundle.

MR ZINDEL:

My apologies, Justice Glazebrook.

WILLIAM YOUNG J:

Well, the whole bundle of authorities is virtually illegible.

MR ZINDEL:

Yes, I apologise immensely for that.

ELLEN FRANCE J:

It is in the Crown bundle at tab 36.

MR ZINDEL:

I can redo the exercise if it causes you –

ELIAS CJ:

No, no…

MR ZINDEL:

Which case is it, sorry? The Crown's got a legible copy I hear.

ELLEN FRANCE J:

Tab 36.

MR ZINDEL:

Yes, the *Rudiger* decision. You've got a whole range of facts there.

ELIAS CJ:

Well, this is possession of pornography.

GLAZEBROOK J:

No, it's also voyeurism…

MR ZINDEL:

That was one of the provision – that was one of the charges. Also voyeurism, which has those three ingredients: the surreptitious, sexual motive and breach of privacy. Not indecency, but there might be a –

ELIAS CJ:

Sorry, but is voyeurism an offence in British Columbia –

GLAZEBROOK J:

Yes.

MR ZINDEL:

Yes.

ELIAS CJ:

– which is define?

MR ZINDEL:

No, that's defined…

WILLIAM YOUNG J:

So it looks like it's a federal offence, doesn't it?

ELIAS CJ:

A federal offence. So whereabouts do we find the text of that offence?

GLAZEBROOK J:

I had found that before, I've lost it again.

ELIAS CJ:

Oh, well, don't worry, the Crown's relying on this case so they can take us to it.

MR ZINDEL:

Yes, it's…

WILLIAM YOUNG J:

There's a definition at page 222 of the bundle, page 554 in the report.

MR ZINDEL:

Yes, halfway down on page triple two. So you commit an offence if you surreptitiously observe or record…

ELIAS CJ:

Is done for a sexual purposes, yes, I see.

MR ZINDEL:

Yes. So surreptitious, reasonable expectation of –

GLAZEBROOK J:

I've lost that. What paragraph number is it?

ELIAS CJ:

Page 222 under issue two.

GLAZEBROOK J:

Oh, 222.

MR ZINDEL:

So surreptitious, reasonable expectation of privacy, done for a sexual purpose. So "indecent" is not particularly mentioned but there may be some overlap.

At paragraph 77 of the decision, there's reference to repeated and regular basis. For many seconds at a time the video focuses on the genital and buttocks area of young girls. No attempt to capture their faces or the rest of their bodies. So it's different in degree, of course, from the case at hand.

ELIAS CJ:

Well, it's a very different offence, I would have thought.

MR ZINDEL:

The Crown may say that indecency is captured by breach of privacy and surreptitiousness are offending community standards of propriety. Sexual motive is a different offence.

GLAZEBROOK J:

Well, it might just say that you have to have a specific offence like they do in Canada in order to capture this type of behaviour.

MR ZINDEL:

Yes.

GLAZEBROOK J:
That would be the other view of the case.

MR ZINDEL:
That's right. All these – most of these Canadian cases are on this voyeurism provision. As I said before, that seems to me to be the high water mark of the cases that involves clothed children, but close-up and extreme close-up and not just close-ups but also capturing them when they are at their most vulnerable when their bodies are contoured in a certain way and so on. So it's sort of as yucky as you can get in terms of the clothing aspect.

So that's why I was saying before that that presents some challenge to my argument because I'm saying that you should be able to record or see what you can ordinarily see. In this case, you couldn't see the children playing in the park but with the aid of technology you could enhance. Then again, enhancement can be done out of a panorama shot as well. It could be done back on your computer afterwards. You could take a photograph of Kaiteri Beach or you could go to the live cam over summer, which apparently attracts 7000 hits a day of the beach and enhance those photographs to your heart's content. So the whole enhancement thing when it occurs is problematic.

So that's in essence the argument that the subjects of photography were not reduced in their dignity. I'm saying that there was no general reduction in feminine dignity either, whatever the level of abstraction you want to picture that, from being photographed in their state because they weren't sexually immodest or sexually private in what they were doing.

And then in my summary there's the other specific argument which the Crown hasn't addressed and that may be because it's a very weak argument, I'm not sure, but in relation to 216G to 216N of the Crimes Act 1961, I make reference to the fact that Parliament has chosen from 2006 to provide a certain regime for intimate visual recordings and the key provision is in this 216G which is on page 4 of the appellant's materials. The test there is without knowledge or consent taking any photograph or visual recording, reasonable expectation of

privacy, and the subject matter of the photograph or video or whatever either has private areas partially or fully exposed or they're clad solely in undergarments or there's intimate sexual activity or there's showering, toileting or other personal bodily activity. So quite specific, quite concrete, and Parliament has provided that is an offence, an offence which carries incidentally a three-year maximum rather than the two-year maximum in 126. And the submission is made that if Parliament chose to put a whole detailed set of provisions to cover a particular area it obviously intended that other provisions would not be used for that purpose. The other argument against that might be, well, perhaps the prosecuting authorities can pick and choose what provision they want to use, just like they can choose between a Summary Offences Act 1981 assault or a Crimes Act assault, there's an element of discretion, but that's where the activities are generally very close. Here there is the particular regime provided for and so it covers –

ELIAS CJ:
What's the penalty here?

MR ZINDEL:
Three years for the, under 216H, on page 5.

ELIAS CJ:
Right.

MR ZINDEL:
And it does make reference to "female breasts partially exposed" so it may potentially have caught some of this offending. But then again you have the argument about whether it's, they had a reasonable expectation of privacy or not.

ELIAS CJ:
Well, that's all the difference.

MR ZINDEL:

And it covers “without the knowledge or consent”, so that’s an interesting one if, for example, a parent took a photograph of their child without their knowledge, whether that might be cause. But leaving that aside, Parliament has provided for this type of behaviour to be circumscribed in a certain way and in my submission the old 126 shouldn't be pressed into service, 126 is more aimed at male behaviour, the offender’s behaviour, flashing and exhibitionism and so on, or control of some female subject, just to use the gender, the common gender roles, here.

And then the last argument is in connection with the officially induced error point, and I take on board that Mr Rowe did have a conviction for offensive behaviour some years earlier in 2005, the Court of Appeal two to one found him liable for offensive behaviour for photographing schoolkids on the way to school on the street. But there was a provision, the appellant gave evidence at trial of having looked up the website and relied on it, he said, and it formed part of his evidence and it was also part of the closing, and the key phrase is –

WILLIAM YOUNG J:

Was he asked about his previous conviction?

MR ZINDEL:

No, he wasn’t asked about his previous conviction, no, they didn’t cross-examine him about that, and the Crown indicated in their submissions that it could expose him to jeopardy. Well, I would have thought even his mentioning –

WILLIAM YOUNG J:

It could have, sorry, what?

MR ZINDEL:

The Crown in their submissions for this hearing indicated that that could expose him to jeopardy, but he was in a way exposed to jeopardy by giving evidence about the fact that he relied on the website. But there was no cross-

examination about that previous conviction. But the police website, which is still unchanged to my knowledge, may be seen as the very last page of the additional materials volume 2 bundle.

ELIAS CJ:

What are you referring us to this for? Because there's no defence able to be put forward based on it. So it is simply just an opinion which suggests, which is really the issue that we have to determine, the one of indecency?

MR ZINDEL:

Well, that's an aspect. But there's also the aspect about whether this Court wants to recognise some right to stay of prosecution for example or to give a discharge without conviction if somebody erroneously proceeds on official advice. So it doesn't operate as a defence or excuse under section 25 of the Crimes Act. But a Canadian line of authority might suggest that a prosecution should be stayed if somebody was misinformed by somebody reliable and in official circles, and in this case it's a very clear statement on the website as to what somebody might do, and he gave evidence of having relied upon that, and that doesn't seem to have been disputed.

ELIAS CJ:

Sorry – don't take us to it but give us the reference again.

MR ZINDEL:

It's the very last page of the additional materials volume 2 bundle. It has a nuanced three-quarters and then it has a final emphatic sentence. The emphatic sentence is, "However, you can take and/or publish photographs or film of people where there's no expectation of privacy such as a beach, shopping mall, park, or other public place." So that's the police advice to the public.

All right, so that's the essence of the appellant's argument. I can develop this further as Your Honours find interesting. I suppose the first place to start is that we maintain that photography is not an extra criminal act. Maybe it's an

extra physical act that goes on, but it's no different from what you may view and I find comfort in the decision of *R v S* which said that, and that's paragraph 29 of my submissions.

There was such an act because it wasn't just a case of dumbly looking at the girl in question. There the offender had produced garments, pinned the crotch, assisted poses, and so on. So there was that necessary activity going on, on his part. So *R v S*, the person was liable.

My friends for the Crown indicate that this Court has cast doubt on the validity of *R v S* in your *Y v R* decision. As I read *Y v R*, that was more in connection with the phrase "with or upon" in the relevant provision. And in *R v S*, there seemed to be the flavour that it had to have some direct or indirect physical element and in *Y v R*, which was slightly different facts, this was a guy who had some boys locked into a garage, as I recall, watching pornography that he arranged and got them to do what they wanted to the – as they were watching and then he watched them. This Court indicated that there was a necessary element of control and manipulation going on, that that would be sufficient for "with or upon". It didn't have to have the extra element of the physical interactivity that *R v S* seemed to suggest. So that's the only respect that I found *Y v R* to take exception to *R v S*.

The point which I rely on in *R v S* is that photography per se is still the same recipient-type behaviour. You're receiving what you can ordinarily see. I think *R v S* then, with respect, is good law in that respect.

Different, though, if something crosses the line beyond being a passive recipient enjoying it or whatever, but still being a recipient, to where you cross the line and you take other actions. In paragraph 30 of my submissions, I refer to the handheld mirror case under the table. I refer to the person that stands on a toilet seat so he can peer at a woman in the nearby toilet cubicle. There you're going into further actions.

So I say that photography by itself is nothing extra in terms of the act. It may be relevant for breach of privacy, of course, and I refer page 6 of my submissions to the *Rudiger* decision.

O'REGAN J:
We have read all these submissions so it's really – we have read all this material so you don't need to go over it unless you'll be adding to it.

MR ZINDEL:
Yes, Sir.

ELIAS CJ:
And indeed, your introduction, which I thought was your principal submission, was pretty full. So it's really only necessary for you to touch on any matters you want to expand on.

MR ZINDEL:
Very well, Your Honour. My friends raise the issue of oblique intent at length in their submissions…

WILLIAM YOUNG J:
So this comes from *R v Price* [1919] GLR 410 (SC) does it?

MR ZINDEL:
The…?

WILLIAM YOUNG J:
Idea that you don't have to intend to produce an adverse emotional response in a particular person to offend or insult them, it's enough that you intend to insult their dignity.

