IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 12/2025
[2025] NZSC Trans 14

TYSON WADE FRANCIS REPIA

Appellant

v

THE KING

Respondent

Hearing:	14 August 2025
Court:	Winkelmann CJ Glazebrook J Ellen France J Kós J (via VMR) Miller J
Counsel:	P K Hamlin, S J R Baird and S J Gray for the Appellant M J Lillico and I L M Archibald for the Respondent

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CRIMINAL APPEAL

(Missing audio 09:32:34 to 09:33:00)

WINKELMANN CJ:

Tēnā kōrua. Mr Hamlin?

MR HAMLIN:

Mōrena. I've provided I hope a little road map this morning.

WINKELMANN CJ:

We have it.

MR HAMLIN:

And I want to refer to that to begin and where I'm going to start is answering the question that the Court has, quite simply was the Court correct to not look at Mr Repia's reasonable belief in consent. That was incorrect. The answer ought to be no and we shouldn't exclude his reasonable belief in a section 10 enquiry. And I'll go now through this road map, which is a slightly different way from the written submissions but hopefully in a helpful way to understand when put a bit of an overlay on the written submissions in a way.

The proposal for the appellant is to look at the legislative intent, a rights-consistent interpretation of the Act, and to show that this can encompass at the section 10 hearing a consideration of the belief in consent on two bases; either because it's a mixed or composite mens rea offence or and it becomes a defence, I hesitate to use that and I'll come back to explain why I don't want to use the word "defence" so much, but when the Court has referred to parameters of self-defence, mistake, accident, involuntariness as exceptions, say in *Regina v Antoine* [2001] 1 AC 340 (HL) for example, the case, then that's what I'm talking about. So I think there's two ways in which the Court under section 10 can do it, by using the mixed mens rea approach and taking it as an incident, sorry, offence specific approach, or by using it as a defence but I hesitate to use that because the belief is something the Crown ought to negative to make this an unlawful act anyway. So that's where I'm going.

Let me go to point 2. Before I do, I just want to say in terms of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CP(MIP)) legislation it's positive, it's useful, it's basically fair and better than what was there. What we're asking this Court is to go that little bit further to make it fairer, to make it better and non-discriminatory in the way that I'm about to talk about. So it's not the

whole system that we're suggesting is incorrect at all, not the whole CP(MIP) arrangement but just this aspect when we look at under section 10 to this enquiry should it go this little bit further and look at the mens rea elements in certain offences and in my submission to the Court is yes it ought to for the reasons that we're about to discuss.

Point 2. The immediate comparison that I'm making here is with a criminal trial in saying had he gone to trial the immediate concern would have been whether he had and he was fit that is. The Crown would have to negative prove that he didn't have any belief or any reasonable belief, two aspects of the same thing, and in a sense often at trial a reasonable belief is the "defence." In this case the Court of Appeal has wrongly assumed that the mental impairment precludes that enquiry whereas what we're having here is the unfit person who is impaired, and I abbreviated that simply as MIP, is deprived of this defence and a possible acquittal at a section 10 hearing. Now that's important because that's effectively the denial of a defence at the section 10 hearing and the section 10 hearing specifically allows for that. It allows for an acquittal if the charge is not, he's not involved in the charge, and by taking away the reference to his belief, reasonable belief in consent, he is deprived effectively of securing an acquittal at that stage.

We might get to a peculiar situation where at a section 10 hearing for an unfit defendant he is found to be involved and detained as a special patient, as has happened with Mr Repia, and then subsequently he becomes fit and then comes back to a criminal trial and erases his belief in the consent of the complainant and is acquitted and it seems that that seems an untenable, unfair situation where he could later be tried if he were fit in those circumstances. We don't know and I'll come back to this later on because it's an important point here. We don't know if the fitness is permanent, sorry the unfitness is permanent, because if it is, this is the only trial he's going to get. If he becomes fit subsequently and it's difficult to tell, then he may go on through the process and then subsequently can be acquitted and under section 10 this hasn't been looked at.

In my submission the injurious act is knowingly having consent with someone, knowing they're not agreeing to the process and it's that, that's the injurious act, it's not just the complainant saying "no" and not consenting, so indicating her lack of consent in this case but the gravamen of the offence is him knowing that. So my point there is his involvement in an act of sexual activity without a consent that's not a crime but that has led to his detention in the current circumstances. We're out of step. We'll come and deal with that later.