MR ZINDEL:
Yes, I don't really have any –

WILLIAM YOUNG J:

Or that they would be likely insulted if they found out.

MR ZINDEL:

And I don't have any major difficulty with the Crown's submission on oblique intent, it has to be approached with some care. I note –

WILLIAM YOUNG J:

You mean oblique intent, that they intend the natural and probable – you intend what the consequence of your action?

MR ZINDEL:

Yes, I think natural and probable has not found favour any more, but virtual certainty or moral certainty is.

WILLIAM YOUNG J:

All right. But this idea certainly that I'm slightly more interested in is whether one can be said to intend to insult or offend any person, it's the whole purpose of the exercise, so that that person never knows about it.

MR ZINDEL:

Yes…

WILLIAM YOUNG J:

That idea seems to have come from *Price*.

MR ZINDEL:

I was just trying to – oh, *Price*, that's right, the no dolly in the trou?

WILLIAM YOUNG J:

That's right.

MR ZINDEL:

Yes. Well…

WILLIAM YOUNG J:

It seems, I mean, *Price* I suppose deals with a situation where you might expect the person to be offended but in fact they weren't. So that's probably a slightly different issue.

MR ZINDEL:

I suppose if we look at 126, as I imagine it started with the exhibitionist-type behaviour, someone at a park is offended, goes to the police and say that person flashed or whatever. You might not necessarily intend to offend that person but…

WILLIAM YOUNG J:

Well, normally they, normally that would be – and that would be the likely, you know, almost inevitable consequence of the action whether in fact it does have that effect, probably doesn't affect what the intention was. "I intended to insult her," but, you know, she wasn't insulted but it's still an offence.

MR ZINDEL:

"I intended to insult her but she wasn't insulted," but somebody else further down was insulted.

WILLIAM YOUNG J:

Or none of them was insulted.

MR ZINDEL:

Another person?

WILLIAM YOUNG J:

No one, no one was insulted.

MR ZINDEL:

No one was – oh, I see.

WILLIAM YOUNG J:

But I mean that doesn't matter because it's a crime of intention, it's an element of intention not of consequence.

MR ZINDEL:

That's right, effect, yes, that's right.

WILLIAM YOUNG J:

But the question to me is whether it has the somewhat more metaphysical component of intending to insult their integrity, their dignity, their privacy, which…

MR ZINDEL:

And this would suggest.

WILLIAM YOUNG J:

And where does that come from?

MR ZINDEL:

Well, I find that in –

WILLIAM YOUNG J:

Does it come from *Annas*?

O'REGAN J:

Yes, I think it does. Well, *Annas* certainly says that.

WILLIAM YOUNG J:

But, I mean, that's just conclusory, *Annas* just says, "Well, that's right," but it doesn't say why.

MR ZINDEL:

I'm not aware of any earlier formulation than *Annas* I'm afraid, Your Honour. I'm sure there is. Yes, are you specifically trying to rob their modesty by what

you're doing to them personally or are you trying to degrade feminine dignity in the context of sexual-type behaviour? All that is very wistful.

ELIAS CJ:

Well, I would have thought that the answer to that is the relationship between section 125 and 126. One's in a public place where you shouldn't have to put up with seeing an indecent act, because you're entitled to frequent a public place, the other's in any other place where there will be many activities which wouldn't insult or offend. But if this is done with that intent then it becomes an offence.

MR ZINDEL:

Yes. The 126 is the – can occur anywhere can it? No, "Any place at all." Yes, it applies to the house situation as well, yes.

ELIAS CJ:

Yes, exactly. So walking around naked in your house or something like that, but if you do it with an intention to insult or offend somebody who is present, it's different.

MR ZINDEL:

Yes.

WILLIAM YOUNG J:

But this idea of offending someone is implicit in section 125(2), because it's a defence if you don't think anyone's looking.

ELIAS CJ:

Yes, yes, or can see you.

MR ZINDEL:

The Crown put it in terms of intent to insult or offend anybody, parents or anybody else. I would have thought 126 would be confined to the group that you're directing your behaviour to.

WILLIAM YOUNG J:

But the Judge summing up just said it's enough to insult her dignity or her …

MR ZINDEL:

Yes. Standard Annas directions – there's only one word missing but probably not material – so tab 10 of the Crown materials is the Annas test on page 80 of the Crown materials. There's (d)(iii) at the very bottom of page 80 and that's, as I said, that was endorsed by the Court of Appeal at paragraph 59. What must be captured, at least on the facts of a sexual-type case like that, is whether the accused intended to insult or offend the complainant's dignity, her right to modesty or privacy, by taking such intimate photographs of her at her age and in those general circumstances and the trial Judge had that word-for-word except for the word "intimate". It just had "photographs".

WILLIAM YOUNG J:

What the Court of Appeal – it is just conclusory, 58 and 59. Now, perhaps they had in mind photographs of a child who's very young.

MR ZINDEL:

They're quite wide concepts, dignity, modesty or privacy. Whether it's in the specific or whether it's in the general is another issue. You know, whatever the level of abstraction you could take this to on the facts, my submission is that there's no way that the modesty or privacy could be affected by filming somebody in their public beachwear.

Annas, as we've discussed, is a very different case, easily came within the provision.

WILLIAM YOUNG J:

I suppose in *Annas* there was a sort of an aura of consent about the case because the person whom the photographs – of whom the photographs are taken was a teenage girl whose behaviour was equivocal, I suppose, as to

whether she had or hadn't consented. So it may have been in that case that the photographs were not intended to insult or offend her personally.

MR ZINDEL:

Yes. That grooming background.

WILLIAM YOUNG J:

But in the view of the Court of Appeal the trial Judge was still objectionable.

MR ZINDEL:

That's right. Her right to modesty or privacy, even if she didn't want to necessarily invoke it. Obviously the behaviour was very degrading and so is that test too wide and too nebulous to capture these kinds of cases because modesty is a very subjective thing, as privacy is?

WILLIAM YOUNG J:

I suppose in the Russian case where we can take a somewhat broader view of what was an indecent act it could probably cover a lot of this sort of behaviour.

MR ZINDEL:

Sir, the Russian case?

WILLIAM YOUNG J:

Yes. The one about the photographs.

MR ZINDEL:

Oh, *Y*, yes. Indecency, no difficulty there on the behaviour that occurred in the garage.

WILLIAM YOUNG J:

Well, yes. I mean, it was possible – it may be that the conduct in question in *Annas* would have been caught by the approach taken by doing an indecent act with or on.

MR ZINDEL:

Yes.

FRANCE J:

She was being posed, wasn't she, and there have been things done with the garments that she's wearing, et cetera.

WILLIAM YOUNG J:

Yes.

MR ZINDEL:

That's right. So that's sort of quite similar to the *R v S*, *Y v R* situation.

WILLIAM YOUNG J:

It may be that in *Annas* that the words were stretched. It was a bit of a stretch when there was perhaps another offence that would have captured the behaviour more easily, more naturally.

MR ZINDEL:

On the facts analysis, what happened was an indecent act. That was when she was naked and so on and groomed and I don't have any difficulty with liability there. It's just when you – the concept of indecency when you are dealing with standard beachwear, how people present ordinarily.

WILLIAM YOUNG J:

Actually, this wasn't the case I was thinking of, *Y v R*. It's another one.

GLAZEBROOK J:

Yes, I just can't remember the name of it. It's the one – it's not actually a specific indecency.

WILLIAM YOUNG J:

Y v R is relevant but no, there was a case here over photographs taken in Russia.

FRANCE J:
The recent one we did.

ELIAS CJ:
Oh, yes.

GLAZEBROOK J:
That was the issue there was more the party to the offending.

MR ZINDEL:
So just – in terms of the filter, what's capable of being indecent and so on in my submission the Court does have a role to provide some workable test as to what conduct should not go to a jury. It should not be enough to say that any interactions with an element of salaciousness or whatever should just go to the jury and let them work it out but that's not the judicial function, in my submission. There needs to be some control and that's why I pose it in terms of it not being indecent if you can ordinarily see the particular presentation which the subject matter of the photographs chooses to give. That's very different from *Annas* where, okay, she may have misguidedly consented because of her age and because of the prior grooming, very different from that and the pornographic poses that she was in there compared to the situation here. And one should be careful about adopting too broad a view of what indecency might mean and just saying, well, it's a factual issue. Otherwise anything which might cause some distaste or be a bit dodgy could end up just being prosecuted by an agency and then join the jury trial in-tray and then no real guidance because this case is really quite a wide precedent, this Rowe case, and could encourage prosecutors to charge all manner of things as being indecent.

FRANCE J:

Just in terms of the meaning of “indecency” and looking at sections 124 to 126 together, 124(6), that’s talking – 124 is talking about indecent distribution or exhibition of indecent matter and there’s a reference there to the Films, Videos and Publications Classification Act 1993.

MR ZINDEL:
Yes.

FRANCE J:
I just wondered whether anything could be drawn from the interrelationship between that provision and the exclusion of material in terms of the Films, Videos Act.

MR ZINDEL:
Yes, I suppose if the censor regards something as objectionable that seems to have its own status.

FRANCE J:
It’s just that that applies whether the publication is objectionable within the meaning of that Act or not and I just wondered whether that suggests that – that scene might suggest that material could be indecent although not objectionable.

MR ZINDEL:
That's right. It doesn’t want to bind the hands of the censor. Yes, that would be true, Justice France. I couldn't take issue with that. That seems to allow control of objectionable or other material.

ELIAS CJ:
It’s a slightly odd subsection, isn’t it? I mean, I don’t know. It would seem to be excluding the most serious offending.

MR ZINDEL:
It’s a publication under the Films Act but it extends to photos, videos, films.

FRANCE J:

I suppose I was thinking about it in terms of that heading of that part, which is crimes against morality and decency, and quite what one draws from that.

MR ZINDEL:

I suppose that Parliament didn't want to have a two-tier system.

ELIAS CJ:

That objectionable material is dealt with only under the Films, Videos, Publications Classification Act, which presumably creates an offence.

MR ZINDEL:

Or any publication, objectionable or not. It seems it's got its own pathway.

ELIAS CJ:

Or not. It's very strange provision. I suppose it depends on publication as defined in that Act.

MR ZINDEL:

So there is material, in my submissions, under those English cases, *R v Court* [1989] AC 28 (HL) and *R v Graham-Kerr* [1988] 1 WLR 1098 (CA). Do Your Honours wish any submissions on those? Those cases seem to emphasise the objective nature of the – the extrinsic circumstances of the Act as opposed to what the motive of the perpetrator was.

ELIAS CJ:

Yes.

MR ZINDEL:

I appreciate there are different statutory provisions in issue and some of those cases talk about indecent photographs compared to indecent assault. In indecent assault you'd have more of an intent motive comes into it. This is indecent act. In my submission, still – as with the indecent photographs cases

in England – you still look at the Act as to whether it objectively is indecent and you don't press into service the sexual motivations, but I'm conscious as a majority decision in *R v Court* where the reasoning of the majority has been quite trenchantly criticised by Glanville Williams, but still it is a majority decision where they say that you can bring in sometimes circumstances of motive or intention. Lord Goff in dissent said that that wasn't appropriate. But the material is set out in my submissions on that difficult area and my overall submission is that you must look at the act itself as to whether it's indecent, not look at it whether the person has any other salacious motives.

I suppose on that, I refer in paragraph 69 of my submissions to *R v Pratt* [1984] Crim LR 41 decision where the English Court indicated that there wasn't an indecent assault where the cannabis dealer had stripped some teenage boys to search for cannabis. I suppose if you have oblique intent, if you think that stripping is necessary, is going to be the virtual – you're creating a situation of indecency, potentially, in the course of some other action. If you have a virtually certain kind of test on oblique intent is the argument that *R v Pratt* would be covered as not only cannabis offending but also an indecency of some kind, particularly if the search of the boys was intrusive. Or do you say, well, while it looks a bit suspicious, it looks a bit indecent, what you're doing, nevertheless you can give evidence that your actual intent was the comparatively – looking for cannabis or money rather than trying to be indecent. So it's just a reminder of oblique intent having to be handled with some care. No difficulty for the cases that are referred to in Glanville Williams' article.

ELIAS CJ:

Just looking ahead in terms of your submissions, where do you want to take us? Because you've really covered, haven't we, the width of the intent test and the submissions based on section 216?

MR ZINDEL:

Yes, I have. I've covered most of them.

ELIAS CJ:

And officially induced error. So you've really covered your submissions, have you? Is there anything …

MR ZINDEL:

Yes. I would just perhaps conclude if you've got time for privacy one more reprise on privacy.

ELIAS CJ:

Yes.

MR ZINDEL:

It is such a multi-layered concept. I see that in the J K Rowling case – the *Murray* case – there was some reading down of *Hosking v Runting* [2005] 1 NZLR 1 on the basis, I think – well, counsel indicated that they don't have – New Zealand doesn't have the same privacy imperatives than they have in Europe. They don't have Article 8. But we have the Privacy Act 1993, so we have quite – in my submission, we have quite a developing law of privacy as well and quite a lot of respect for privacy, even though we also have freedom of expression values in the Bill of Rights, and a photographer is presumably exercising their freedom of expression as well. So privacy plays into this to some degree, even though it's a criminal case. It's not a civil case. But there are a number of factors that come into this. I touched on some at the start, technology, zoom, dissemination, and so on. In my submission, the facts of this case, the zoom was quite modest. The dissemination, there's no evidence of that. There's no right to an image that's clear from English law, at least. That may be seen in the *Murray* decision. I know it's a civil decision. But the Court of Appeal made it clear there was still no right to an image in English law. If I can just take you to that, tab 24 of Crown volume 1, paragraph 54 on page 439 of the Crown bundle.

ELIAS CJ:

Sorry, what tab is that?

MR ZINDEL:

Tab 24. This is a case involving J K Rowling's year and a half year old son, David. She or her husband or both were taking him in a pushchair, so it's quite similar to the *Hosking v Runting* case. It was in the street. There wasn't any real public interest apart from her identity, apart from the mother's identity, and the trial Judge, on an interlocutory basis, it must be said, had indicated that there wasn't the necessary protection of routine activities engaged by Article 8 in the European jurisprudence.

Paragraph 54, the Court of Appeal there indicated – again, an interlocutory decision – but that it didn't accept that if the claimant succeeds in this particular action the Courts will of created an image right, so there's still no right in English law to – a right to your image. So photography is not so special. People need protection from it if they're doing routine things, and there's no distress or privacy intrusion like the Naomi Campbell case where she was going to her drug rehab.

So on a civil basis, taking a photograph in a street is not necessarily objectionable. The law has grown in Europe, particularly with the Princess Caroline case, where she was pursued for 10 years. She was no real public figure. She was doing routine things. On a civil basis, she got injunctive relief to stop being harassed. So you do have a right to privacy, even as a celebrity. You don't have any public functions. There's no element of public – real public interest in what you do, but even on the authorities there there's no right to – no image right in English law.

So I say the same here. You don't have an absolute right not to be photographed, particularly in a public place. It's relevant that on the assessed evidence there was some covertness, perhaps. There's no harassment, as some of the cases talk about. It's not a situation where the subject matter is particularly traumatic, as we've discussed, or arose beyond their control. This article that's – Moreham's article in Crown bundle 2 is relevant there. Various pointers are referred to about whether there should be a privacy interest recognised. One aspect was whether the subject matter were drawing

attention to themselves in the way the girls were posing for their parents. They were fully aware that they were going to be photographed by somebody. It's just they were incidentally photographed by somebody else. In that article, Associate Professor Moreham uses that phrase "self-presentation efforts", and in this case self-presentation efforts were not circumscribed or overcome. Even bearing in mind that they are under 18, they still have some rights as to how they present themselves.

So the relevance of what I've said is that while there's potential breach of privacy issues in what the appellant did, it's not enough to transport it to criminal liability. Breach of privacy by itself is an ingredient in the Annas test is problematic because it is such a wide concept and for criminal law we should have a more narrow, easy-to-apply test than referring to modesty or breaching privacy, or actions which have a tendency towards that effect which is even more nebulous.

So unless Your Honours have any other questions, those are my submissions. Thank you.

ELIAS CJ:
Yes, thank you. Thank you, Mr Zindel.

Yes, Mr Horsley.

MR HORSLEY:
Thank you, Your Honours.

I think possibly the logical flow of this would be to address the separate elements of this offence. First, was it can the act of photography be an indecent act in itself? Second, was this particular act of photography indecent, and third, did it have the necessary third element of an intention to insult or offend?

O'REGAN J:

He was actually charged with intention to insult here, not offend, wasn't he?

MR HORSLEY:
Yes, he was, he was, Your Honour.

And if Your Honours are comfortable with that order of process, and I'm happy to change that in any way Your Honours see fit, but perhaps we commence at least with whether photography can be an indecent act.

Now, I can just refer Your Honours to the Crown submissions on this. They appear from effectively paragraph 29 on page 11 of our submissions and I just wanted to check with Your Honours. The Crown submissions are hyperlinked to all of the Crown cases and if Your Honours are working with the electronic file, that is actually a relatively easy way to get to some of the casebook. But I see that –

ELIAS CJ:
We're not working off it in Court. I think we did find it very helpful in reading. But we're not set up to do that in Court here.

MR HORSLEY:
Thank you.

WILLIAM YOUNG J:
Is *Farnham v Police* HC Christchurch AP 117-91, 5 June 1991 the case – the judgment of Justice Tipping – that's not hyperlinked. I haven't checked that, but I don't think it's in your bundle of authorities.

MR HORSLEY:
If it's not in the bundle of authorities, Sir –

WILLIAM YOUNG J:
Then it won't be hyperlinked.

MR HORSLEY:

Then it won't be hyperlinked. No, it's not in the bundle, Your Honours. On the taking of photographs, this is simply whether the act of actual photography can be an act and in the Crown's submission it's a relatively simple submission and that is that of course it can be. The act of photography involves a deliberate movement. It involves the obtaining of a camera, pointing it at a person, and the conscious intent to actually capture that person's image. On that very analysis in its most simple forms, it must be an act.

ELIAS CJ:

Doesn't it have to be – I know you're going to come on to look at indecency but isn't it the composite term, an indecent act, rather than an act?

MR HORSLEY:

The only reason we start this way is because in fact there's a suggestion – particularly coming out of *R v S* – that the act of photography itself could never be an indecent act and in fact in a very short passage in *R v S* they say they agreed with – I think it might have been Bruce Squire, as he was then, agreed with counsel that the act of photography is no different from looking at somebody, in which case that cannot amount to an act sufficient to form criminal liability for the purposes of section 125 or 126.

In my submission – and I may not have to go far with this –

ELIAS CJ:

But that was put on the basis that it's not an indecent act. So why don't we just close on whether it's an indecent act?

MR HORSLEY:

I'm happy to move to that if the rest of Your Honours –

ELIAS CJ:

But it's not – it may not be quite the same thing as an act in circumstances of indecency. I mean, it may be but it may not be. Which is why I'm questioning whether you should look at the act when the expression in the section is "an indecent act".

MR HORSLEY:
Yes, Your Honour, and just to make that very clear, then, that would be on the premise that, of course, the act of photography can amount to an indecent act in certain circumstances.

GLAZEBROOK J:
Can I just – before you do go on to the indecency, do you accept that just looking isn't an indecent act and then –

MR HORSLEY:
No, Your Honour.

GLAZEBROOK J:
All right. So looking can be an indecent act as well. So really the submission is that "act" just means "doing anything".

MR HORSLEY:
Well, effectively it does come down to that.

GLAZEBROOK J:
All right.

MR HORSLEY:
It is doing something. That's right. I think it's the case which made it clear that peering over the top of a toilet cubicle and looking into the cubicle itself –

WILLIAM YOUNG J:
But that's not just looking, I suppose, is it?

MR HORSLEY:

Well, the actual act is the act of looking over a cubicle. There wasn't any capturing of the image by some other way. There wasn't anything.

GLAZEBROOK J:

Well, presumably he had to climb up to look over.

MR HORSLEY:

Well, exactly, Your Honour.

GLAZEBROOK J:

So the act could well be the climbing up or using the mirror in those circumstances.

MR HORSLEY:

That's right, Your Honour.

GLAZEBROOK J:

But if the toilet door is open and somebody comes in and looks at someone sitting on the lavatory –

MR HORSLEY:

And continues to do so. But it also could be an indecent act.

GLAZEBROOK J:

So the immediate looking isn't but not turning your eyes away?

MR HORSLEY:

Well, only because of the rest of the provisions would probably save you in that circumstance. So I suppose really what it comes down to is that it is all around the circumstances that surround the particular act and the Crown is saying that there is no reason for limiting the act to a handheld mirror can be an indecent act, but the taking of a photograph in the very same situation cannot be. And I think, Your Honour, the Chief Justice has probably worked

me on that and is probably more keen to move to the let's look at the circumstances of indecency, and I'm happy to do that.

ELIAS CJ:

Well, I'm just querying whether – well, it may be that any act in circumstances of indecency but it may not be. It may be narrower than that, an indecent act. It's just a question.

MR HORSLEY:

Well, certainly – and I'll put this to one side because we can always come back to it.

ELIAS CJ:

I mean, everyone would accept that flashing is an indecent act. But you need to say that anything done in circumstances of indecency is an indecent act.