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Let me just go to the right point 3 now by way of a summary on the rights-consistent approach. Again I said, and while I was a little surprised in the Crown submissions at the suggestion that section 25 of the New Zealand Bill of Rights Act 1990 didn't apply, it's more than just a nice to have under section 6, it's an essential way of interpreting legislation, and in our submission at paragraph 141 we set out that under the rights-consistent approach a reference to *Rafferty v R* [2024] NZCA 217. The appellant's submissions, your Honour, it's at page 141. Sorry, paragraph 141. So to suggest that section 25 doesn't apply, it seems to fly in the face of a number of cases.

The fact that Justice Cooke said words to the effect that the New Zealand Bill of Rights is woven into our law and society, is appropriate here, and one would have thought, as did the Court of Appeal in *Rafferty* agree that for the reasons set out in paragraph 142, and over the page, we've got there the application of section 25 in these circumstances under section 10.

So to be rights-consistent the argument for the appellant here is that it should be. That's acknowledged in *Rafferty*, that section 25 is the minimum standard or procedure that should be applied in that circumstance, as is here. So the argument for the appellant is that his rights, particularly to an acquittal, if that, if he did have a reasonable belief, and that were the finding, had been taken away.

I pause to mention again the significance of the section 25 minimum rights at this time. This might be for a permanently unfit defendant his only trial.

That's why we have comments in the cases about the section 10 hearing being the functional equivalent of a trial. I think that's important because the function equivalent would then bring into play, quite clearly, section 25, the New Zealand Bill of Rights Act, and the minimum rights including the ability to present a defence, namely, and I say "defence" in inverted commas, but his reasonable belief. So he's prevented from providing an effective defence.

What he can rely upon as a defendant, or mentally impaired person, is the judicially accepted and crafted exceptions and parameters. Accident, mistake, self-defence, and involuntariness, which in fact really apply in sexual violation cases. I think Justice French made that reference in *R v [C]* HC Christchurch CRI-2001-009-835552, 17 July 2009, and we'll come back to that, but generally speaking those sorts of judicially crafted parameters don't apply in these sorts of cases. So rhetorically I ask this question, why should this procedure, the CP(MIP) procedure, remove from a mentally impaired person an effective defence, and and ability to obtain an acquittal in a section 10 hearing.

WINKELMANN CJ:

Sorry, can you just repeat the list of judicially crafted…

MR HAMLIN:

Yes your Honour. The parameters are accident, mistake, self-defence, and involuntary conduct, involuntariness is what I put it at. I'll come back to those your Honour, in fact, specifically dealing with those in my point 9. I should have said at the beginning to the Court I plan to deal with points 1 to 9. I was going to ask my learned junior Ms Baird to deal with points 10 and 11, just to give your Honours an idea of where I'm going. My apologies.

So my last point before point 4 is that at this stage if we are not allowing a consideration of a belief in consent in this charge, then we're treating mentally impaired people differently, those with a disability, and that amounts arguably to some form of discrimination.

Point 4, almost exhausted my 15 minutes, but I'll continue until your Honours interrupt me. Sexual violation charge. A couple of comments about this. The Crown has to prove the absence of a reasonable belief is part of one of the key elements, and that's why I hesitate to refer to it as a defence, but when I come to point number 9, your Honour the Chief Justice just raised that, I'm going to refer back to that, because that's another way in which this could be dealt with by this Court in elaborating, keeping it consistent, with the legislation. I'm going to suggest it's not like a defence, but it could be dealt with like a defence, and when I get there I'll talk about self-defence and how the subjective, objective elements of self-defence have a comparison with reasonable belief in consent. How the Court is prepared to consider those.

KÓS J:

As I understand it, Mr Hamlin, you accept that insanity, for instance, isn't one of those defences available here, if that's the basis of the unfitness.

MR HAMLIN:

Yes, correct indeed. So mental elements –

KÓS J:

Would it follow then that to the extent that basis of the unfitness is also the basis of the defence or the excuse being offered, that too would not be available?

MR HAMLIN:

Correct. I think if the belief stems from the impairment, yes, I agree, that's something that can't be relied upon as a defence, or an incorporation of the defence itself. But I think when you're looking at the offence itself, sexual violation, a consideration of the man's belief, or the perpetrator's belief ought to be considered by the Court as section 10.

KÓS J:

Thank you.

MR HAMLIN:

It may well be that there isn't a belief, or the belief is affected by a mental impairment, then that's not going to be relevant, and won't amount to a defence, but if it's not, then it ought to be considered and applied. Can I look at my point 5, the act or omission. It forms the basis of the offence of which he's charged. The cases clearly show it's just simply not an act, not just a physical act itself, perhaps something more to it, the guilty act, the injurious act, is what we're talking about. But the Courts all recognise this is not simple, it's a little bit complicated, because they have a mixed mens rea offence and a number of them are referred to in the way in which we deal with trying to do that, and I come to that in point 8. That's my first answer, in a sense, and point 9 is my second answer to where the Court ought to go, and allow this appeal.