MR HORSLEY:

I'm not so sure that I need to be quite so broad, but certainly I need to be able to establish that the act of photography in circumstances of indecency can give rise to criminal liability, and that is the purpose of those short paragraphs from paragraph 29 through to – and we deal with visual observation in those paragraphs – through to – I say short paragraphs but we merge going right through to paragraphs 44. But one thing that I think does come out quite clearly from both the definition provided by Black's Law Dictionary plus the cases that we've cited there is that other than *R v S* there seems to be a generally-accepted proposition that the act of photography itself can amount to an indecent act obviously if the surrounding circumstances of the taking of that photograph are indecent. If Your Honours don't need to hear from me further on that, I'm happy to move into the circumstances of indecency.

So the next step is in this particular case could the taking of that photograph in the circumstances amount to an indecent act? It's important that we may have to deal with some of the hypotheticals but I would initially, at least, like to focus on the actual act that happened here. This was the surreptitious –

GLAZEBROOK J:

I'd prefer you tried to – at least at some stage – define what you mean by that.

MR HORSLEY:

By what, sorry, Your Honour?

GLAZEBROOK J:

In a more general sense, because it doesn't help going to the particular if we don't know what the definition is. Are you just relying on the *Annas* definition or what are you doing?

MR HORSLEY:

Sorry, Your Honour, yes, absolutely. So the Crown's position is that the *Annas* definition is a correct statement of the law as to what is an indecent act. That is that it is an act which is accompanied by circumstances that are an affront to the general public morality or offensive to the general public, and as Your Honour the Chief Justice mentioned, it is really a test that is quintessentially one for the jury. There is a screening exercise to be done by the Courts as to whether in fact a particular surrounding set of circumstances and acts could ever amount to an affront to the public, but beyond that the issue of whether in fact it was capable of being indecent is one for the jury. Now, the *Annas* test encompasses those concepts and –

GLAZEBROOK J:

What concept, sorry? Just the …

MR HORSLEY:

The affront to the community standard.

ELIAS CJ:

I'm sorry, I've just realised the time. Is it convenient to take the adjournment now? All right.

COURT ADJOURNS 11.29 AM

COURT RESUMES 11.48 AM

ELIAS CJ:
Yes, Mr Horsley.

MR HORSLEY:
Thank you, Your Honours.

So, Your Honour Justice Glazebrook, I had started by saying that I'd like to sort of go to the circumstances surrounding this particular act and talking about those circumstances that amount to one of indecency, and I think rightly you've asked me whether we endorse the *Annas* test and just what is the correct test for an indecent act. And I think we are at that stage where we are saying that it is the *Annas* test, that it is – that the act occurred in circumstances of indecency in the sense that it would be so regarded generally by right-thinking members of the community. From there it becomes important to look at what did happen here to see whether in fact the acts can amount to an indecency and we've talked about a number of aspects that get you some of the way there, and it's a combination of factors. There are the factors such as the breach of privacy and I'll have to talk to you in greater detail about that. There's the use of technology so the zoom lens in particular capturing the images of these girls. There is the surreptitious nature of the filming, the fact that there was no consent sought or offered for the filming, and the fact that there was no alternative legitimate interest in the filming, and the legitimate interest comes back to the difference between – my learned friend pointed out that these girls were posing for a photograph at one stage. They were posing for a photograph to be taken by their parent. Mr Rowe took that opportunity to surreptitiously take the very same photograph by zooming in and filling his camera lens with a photograph of these teenage girls in their bikinis.

O'REGAN J:

But the test you've just given would apply to a journalist taking a photo of the beach at Oriental Bay. They'd be arguably breaching privacy. They'd be using technology. They would be surreptitious in the sense that the subjects wouldn't know they were being taken. They wouldn't have asked for consent. So you're saying if you're a journalist you have a legitimate interest and if you're not a journalist you don't?

MR HORSLEY:
There may well be cases that are in that.

O'REGAN J:
Is that a basis to impose the criminal law? So we say two people do exactly the same act. One's committing an offence and one isn't because one's a journalist and one isn't?

MR HORSLEY:
Well, it's the entire surrounding circumstances so the journalist might be capturing images of Oriental Bay to publish in the papers about what a glorious summer Wellington has had.

O'REGAN J:
Yes. But that's worse from my subject's point of view because they're on the front page of the newspaper.

MR HORSLEY:
Well, possibly. But, of course, that goes down to a breach of privacy and possibly even tortious action or something like that.

O'REGAN J:
But aren't all your distinguishing factors here just facets of breach of privacy?

MR HORSLEY:
Except for the age of the girls, so that's not necessarily a facet. Well, it might be a factor going into whether teenagers have a greater expect –

WILLIAM YOUNG J:

Well, say these were a group of girls of, say, 19 or 20. Would it have been different?

MR HORSLEY:

Hypothetically, Sir, I think it could be different because just some of the analysis that the Europeans have used around protection of children, certainly under the age of 18. The European Courts have said that we have an obligation to protect the privacy of children.

WILLIAM YOUNG J:

But that's privacy. What troubles me is you've got lots of factors that point to what might be a rather low-level breach of privacy because it's, after all, referring to things that have taken place on a public beach, taking photographs in these cases that probably look almost exactly the same as the photographs that were taken by the parent.

MR HORSLEY:

Yes.

WILLIAM YOUNG J:

But it's a stretch to say that it's got a sexual component. I mean, it may well do have a sexual component but it's very hard to infer from the photographs or, indeed, anything else that would be material to the case that there was a sexual overlay to this. So how can you?

MR HORSLEY:

Well, on that point alone, Sir, he – Mr Rowe acknowledged that this was not for public dissemination for his so-called travel book, that he was intending to put this into a private folder that was marked, "Girls, blondes, Asians," categorised in such a way that it was for his collection of so-called "beautiful things" and it was for his admiration and gratification. So whether one calls that a sexual motive or some other personal gratification –

WILLIAM YOUNG J:

But doesn’t there really have to be a sexual motive to be indecent?

MR HORSLEY:

No, no, because of course indecency can be anything from the act of putting a condom over the Virgin Mary.

WILLIAM YOUNG J:

There are a whole lot of sort of hypothetical examples discussed in *Court*, but in the case of equivocal actions, or actions that are most equivocal, wouldn't you normally require a sexual motive?

MR HORSLEY:

I think that the sexual motive in particular in cases like this will come into the intention to insult aspect of the charge, and –

WILLIAM YOUNG J:

But what does “indecent” mean? Does it imply some sort of deviation from sexual norms?

MR HORSLEY:

No, just deviation from community norms, so –

WILLIAM YOUNG J:

But, I mean, bad language, is that indecent?

MR HORSLEY:

Well, it can be, Your Honour. Like, if somebody is walking along the beach calling everybody names –

WILLIAM YOUNG J:

No, but just using bad language, generally. It might be offensive but it wouldn't be indecent would it?

MR HORSLEY:

Well, that's where the community morays change from generation to generation, Your Honour, and saying, “Bugger,” on TV some 50 years ago may well have been met with a notion that that was an indecent statement. Saying it now, nobody even blinks, which is –

WILLIAM YOUNG J:

Saying to someone to their face, “You are a Nazi swine,” now that may be very offensive, particularly if it’s without basis in fact, insulting, and contrary to norms, but it’s not indecent.

MR HORSLEY:

It depends on the circumstances and it’s –

WILLIAM YOUNG J:

I mean, you can sort of divert a little from my point by referring to the sexual overlays of some of the standard insults, but it’s possible to insult someone otherwise than by reference to words that have an sexual overlay or connotation.

MR HORSLEY:

It is, and for instance those sorts of statements made in the context of an Anzac parade calling somebody a Nazi swine or something like that…

WILLIAM YOUNG J:

But it’s not indecent, it’s offensive.

MR HORSLEY:

No, it may not be, and it may be offensive behaviour because it’s likely to lead to public discord.

WILLIAM YOUNG J:

So why isn’t it indecent? Because it hasn’t got a sexual overlay.

MR HORSLEY:

Well, perhaps. It's difficult to look at the hypothetical without all of the surrounding circumstances, and in fact it could be indecent, I'm not saying that it isn't. But in that circumstance –

WILLIAM YOUNG J:

On that basis everything's indecent, which is a bit of a problem. I mean, just about, looking is indecent or can be, taking photographs can be indecent. It does seem a hugely expansive concept that you're advancing, subject only to the opinion of a jury as to whether it contravenes their standards of, it contravenes the standards of the community, and doesn't even have do it in a sexual way.

MR HORSLEY

No.

GLAZEBROOK J:

And possibly the illegitimate interest in filming which a journalist might have but anybody else wouldn't.

WILLIAM YOUNG J:

Say I'm in someone's office and I take a photograph of a private letter, I mean, that's with my cellphone. That would be a breach of norms but it's hardly indecent.

MR HORSLEY:

No, and I doubt that it would amount to indecency, Your Honour, whereas we've had situations –

WILLIAM YOUNG J:

Well, it's good of you to doubt it, I mean, I would have thought it plainly wouldn't.

MR HORSLEY:

Well, absolutely. And I'm prepared to concede that when I can't see anyone being charged with that, well not, with that particular offence.

WILLIAM YOUNG J:

All right. Well, what I wanted to distinguish is between breaching norms and breaching norms in a way that is properly regarded as indecent.

MR HORSLEY:

Yes.

WILLIAM YOUNG J:

Otherwise –

MR HORSLEY:

Can I go back to another example, because I think it is important that we understand that it's not limited exclusively to sexual conduct, although that is the most clear time that it comes up. We've had indecencies around things like using I think it was baby foetuses as earrings, and that was seen to be indecent. It's an affront –

WILLIAM YOUNG J:

In a case?

ELIAS CJ:

Sorry, baby what?

WILLIAM YOUNG J:

Foetuses.

MR HORSLEY:

Baby foetuses, dried baby foetuses were –

GLAZEBROOK J:

What was the offence? Can we go and look at the case?

MR HORSLEY:

I don't want you to get side-tracked by that too much Your Honour but…

GLAZEBROOK J:

It was an exhibition, it was *R v Gibson* [1990] 2 QB 619 (CA). Where are we?

MR HORSLEY:

Thank you. It's referenced in our submissions, Your Honour.

GLAZEBROOK J:

Have we got the case?

MR HORSLEY:

I'll just check with my learned junior. Sorry, Your Honours, it wasn't going to feature large in my submissions. But it is an example –

GLAZEBROOK J:

Well, it might well be important what exactly those cases are, and the disturbing the ashes of dead and putting them on the garden is a most indecent act.

MR HORSLEY:

Mmm.

GLAZEBROOK J:

Well, what were these cases about, what were the charges? We've got *R v Jacob* (1996) 142 DLR (4th) 411 (ONCA)…

MR HORSLEY:

Well, the one that you mentioned was the spreading of ashes that had been taken from the cemetery and was spread on the garden, that was deemed to be an indecent act because it was calculated – well, not calculated, but it had that gross offence to the public standard.

GLAZEBROOK J:

But what was the charge?

MR HORSLEY:

In that one – there's a list of them, Your Honours, in my submissions…

GLAZEBROOK J:

Yes, footnote 48 but…

MR HORSLEY:

48, thank you.

WILLIAM YOUNG J:

This is *Crowe v Graham* (1968) 121 CLR 375.

MR HORSLEY:

So it's difficult actually, Your Honours, because as my learned friend points out to me they are English offences and common law offences of outraging public decency in that case and –

WILLIAM YOUNG J:

Okay, well, that's slightly different.

GLAZEBROOK J:

Which is slightly different.

MR HORSLEY:

Well, it's the decency aspect of it, I suppose, that we're looking at.

ELIAS CJ:

Although this ambulatory meaning you say applies to this offence comes awfully close to making it a common law offence.

MR HORSLEY:

No, Your Honour, it's no different from an indecent assault, it's no different from other statutory provisions where you actually have to deem or find whether a particular act –

ELIAS CJ:

But it's grounded in the assault in that case, whereas this could be any, as you say, any act.

GLAZEBROOK J:

And *Jacob* says to be walking around with bare breasts, which they said it doesn't have to have a sexual content, but presumably bare breasts are offensive in public, in the same way that flashing is offensive in public.

MR HORSLEY:

Well, at least could amount to. So again, context and circumstance is important because bare breasts on a beach that has been categorised as a nudist beach will probably not, in fact won't be outraging community standards, it won't be offensive and it won't be indecent. So the critical –

GLAZEBROOK J:

But the taking of photos could be indecent if it's surreptitious on a nudist beach, if it's surreptitious and not by a journalist, and is that the submission?

MR HORSLEY:

Well, I'm not making a submission around that yet, Your Honour, but if you're asking me about that as a hypothetical then, yes, it could be. If somebody is using a zoom lens to get into that nudist beach in circumstances where people have no expectation of being photographed where they would not expect to have a permanent image recorded of them, let alone when it's going close-up onto their genitalia, then that can amount to an indecent act. And in fact the Canadians have that very situation with the, I think it was the *Rudiger* case, where the woman wore a Brazilian thong and was quite happy to wear that in public, yet it was a breach of her privacy to film –

ELIAS CJ:

It was a very different offence. So we really do need to focus on offences which are comparable, if you're asking us to reason from analogy from other jurisdictions.

MR HORSLEY:

I suppose, Your Honour, on one level I agree with you. Except that the argument here is that there can be no breach of privacy for young teenagers on a beach where they're wearing bikinis, because they have publicly put themselves –

ELIAS CJ:

Well, I'm not sure that we need to decide that at all.

GLAZEBROOK J:

I don't think that was the argument in any event, was it, that it might be a breach of privacy, it just shouldn't be one that the criminal law deals with. So in a civil sense it might be a breach of privacy but not one that the criminal law should be concerned with.

MR HORSLEY:

And certainly it is the sort of breach of privacy that the criminal law is concerned with because that is the point of the Canadian case, which is that you have to have a breach of the reasonable expectation of privacy before it incurs criminal liability in that context. That is the relevance of the Canadian cases.

GLAZEBROOK J:

Well, isn't that – well, let's go to that, the actual, because the offence actually says that doesn't it?

MR HORSLEY:

Yes, it does.

GLAZEBROOK J:

So, I mean, it's not – that's because the statute says you have to have it, not because it's implicit in the offending generally. Where's the – we had it a minute ago.

MR HORSLEY:

Yes. The point to it is that my learned friend –

GLAZEBROOK J:

"Everyone commits an offence who surreptitiously observes, including by mechanical or electronic means or makes a visual recording of a person, who is in the circumstances that give rise to a reasonable expectation of privacy, if it's done for a sexual purpose." So of course you have to have a reasonable expectation of privacy, the statute says so.

MR HORSLEY:

Yes, and so the point of putting those cases in to the Crown's submissions was that there was a suggestion that people who are on a beach wearing a bikini do not have a reasonable expectation of privacy, and if that is the case then that makes the taking of photographs of them far more legitimate. In this situation the Crown says we're supported by overseas authority which would suggest that even where you have put yourself out in public where you can be –

GLAZEBROOK J:

All right, so that's the only purpose you use in these cases, to say there can be a reasonable expectation of privacy?

MR HORSLEY:

And there can be acts which go to offend people because they have breached their reasonable expectation of privacy, yes, Your Honour.

ELLEN FRANCE J:

In terms of the context, I just have difficulty because if you look at 125 and 126 together they do suggest a focus on “indecent act” as it’s the act that you're looking at. In other words, I’m a little unclear about how it is you say the circumstances can play such a key role.

MR HORSLEY:

A role in that, yes. There are English authorities, mostly in the minority, Your Honour, where they suggest that you just look at the act exclusively, so you don’t take into account any of the surrounding circumstances. That's never been the position in New Zealand. We have, in terms of looking up whether a particular act is in fact indecent, we have always looked at the surrounding circumstances, so, as do the Canadian and I think the Australians too, which is that there is a big difference – which is why we say the act of a father taking a photograph of their child in a bath is very different from a stranger doing the very same thing. And let’s put that into the public arena, where you have a three-year-old who’s splashing around in an outdoor pool and is in the nude, then a father taking a photograph of that is quite a different proposition to somebody who had paedophilic intentions behind it, and so these surrounding circumstances are, as here, if they are hidden, if they have used the zoom lens to try to get closer to the child’s genitalia or –

ELIAS CJ:

But you don’t have to – oh, well – you don’t have to establish paedophilia tendencies for this offence.

MR HORSLEY:

You don’t have to, no, Your Honour, I’m just using that as an example.

ELIAS CJ:

Well, is it the sort of unspoken premise, is that what you're saying it is? Was that the answer to Justice Young, that there does have to be a sexual overlay?

MR HORSLEY:

No, it's the absence of a legitimate purpose really. But underlying that –

ELIAS CJ:

Well, suppose he just liked taking photographs of people who were un-posed, you know, it's your pageant of humanity that you're recording, someone like that, fine, they don't have a – they're not a journalist, they're not doing it for a living, but they take what they think are nice photographs of human beings. If there isn't a privacy offence of something like that, you would say, what, that it's not indecent if they didn't have a sexual urge?

MR HORSLEY:

Well, it comes down to whether there is that underlying intention to insult or offend as well…

WILLIAM YOUNG J:

It sort of folds it together though doesn't it?

MR HORSLEY:

It can, and that's that thing, because in fact the cases do suggest that, that the surrounding circumstances will often go to both aspects of that test. But the difference here between somebody with an interest in photography of, you know, humanity basically, is that that's not actually what happened here.

ELIAS CJ:

Are you sure? I mean, I don't know.

MR HORSLEY:

Well, that's certainly not the evidence.

ELIAS CJ:

Well…

GLAZEBROOK J:

Well, the evidence is that he had an interest in photography of particular types of girls he thought were attractive or similar.

ELIAS CJ:

And bridges.

MR HORSLEY:

Well, forget the bridges, because no one's suggesting that's indecent. But he has 2000 images of females.

GLAZEBROOK J:

So if he'd had 2000 images of a general view of humanity that would be all right, even if there was 500 images of young girls, but it's not all right if it's just young girls, is that the …

MR HORSLEY:

Well, the claim here was that 6000 of the images were meant for his travel book and that 2000 of the images were for his personal gratification, that he –

ELIAS CJ:

Personal enjoyment he said.

MR HORSLEY:

Well, he – exactly.

GLAZEBROOK J:

I mean, one can understand that one mightn't want to put specific photos of specific people in a travel book without asking their permission, because you're disseminating photos to other people. I mean, journalists will usually ask for people's names, even if they don't have to. So a journalist could take a photo on the beach of a whole lot of naked toddlers in the water to say what a lovely day it was. They would usually ask for permission, and they might because of concerns about issues with toddlers generally and photos of

children generally not put them in the newspaper. But that's not to say that if they did it would be a criminal offence, is it?

MR HORSLEY:
Well, that's the problem with –

GLAZEBROOK J:
I mean, there's journalistic ethics as against what you can and can't do legally.

MR HORSLEY:
Yes, and that's the problem with dealing with this hypothetical is that I can't give you an answer to every situation because they are quintessential jury questions, many of these.

GLAZEBROOK J:
So part of the jury question is there's some other legitimate purpose that you think a community would think was all right.

MR HORSLEY:
That's absolutely one of the factors that's weighed into the surrounding circumstances.

O'REGAN J:
So anyone who takes a photo of someone on a beach in their bathing costume is liable to be prosecuted and then we just see what the jury thinks about indecency? Is that what you're saying? I mean, that's basically what you're saying to us. Well, it'll all come out in the trial and the jury will come up with a wise answer and everything will be fine. But that's just not the way the criminal law works.

MR HORSLEY:
Yes. I understand that, Your Honour, and that's not what I'm saying. I'm saying that in this particular case there was sufficient that gave concern that a jury should look at it, and that's why I say I can't give you an answer to that.

Certainly that is not the case that anyone who photographs on a beach is in jeopardy of being charged with an indecent act or doing an indecent act. The circumstances of this case, though –

GLAZEBROOK J:
But how do people know when they're going to be charged and when they're not on the test that you are positing?

ELIAS CJ:
And what sort of behaviour to avoid doing if you don't want to infringe the criminal law.

MR HORSLEY:
Well, the behaviour that you should avoid doing is surreptitiously filming 13 to 15 year olds who are in bikinis using a zoom lens.

ELIAS CJ:
Does it matter that they're in bikinis?

MR HORSLEY:
Yes, it does.

ELIAS CJ:
Why?

MR HORSLEY:
Because of how scantily clad they are.

ELIAS CJ:
Well, but they're not committing an indecency in a public place.

MR HORSLEY:
No, nor is the person who loses their top.

ELIAS CJ:

Well, I can't see that it's material myself, that it's on a beach.

MR HORSLEY:

It changes the affront to the community standard. One might be quite happy to be photographed, for instance, in full clothing. That's a big difference from having pictures of you in minimal clothing being saved in a digital format available for dissemination, available to be enhanced, available to get closer to your genitalia.

O'REGAN J:

But he was charged – his last conviction was taking photographs of girls in school uniform.

MR HORSLEY:

Exactly. And again, I think that just shows what the community standard is, which is that when you are a 60 old man using a zoom lens to –

ELIAS CJ:

So that enters into it, too? The identity of the person taking the photograph? Not just their motive but …

MR HORSLEY:

Well, it's not their parent, yes. It's not a boyfriend.

ELIAS CJ:

So a young person – I see. Perhaps moving away from this a little bit, do you accept that he could have been charged under section 125(1)?