So what we have here, in dealing with the Courts, is this complication how to interpret the inherited phrase from the English, which is where we seem to have got it from, and I was going to refer briefly to our submissions at paragraph 28. Beg your pardon, no it wasn't. It's the Court of Appeal decision in this case, paragraph 28.

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WINKELMANN CJ:

Your submissions?

MR HAMLIN:

No, *R v Goldsmith* [2024] EWCA Crim 780, [2024] 4 WLR 79 case I was going to refer your Honour and it's set out well. I'll show you it in the Court of Appeal decision, in this case paragraph 28, and if you look – and the one I'm dealing with is the complication, the difficulty and the way in which the Court has seen through having to deal with how do we interpret the act or omission that forms the basis of the offence with which he's charged, how do we deal with that issue, and it's led to all these complications and perhaps paragraph 28 sets out how we get, how the conclusions might be.

But if we pop up, if I can ask my learned junior to go back to paragraph 25 in the Court of Appeal, and a discussion there of the *R v Wells* [2015] EWCA Crim 2, [2015] 1 WLR 2797 case sets it out really well. It also deals with the point that I'm coming to later that your Honour the Chief Justice when asked about the defences and the quotation at paragraph 12: "It is not difficult to see that these examples qualify the act. If committed in self-defence, an assault is not unlawful; if an accident, the act is not deliberate; if a mistake, the quality of the act has been affected by the circumstances. This delineation is clear but does lead into the first question, namely, the extent to which it is always possible or appropriate to separate actus reus from mens rea. Other offences create rather more difficulty and underline that a proper consideration of the 'acts' required to prove an offence require an offence specific consideration of its ingredients." So I'm asking here for this Court to do the same. "As the authorities make clear, there is no bright line and the actus reus may, indeed, involve mental elements."

So that's my first point there in terms of interpretation. It's confused. The actus reus/mens rea distinction is not always apparent and it's clear in this case already that the Crown have to prove the absence ordinarily of this belief.

And then the *Smith & Hogan* quotation there in paragraph 26 is helpful and again it says that it can't be easily divided "into elements only of actus reus and mens rea that can be readily identified." Then we go and deal with the last line at the bottom of that paragraph: "But the 'defences' of mistake and accident are simply denials of mens rea, not of the actus reus" interestingly "and self-defence has a vital mental element." Footnote, when we come to self-defence and comparing with reasonable belief I'll talk about that later on. "If this *dictum* is right, it is hard to see why any evidence, other than of a defence of reason from disease of the mind, suggesting the absence of mens rea, should not be admissible, thus undermining the whole decision." And that last sentence is really where we're suggesting the Court ought to be going. It's hard to see why any evidence other than that of a defect or a reason from disease of the mind suggesting the absence of mens rea should not be admissible and Justice Kós you raised that earlier effectively and so that's where the Court ought to go

further and look at the mens rea element because it can analyse that in the way in which it should do.

KÓS J:

Well what do you say Mr Hamlin that Parliament was trying to do by section 10? What's the principle, the governing principle?

MR HAMLIN:

I think it was to deal with unfit defendants so to give them a procedure where there was an investigation into their involvement in the crime and treat them differently because they're not going to be convicted or go to prison but they are going to be dealt with in a way that protects them and the public. So the question –

KÓS J:

Well that doesn't really explain what the words cause the act or omission that forms the basis of the offence were trying to achieve. What were they trying to do with that expression? What's in and what's not?

MR HAMLIN:

That's the whole, that's the question, your Honour this appeal is all about and what I'm trying to say is you can't just cut it off by looking at the physical act, correct, just the act, you've got to go further and some cases that make it particularly – so possession of offensive weapon, there's arson, sexual violation, abduction. You've got to then look at there's an intent that forms part of the offence and it has to be considered and there's no reason the Court ought not to do that. The Court shies away from that I think wrongly because it looks at oh there's a mental impairment and confuses that a little bit with what could be insanity and say we can't go back to that, bearing in mind mental impairment, your Honour, is at the time of the trial or section 10 rather than at the time of the offending.

So there may be two different things there. There may be an insanity defence, there may not be, at the time of the offending. The unfairness is a different

issue, related sometimes, but can be a different issue. So what we can't then rely upon as the defendants are the belief in this case or the mental element was that it was affected by the mental impairment and I accept that but where it's not then we should be looking at it. So overall there shouldn't be a reason that we shouldn't go further and look at what's involved particularly in this sort of case. So the first enquiry is offence-specific. In short, let's look at sexual violation. The Crown has to prove the absence of a belief that the act took place, that she didn't, in this case didn't consent, and that he didn't reasonably believe she did. Now those are the three things that have to be considered. We're only arguing the latter one. Why has that been cut out? That amounts to unfairness and that ought to have been considered in short.