MR HORSLEY:

No.

ELIAS CJ:

Because it was within a public place.

MR HORSLEY:

No, he couldn't be because he had a defence of believing that he wouldn't be observed.

ELIAS CJ:

Well, no, leave aside the defence for a moment. On your view, there's a completed offence subject to the defence under (1), isn't there?

MR HORSLEY:

Yes.

ELIAS CJ:

Okay. And so (2) makes it a defence if you believe on reasonable grounds you wouldn't be observed. Doesn't that suggest that the nature of the act is something that is intrinsically indecent?

MR HORSLEY:

Well, that's right, but that particular section the focus is actually on you doing an act which is intrinsically indecent.

ELIAS CJ:

So then you would say he couldn't have been charged under subsection (1), because this isn't intrinsically indecent?

MR HORSLEY:

Well, no. I say that that's the focus of it, I'm not saying that you couldn't charge.

ELIAS CJ:

Well, I'm just trying to understand the scheme of the Act, and just reading the scheme of the Act it does seem that 126 is there to cover the situation in which what you do that is indecent is not in a public, whereas 125(1) is if it's in

a public place. And then you have the additional overlay in 126 that it must be done with intent to insult or offend, which is not present in 125.

MR HORSLEY:

Well, perhaps I can explain that then. Because the difference with 126 is that it allows for the offence to be committed in any place, so whether that's public or private.

ELIAS CJ:

Yes, no, I understand that.

GLAZEBROOK J:

So wandering around with the intent to insult your neighbour in your back yard would come within 126?

ELIAS CJ:

Yes.

GLAZEBROOK J:

And one would have thought that's what they were looking at, so effectively standing in your back yard doing whatever you might be doing, unclothing yourself, flashing in your back yard with intent to insult your neighbour, would seem to be the quintessential act under 126 isn't it?

MR HORSLEY:

Well, I would have thought the quintessential act in 126 was probably taking paedophilic photos or doing something like that inside your house –

ELIAS CJ:

Well, I think it's not helpful to use those terms. We're trying to unpack what the language of the section is.

MR HORSLEY:

I'm sorry, Your Honour.

ELIAS CJ:

And if – surely an indecent act in 125(1) must be the same as an indecent act in section 126, that's all I'm putting to you.

MR HORSLEY:

They could be, they could be, there's no doubt about that.

ELIAS CJ:

Well, I don't understand the distinction in those two proximate provisions which has an overlay if you're in a private place.

MR HORSLEY:

The distinction is one's about observation, because you're in a public place, versus being in a private place where you have no expectation of being observed and you are doing an act which is intended to insult –

GLAZEBROOK J:

Well, you'd have to have some expectation of being observed because you insult – well, you couldn't insult someone without an expectation of being observed could you?

ELLEN FRANCE J:

Sorry, could you just – could Mr Horsley just explain…

GLAZEBROOK J:

Sorry.

ELLEN FRANCE J:

You were saying one is about observation in a public place and the other is…

MR HORSLEY:

The other is that it occurs in circumstances where there is no need for observation outside, obviously, the fact that you have to insult or offend somebody, that is right. But it's not about whether you're observed in that act so much as whether you have an intention to insult or offend any person. And

the authorities make it very clear, as Your Honour Justice Glazebrook was just saying, that you can't commit this offence if there is no second person because there can be no intent to insult in those circumstances. So, yes, I'm not saying that that sort of observation won't occur.

ELIAS CJ:

I would like to put to you that both sections are concerned with the impact on public welfare, because that's the heading to this whole part, or crimes against morality and decency. Both are concerned with what is observed of you, that's made quite explicit by subsection (2) to section 125, and it's the thrust of 126 as well. So that what matters is the impact of the act that you're taking.

MR HORSLEY:

Well, certainly the impact is what's targeted under both of these.

ELIAS CJ:

Yes. But I would have thought the indecent act must be an act of the same quality under both provisions here.

MR HORSLEY:

I'm not sure I understand that. It has to be an indecent act. There's no doubt about that.

ELIAS CJ:

Yes.

MR HORSLEY:

So to put it bluntly, an act of masturbation in public will be caught by –

ELIAS CJ:

125(1).

MR HORSLEY:

125(1).

ELIAS CJ:

But it will not be an offence under 126 unless you do it with intent to insult or offend any person.

MR HORSLEY:

Correct, correct.

ELIAS CJ:

Well, I understand that.

MR HORSLEY:

But that same act, if you were doing it with another person with that intention, could be captured by both.

ELIAS CJ:

Well, both could be captured by both if you don't have the defence under subsection (2) of section 125.

MR HORSLEY:

Yes.

ELIAS CJ:

But there's something in the nature of the act itself that is an affront, it seems to me, in both sections. Whereas your argument relies very much more on the intent to insult or offend as enlarging the scope under section 126.

MR HORSLEY:

If I've led you down that path, then I'm –

ELIAS CJ:

Maybe I've got that wrong but that's what it seems to me.

MR HORSLEY:

Yes. No, because the affront part of it is exactly what I was agreeing with in terms of the Crown says that there has to be an affront to public decency for it to be an indecent act. That's the very test that the jury is asked to decide upon. So that's why I come back to the circumstances of this, and that is that nobody finds it an affront for a parent to take a photograph of their child on a beach. They do find it an affront for a 60-year-old man to take a photograph using a zoom lens and taking it for their personal gratification with no other legitimate purpose.

ELIAS CJ:

I understand that, but why, then, is it – why, then, is there the defence provided in subsection (2) if it is simply what you're intending? Because subsection (2) makes it a defence that you don't – that you have reasonable grounds for believing you wouldn't be observed.

GLAZEBROOK J:

The more surreptitious you are in taking the photo the more defence you have under 125.

MR HORSLEY:

Yes, but that's why – because 125 is – you don't have to have an intention to insult or offend to commit an offence under 125.

ELIAS CJ:

But that's because of the place in which you're undertaking the indecent act.

MR HORSLEY:

Well, you might think that there's automatically an intention to offend or that you know that you will offend.

ELIAS CJ:

But it's not a defence if you're doing it in public under 125.

MR HORSLEY:

Well, it is because your defence – well, your defence under 125 is that your offensive act could not be seen or you reasonably thought it would not be seen.

GLAZEBROOK J:
So the more surreptitious you are in taking the photo, the more you're likely to have a defence under (2).

MR HORSLEY:
Yes, which is exactly why 125 was not the correct charge here. 126 was the correct charge.

ELIAS CJ:
Well, to me it seems that neither may be the correct charge because the indecent act must be something that is in itself an affront to anyone observing and that the difference between 125 and 126 is simply it's in a private place and therefore you need to have intended to insult or offend.

MR HORSLEY:
I understand.

ELIAS CJ:
But on your argument, 126 is a much wider offence than is available under 125.

MR HORSLEY:
It's a more difficult offence to prove for the Crown because of that additional mens rea element, definitely.

ELIAS CJ:
I understand. Thanks.

MR HORSLEY:

Your Honours, does that – I'm not sure whether that has adequately covered the Crown's position on what amounts to an indecent act and that it is – but it is a very simple submission, really, that it is an act which is, in the *Annas* words, an act that is made, "In circumstances of indecency in the sense it would be so regarded by right-thinking members of the community," it's an affront to decency, and that the surrounding circumstances of the act are relevant when one looks at whether the particular act does pass that threshold, that's the basic Crown's –

GLAZEBROOK J:
Surrounding circumstances and motives of the actor?

ELIAS CJ:
And age of the actor?

MR HORSLEY:
Relationship of the actor to the people, all of those surrounding circumstances that are there. So when the public is informed of what has occurred in that situation they say, "Is that or is that not an affront that warrants the intervention of the criminal law?" And in the particular circumstances –

WILLIAM YOUNG J:
And you say that they can do that devoid of any sexual content or sexual overlay?

MR HORSLEY:
In circumstances outside of this one, definitely, in circumstances of this one it's more that you might not call it sexual, you'd call it something like gratification, because the evidence around –

WILLIAM YOUNG J:
But that is sexual.

MR HORSLEY:

Well…

WILLIAM YOUNG J:

If sort of broadly construed. But you say what made this indecent was that it was for the purposes of sexual gratification?

MR HORSLEY:

No, I say it was for – I would omit the word "sexual" because I think the evidence around exactly what sort of gratification, albeit that you can suspect what he may be doing with it, was not – I think it was the *R v Taylor* [2015] ONCJ 449 case or the *Rudiger* case, I can't remember, where the person was actually in the van taking images and clearly masturbating to those images – there is not that sort of context to this one. But he has taken those images of people in circumstances where there is no legitimate purpose to it and in circumstances where it is purely for his own gratification, so there's no overlay –

GLAZEBROOK J:

So if he had been a 25 years old woman who liked taking photos and was particularly interested in photos of young girls with no sexual view to it whatsoever, then that would have been all right?

MR HORSLEY:

Well, it's hard to know what the surrounding circumstances would that incur.

GLAZEBROOK J:

Well, exactly the same circumstances as now.

MR HORSLEY:

Yes, it's difficult, because the minute you put a slant of a female taking photos of a teenage girl we assume that they are heterosexual females and that –

GLAZEBROOK J:

Well, let's assume she is heterosexual, or not heterosexual, but community standards may say that's perfectly all right mightn't it, without even knowing one way or the other?

MR HORSLEY:

Well, they may, because to be perfectly frank the thing that probably upset a 13 year old girl the most is that a 60 year old man has images, close-up images of her body –

GLAZEBROOK J:

Sorry, we're morphing into intention to insult now rather than looking at the act itself.

MR HORSLEY:

Well, there is a bit of morphing because, as I said, the surrounding circumstances are relevant to both the circumstances of indecency but also they go to whether there was a proof of an insult –

GLAZEBROOK J:

So community standards may say it's all right for a 25 year old woman to take these photos but not for a 60 year old man?

MR HORSLEY:

Well, let's put it this way: if the community says, "No, in general terms we do not think you would be affronted by a 25 year old woman taking photos of you because she has some legitimate purpose there, whatever that may be, but we understand that in our day and age of paedophilia, of dissemination of images onto the Internet, that a person who has a collection of photographs of young women, and you are now going to joint his collection of beautiful things, that actually that is an affront to community standards and those –

O'REGAN J:

So how would you re-write the police guidance that he relied on? So if I'm a member of a camera club and I take photos of various places, what guidance would you give me? You'd probably say, "Don't do it because you're a 60 year old man."

MR HORSLEY:

I'm creeping there too, Your Honour.

O'REGAN J:

I mean, this is an important point, because there are people who legitimately take photos and they need to know are they crossing the line of the criminal law or not?

MR HORSLEY:

There are, Your Honour, and I do accept that, and I think that the difficulty with the police advice is that it actually did say that if you're going to interfere with the use of the beach by your acts –

O'REGAN J:

Well, no, it didn't because it said – the last sentence said, "However." It qualified all of that earlier stuff and said, "There's no problem taking photos on the beach because no one has a reasonable expectation of privacy." It was completely unequivocal, that last sentence.

MR HORSLEY:

Yes, although one could argue that the police probably hadn't thought about the circumstances that surrounded some of this photography when they published it.

O'REGAN J:

Well, we're talking about in the past but we're told by Mr Zindel that it's actually in the present because it's still the police guidance, notwithstanding the Court of Appeal decision in this case.

MR HORSLEY:

Yes, I totally understand that too, and I'm not going to try to defend what that advice says. But it is couched in terms that there are privacy concerns about taking photographs in public and of people that you should ordinarily take – that you should get consent, taking photographs on a beach.

O'REGAN J:

Actually, what it says is however – sorry, it sets out the equivocal stuff you've talked about and says, "However, you can take and/or publish photos or film people where there is no expectation of privacy such as a beach." That's what it says.

MR HORSLEY:

Yes, it does, and it's wrong to that extent, quite frankly.

GLAZEBROOK J:

So how would you rewrite it?

MR HORSLEY:

I'd delete that last bit, Your Honour.

GLAZEBROOK J:

Well, that's not very helpful because you say you can take photos on a beach without offending the criminal law.

MR HORSLEY:

I'm not going to attempt to draft it on my feet right now, but certainly when people are talking about expectations of privacy, then I think you have to be couching it in terms of you need to be careful about people's expectations of privacy and to not breach them, because the police are clearly wrong about that and in a civil sense they're wrong about that straight away, so advising people that it's okay –

GLAZEBROOK J:
Well, are they?

MR HORSLEY:
Internationally, yes.

GLAZEBROOK J:
Well, in New Zealand I don't think that –

MR HORSLEY:
Even *Hosking v Runting* would suggest that there might be circumstances on a beach where –

GLAZEBROOK J:
Well, very limited circumstances, *Hosking v Runting*.

MR HORSLEY:
But even so, it just shows how difficult and how probably inaccurate that police advice is, and certainly – well, I'm not going to get into whether that was properly relied upon but I certainly accept that the guidance around this is inadequate, probably, and certainly the police guidance on it is inadequate. But when comes back to the circumstances of this particular offence, you've got to be asking was there sufficient in the circumstances around this particular indecent act that it warranted going to the jury, and if so failing some aberrant behaviour by the jury then there is a proper conviction that has been entered here because that jury has found that Mr Rowe's standards or conduct breached the morality of our community standards, the exact offence it's designed to capture.

ELIAS CJ:
Can you explain to me – sorry, I can't get into libraries on my screen so I don't have the text of the Bill of Rights Act in front of us. But how does this leave it to the jury mesh with the human rights requirement that the criminal law be certain?

MR HORSLEY:

Well, I don't – in my submission, it doesn't come into it because you can read this statute, you can take advice upon it, it is certain. You can actually go and speak to a lawyer about what you're about to intend to do and say, "Do you think I'm committing a criminal offence here?"

ELIAS CJ:

But really, if it depends on all the circumstances that is something that is only going to be assessed after the event.

MR HORSLEY:

Well, absolutely, Your Honour, and that's just a matter of fact for the jury. There will be degrees.

ELIAS CJ:

Well, hang on. If it's only going to be assessed after the event, doesn't that run foul of the requirement that the criminal law be ascertainable in advance and certain.

MR HORSLEY:

Well, we can't ever prescribe exactly what conduct will amount to an indecent act.

ELIAS CJ:

All right, thank you.

MR HORSLEY:

You can't have the full parameter of that. So instead we set out what –

ELIAS CJ:

Look, I accept that on the margins.

MR HORSLEY:
Sorry.

ELIAS CJ:
I do accept that on the margins. But this seems to be so imprecise.

MR HORSLEY:
I understand Your Honour's concern and in fact Justice O'Regan's concern about the limits to which an indecent act can go to, but in my submission that's not a Bill of Rights issue, it's about whether in fact this particular circumstance does amount to an indecent act.

Your Honours, does that cover at least the indecent act aspect of the submissions?

ELIAS CJ:
Yes.

MR HORSLEY:
And, if so, I'll take you to the insult, the intent to insult. And I think the only issue, and it may not even be an issue for this Court, is the suggestion here of the oblique intention, and I think –

WILLIAM YOUNG J:
Well, no, I don't think it is. Myself I'm troubled as to whether you can intend to insult someone without the intention that your actions will come to their attention and annoy them.

MR HORSLEY:
Yes, so that is the oblique intention.

WILLIAM YOUNG J:

I thought the oblique intention is even if you don't intend to insult someone because your primary intention is simply to gain pictures for your gratification, you are guilty if you know that they will be cross.

O'REGAN J:
If they find out.

MR HORSLEY:
Yes…

ELIAS CJ:
No, not…

WILLIAM YOUNG J:
But you have to contemplate they'll find out.

ELIAS CJ:
Yes, if they find…

WILLIAM YOUNG J:
I mean, I would have thought the oblique intention argument would at least contemplate that there would be, that they would realise what's happening.

MR HORSLEY:
So the –

WILLIAM YOUNG J:
But, I mean, at least for me, just given the fact that this does seem to me to be aimed at exhibitionism, I would have thought on the whole it is the, the gravamen of the offence is actually offending someone.

MR HORSLEY:
Yes, it is, and that's your classic indecent act with intent to insult or offend, definitely. But don't forget there are other circumstances, for instance where photographs have been taken of children who are actually unaware and

perhaps even incapable of, at least at that stage, of understanding that what has happened to them is an indecent act and that it's an affront to their dignity and an insult to them. So that is why we have an oblique intention here and why the act is actually complete when the person couples that mens rea of the act of taking the photograph knowing that at that time the inevitable consequences of his action is that he has actually insulted that person in the sense that that person's dignity has been stripped from them, even though they didn't realise it at the time. So that applies to a child –

WILLIAM YOUNG J:
This just comes from *Annas* does it?

MR HORSLEY:
No. The oblique intention is –

WILLIAM YOUNG J:
No, perhaps – because I think the expression "oblique intention" is a bit ambiguous here.

MR HORSLEY:
Certainly, Sir.

WILLIAM YOUNG J:
Where does the idea that it's enough to insult someone's dignity, you don't actually have to insult that person come from?

MR HORSLEY:
Mostly *Annas*, it's also discussed in – I'm trying to recall the case, Sir, that was the child – I think it's in the so-called "dolly" case as well, Your Honour…

WILLIAM YOUNG J:
But that's the *Price* case.

MR HORSLEY:
Yes.

WILLIAM YOUNG J:

But that's slightly different because that just turned on the vagaries of whether the little girl was or was not insulted, it was an action that would be, it involved direct physical interaction between the defendant and the victim of the offence.

MR HORSLEY:

But again it's the same sort of thing, it turns on the vagaries – well, they wouldn't allow it to turn on the vagaries of whether the particular person was actually insulted.

WILLIAM YOUNG J:

Yes, well, I understand that. But terms of where there's absolute – I mean, there really is an intention that you not be caught, the intention is not to affront someone, the intention is to do something surreptitiously. Where does the idea that that is within the offence come from? It's an extension of *Annas*, really, isn't it?

MR HORSLEY:

No, I don't think so, Your Honour, because it is – it's simply saying that this offence is complete at the time you complete the act and there's no requirement, nowhere in the section does it say that you actually have to have insulted. It's just that you have that intention to. If it was going to be –

WILLIAM YOUNG J:

Normally it refers to something that's practically inevitable.

MR HORSLEY:

Yes.

WILLIAM YOUNG J:

Well – but here it's not practically inevitable. It would be dependent upon whether the other person learns about it.

MR HORSLEY:

Which is the –

WILLIAM YOUNG J:

The practically inevitable subject to a very big condition.

MR HORSLEY:

I suppose so, except it's the inevitability of that act to cause insult and it might be that you never actually hope to get caught but that's not the point. You know that you have caused and that your act will cause insult when you do it.

WILLIAM YOUNG J:

Say I fire a rifle around a corner. I know it's practically inevitable it will cause bodily injury to anyone who happens to cross into the line of fire, but it will only do it if they do so. I don't think that would be an intention to injure, would it? Or I would be acting with reckless disregard. But I wouldn't be intentionally injuring that person.

MR HORSLEY:

I don't think that's …

WILLIAM YOUNG J:

Because it's so conditional.

MR HORSLEY:

Yes, and I don't think that that's the right example, Your Honour. But for instance, this offence would be complete, in my submission, at least, if you took an image – and I understand that this is something that happens – but if you took an image of a person and then a photograph of you having masturbated on that image and posted it, now, the fact that – or were preparing to post it, at that stage you have done an indecent act. You have insulted their dignity and it's much clearer there. The fact that they don't know about it yet is not relevant, in my submission, to the actual intention that you had when you carried out that act, and here –

WILLIAM YOUNG J:

So you don't think it matters that it's conditional upon someone finding out?

MR HORSLEY:

Well, I don't think that's part of the offence. It's not about it being conditional. It's about somebody hoping that they will not get caught, which is quite different. His intention when he does it – and it's quite clear from the acts that he takes in trying to be surreptitious – is that he knows what he is doing is going to insult people.

O'REGAN J:

I disagree. I mean – well, I mean, anyone who wants to take candid photos does it surreptitiously. They use a telephoto lens. But that doesn't mean they're all weirdos.

MR HORSLEY:

No. I wasn't suggesting that. Sorry, Sir. It's way more about what he was doing here and about what he does with his collection.

O'REGAN J:

But what he was doing is exactly the same as what any other photographer would do. That's what I was saying to you. You're really just saying that two people could – another person could have been in the same carpark taking photos of the same girls and not been guilty of an offence because they were a woman or they were a news photographer or they had some particularly legitimate interest in photographs of children that you would classify as legitimate as opposed to his interest. So –

MR HORSLEY:

Only on the intent to insult or offend, Sir, and because in this situation it was basically did he know that those 13, 14, 15 year old girls would be insulted if they knew that he had zoomed in on them in their bikinis and taken

photographs of them for the purpose of putting them on to his computer for his gratification.

O'REGAN J:
Yes, but wouldn't they also be offended by a newspaper photographer doing that and putting them on the front page of the *Nelson Mail* when they didn't know about it?

MR HORSLEY:
They could be. They could be. But that won't necessarily –

O'REGAN J:
So you say that person has committed a criminal offence as well?

MR HORSLEY:
No, I don't, I don't because in fact he won't – that person won't have had that intention to insult or offend.

O'REGAN J:
Well, he must have had that intention. He's caused it. Are you saying he mistakenly offended them by putting them on the front page of the paper without their consent?

MR HORSLEY:
No. He's simply published – and again, the hypothetical has become quite tricky but one assumes that as a journalist he's taken a photograph of – I think my learned friend used Miss Kaiteriteri as an example – for purely the purpose of showing the winner of the Miss Kaiteri beach competition.

ELIAS CJ:
No, no…

O'REGAN J:

No, but let say he took these three girls that are in these photos, without them knowing, and the next day on the front page of the *Nelson Mail* or whatever it's called it said –

ELIAS CJ:

For all sorts of 60 year old men to look at.

O'REGAN J:

– "What a lovely day at Kaiteri, look at these three girls having a great time."

MR HORSLEY:

Yes.

O'REGAN J:

And they say, "Well, we didn't want to be on the front page of the paper in our bikinis and we are very offended by that."

MR HORSLEY:

So he has caused actual insult, it would appear. Did he intend to cause it? No. So he hasn't committed an offence.

WILLIAM YOUNG J:

But it's far more likely that the prospect of insult would have been far more prominent, one would have thought, in his mind than actually in the mind of Mr Rowe.

MR HORSLEY:

Well, we don't know, Sir, like we don't know whether –

WILLIAM YOUNG J:

I know, but it's a matter of logic, I mean it just – I know we don't know, but he would know that he was doing something that would come to their attention and about which they might take offence.

MR HORSLEY:

Well, that's entirely theoretical, and in my submission, Your Honour, those girls would have taken way more offence at being captured by Mr Rowe and being held in his digital file for his sexual gratification or gratification then they would have been by being published on the front page of the paper.

ELIAS CJ:

Suppose somebody takes from other people's collections publications, photographs, for their own gratification, that's an act on your definition of act, clipping them all, transferring them digitally. How is that not within section 126 on your approach?

MR HORSLEY:

Well, I think the remoteness of it, of whether those images were already in the public domain, et cetera. Again, you've got to go to all the surrounding circumstances –

ELIAS CJ:

But these – okay.

MR HORSLEY:

– to look at whether in fact an act is indecent. Some of those hypotheticals are incredibly difficult to answer, which is why I keep coming back to let's just look at the circumstances of this case, and in fact is the conviction sound?

ELIAS CJ:

We have to be concerned about applications of this outside the frame that we're actually looking at, which is why – but I think perhaps I'm more stuck on this indecent act point and the relationship between section 125 and 126. Anyway, we've done that probably to death.

MR HORSLEY:

Yes, Your Honour.

GLAZEBROOK J:

And I wonder to a degree what the intent actually adds to the indecent act in the first place, because the intent seems to be possibly that you know it might insult community standards. But that's the test, on your analysis, that it's community standards, whether or not the particular person was insulted, whether or not the particular person knew about it, whether or not the particular person would have been insulted had they known about it.

MR HORSLEY:

Well, it's – sort of, Your Honour.

GLAZEBROOK J:

So it's really, really the test is the same for insult as it is for indecent act.

MR HORSLEY:

No, because an indecent act –

GLAZEBROOK J:

Well, it's all whether a normal person would be insulted by it, ie, whether it breaches community standards.

MR HORSLEY:

Well, no, it's whether in the particular circumstances a person would have been insulted.

GLAZEBROOK J:

Well, no, because you're saying it doesn't matter, if it would insult a normal person that's enough. So if it breaches community standards and a normal person would be insulted, it doesn't matter the person doesn't know about it, it doesn't matter if they wouldn't be insulted had they known about it.

MR HORSLEY:

This is only to go towards whether the person who's taking the photograph has a particular intention in mind at the time they take the photograph, and

this is where the oblique intention comes in. Mr Rowe did not want to be in a situation where he was confronted by people who were insulted, he was trying to avoid that. But when he did the act he knew he was doing an act that was going to insult or offend, that that act would insult or offend a person.

ELIAS CJ:
It was intrinsically?

MR HORSLEY:
Yes.

ELIAS CJ:
It was intrinsically an indecent act?

MR HORSLEY:
Well, on this aspect of it it's intrinsically going to offend the people that he took the photographs of, yes.

ELIAS CJ:
I see.

WILLIAM YOUNG J:
But, I mean, the intent to insult or offend adds virtually nothing, because any intention to do an act – so, because your position is that it's indecent because it's an act which would have the tendency to insult or offend, and since he does an act with that, with the intention he does that act, he necessarily intends to insult or offend.

MR HORSLEY:
In a way, yes, yes, Sir.

GLAZEBROOK J:
So it doesn't add anything?

MR HORSLEY:

There are – he has to know that. He has to –

ELIAS CJ:

So why have the additional requirement that it be in a private place?

MR HORSLEY:

It doesn't have to be in a private place, Your Honour.

ELIAS CJ:

Oh, in any place, yes.

MR HORSLEY:

Any place, yes.

FRANCE J:

If you're talking about intrinsically, though, you are really talking about intending to insult a concept, aren't you? Modesty, privacy?

MR HORSLEY:

No. Sorry, Your Honour, I probably regret acknowledging that intrinsically because in fact again it's intrinsically in the particular circumstances of this case because it's about what Mr Rowe knew. He has been charged with offending people before for taking photographs of them in way less –

ELIAS CJ:

Well, I don't know how that's relevant on the evidence – on the case that we have.

MR HORSLEY:

It's relevant, Your Honour, because it goes to his intention. So what did he know at the time he was taking the photographs? He's been trespassed from Kaiteri Beach before for doing this. He's taken photographs of schoolgirls before, and he knows that that was offensive. He's tried it on other occasions

as well. He knows that taking photographs of people surreptitiously for his own purposes is offensive, that it does insult people, and that's why – I regret the use of intrinsic but in this particular circumstance we do know that Mr Rowe when he took those photographs knew that he would insult people.

ELIAS CJ:

What's the basis for issuing the trespass notice?

MR HORSLEY:

That he was taking photographs of girls on Kaiteri Beach.

ELIAS CJ:

But what's the underlying legal basis for trespassing him from that?

MR HORSLEY:

I have no idea and I don't know which authorities did that.

WILLIAM YOUNG J:

Can you be trespassed from a public place?

MR HORSLEY:

Can you be?

WILLIAM YOUNG J:

Yes.

MR HORSLEY:

There's plenty of debate around that, Your Honour. I don't know whether he was trespassed from the public place of the beach or whether he was trespassed, for instance, from all the surrounding shops, et cetera, which made it almost impossible for him to be there and surreptitiously film. He was filming from the carpark in this situation. I've no doubt that the carpark is owned by somebody, and he could be trespassed. But to be honest, I don't know the background to that.

GLAZEBROOK J:

Yes, I must admit I'd assumed it was from the effectively private carpark, either council-owned carpark or …

O'REGAN J:

It said it was done orally, so he wasn't actually given a trespass notice. It all seems pretty dodgy, doesn't it, really.

MR HORSLEY:

It does, Sir, and please don't get me into that.

GLAZEBROOK J:

There's such tendency to use that as a verb.

ELIAS CJ:

Does that – what else do you want to address us on, Mr Horsley?

MR HORSLEY:

I don't think I need to address you on anything more. The argument around the defence I think is adequately covered in our submissions. Unless Your Honours want to hear me on that, I don't propose to go into that.

O'REGAN J:

What was he actually sentenced to?

MR HORSLEY:

Two hundred hours' community service and six months' supervision, I think, Your Honour. Oh, sorry, 120 hours of community service.

So unless I can help Your Honours further, those are my submissions.

ELIAS CJ:

Sorry, 120 hours of community service and …

MR HORSLEY:
Six months' supervision.

ELIAS CJ:
Thank you, Mr Horsley.

Mr Zindel, do you want to – are you able to address us now?

MR ZINDEL:
I've got just a few technical points only, Ma'am. It shouldn't take long.

ELIAS CJ:
Thank you.

MR ZINDEL:
First in relation to Justice France's point about section 124 of the Crimes Act, that refers to distribution and exhibition of indecent matter, and the full section 124 is not in the Crown materials but online we looked it up and it refers to indecent model or objects, shows or performances, in contradistinction to publications under the Films et cetera Act. So there's no guide to the interpretation of the provisions from that, they just cover two very different areas.

There's reference made to the *Jacob* case. There the Court, three Judges, indicated that it wasn't indecent for the woman to go topless in the city street, two to one they indicated that there didn't have to be a sexual aspect to be indecent but in any case it wasn't indecent for her to do that. My friend referred to the *Rudiger* decision about the Brazilian thongs. That was the *Taylor* decision, and that concluded that in relation to voyeurism again that there was a breach of privacy but that the sexual purpose wasn't clear, breach of privacy in the sense of walking past and zooming up close to the buttocks of the people on the public beach. So there's definitely a privacy aspect in relation to sunbathing on the beach.

The more tricky question about whether there's a need to focus on the act for section 126 or 125, perhaps there's some latitude to look at intention and motive more for indecent assault, that's certainly the interpretation that the English Court of Appeal adopted in *R v Graham-Kerr* in interpreting the Court decision. The Court decision, interestingly enough the House of Lords –

GLAZEBROOK J:
Have we got that here?

MR ZINDEL:
The Court decision is in my materials, Ma'am.

GLAZEBROOK J:
Oh, your materials.

MR ZINDEL:
Yes. But the Court decision refers to the fact that you could look at motive or intention, the majority said, for indecent assault. The dissent of Lord Goff has been praised by Glanville Williams, but the majority indicated that for an equivocal assault such as smacking someone, a girl on the buttocks 12 times, that as a 12 year old you could look at the admission made to the police that, "Why did you do it?" "Oh, I don't know, buttock fetish maybe," so there could be some use of evidence of motive or intention for assault, and my submission on that is that indecent assault is perhaps a different concept to indecent act or indecent photographs because you're not looking at the actus reus in isolation but you're also looking at the compendious nature of the intention. Interestingly enough the House of Lords in *Court* also approved the decision of Justice Streatfield in *R v George* [1956] Crim LR 52, which was the shoe fetish case, where it was seen not be an indecent assault despite the fact that he admitted to having a shoe fetish when he was focusing on the woman taking her shoe on and off, and helping in that regard. So what I'm saying is that the focus in this case should be on the act in isolation, not the

motive or circumstances relating to actor's state of mind, but that though that may be relevant for indecent assault because it's a compendious expression.

In relation to Mr Rowe's other activities, I've already referred to exhibit C in the trial, where apart from bridges he's also got rather a focus on boats. And in relation to the trespass, yes, I think that was just an oral trespass but by the police officers, and I'm not sure what their basis for it was, and they may have had some authority from the Council.

But those are my technical points in reply. Thank you, Your Honours.

ELIAS CJ:
Thank you, Mr Zindel.

Thank you, counsel, for your assistance. We'll reserve our decision in this matter.

COURT ADJOURNS: 12.58 PM