KÓS J:

Well the reason why it's been cut out historically is because the words that I just quoted from section 10(2) have tended to drive Courts towards the actus reus.

MR HAMLIN:

Yes.

KÓS J:

When the Minister of Justice spoke about this in 2003 he used two different expressions. He talked about there being sufficient evidence in a person's physical responsibility but then immediately the following paragraph, this is at page 9546, he talked about the person who had not committed the alleged offence. Those are two different formulae.

MR HAMLIN:

You're quite right and that's why the confusion sets in and the reference that I've just read, your Honour, from *Smith & Hogan* which is quoted in the *Repia* Court of Appeal decision I think is apposite because it shows the difficulties offence-specific and also shows that there are specific defences that the Court has created to allow consideration of something more because when you're looking at, and I'll come to this in a minute, but just as an introduction when we're looking at point 9 and the issues of mistake, accident, self-defence and

involuntariness we're at mens rea, particularly in a case of self-defence. And if you consider the background for a lot of these cases is violence cases, particularly homicide, that makes sense, but if you're looking at accident, mistake, self-defence and involuntariness in relation to sexual violation, that doesn't really apply often.

So we need to look a bit further, and I'm asking this Court to take that next step and say okay where would we be if we're looking at a case of sexual violation where the Crown have to prove these elements in an ordinary trial at a section 10 hearing if it's a functional equivalent, particularly for someone who may be permanently unfit, then if not we go there too because of the confusion, the way in which this act or omission has been described. I don't think really, your Honour, perhaps partly to answer your question, I don't think really that legislature really envisaged the variety of offences that we might have to deal with. It's easier to envisage a homicide or a serious violence offence and then to apply the judicially created defences, mistake, accident, self-defence, et cetera rather –

KÓS J:

Well, as I understand your formula, you say that those words enable any excuse to be explored other than an excuse that draws upon the circumstances that result in the unfitness finding?

MR HAMLIN:

Yes.

KÓS J:

That's your case?

MR HAMLIN:

Yes.

KÓS J:

Right, thanks.

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MR HAMLIN:

So authority for what I'm talking about, your Honour, Justice Kós, is in the brief – it's summarised really in those paragraphs under paragraph 25 of the Court of Appeal in *Repia* itself, referencing those cases. Now I was going to come and mention the *Goldsmith* case in paragraph 28, if my learned colleague just goes up a little bit, and the point we're just talking about there, Justice Kós, comes there at the bottom of the page as we're looking at it.

WINKELMANN CJ:

When you look at section 4A the thing that the jury are asked to consider is whether the accused was – whether "he did the act or made the omission charged against him as the offence".

MR HAMLIN:

I think "as the offence" is important.

WINKELMANN CJ:

But it's the act.

MR HAMLIN:

And that's where the confusion or ambiguity has arisen. If you go down to, under the decision here, paragraph (b): "In such a hearing, the jury will be concerned only with the 'injurious act'", so it's gone from "act" to "injurious act", "which would constitute a crime if done (or made) with the requisite mens rea." So if we're looking at sexual violation, for example, then we're looking at the act of the sex act, lack of her consent, but also lack of his belief. That's all part of the crime.

One of the things that – if I can make this point – is a fundamental point, we simply exclude mens rea relating to the accused's impairment, take that out of the equation, then we don't have to deal with these distinctions between actus reus and mens rea. We just deal with let's take out of the equation under

section 10(2) what amounts to a mens rea or an excuse or whatever arising from his mental impairment, then we can deal with all the facts at the section 10 hearing, including his belief. There's some number of safeguards I'll come back to, may not be reasonable, et cetera, but let's have a look at that, and if we do that then we have a wider investigation into the unlawfulness of the act that forms the basis of the offence, not just narrowing in on what seems to be the physical act which we agree is not enough; we've got to go further. I'm referring to my submissions, paragraph 83.

GLAZEBROOK J:

I'm going to – either at this stage or at some stage, can you see, can you let us know if you're right what sort of evidence is going to be admissible therefore at the trial? One can understand possibly with somebody who is totally incapacitated, unable to give any instructions whatsoever, I'm just thinking of someone perhaps with advanced dementia, but who has earlier made statements, then presumably you'd say those hearsay statements were then going to be admissible and considered. With somebody who was capable to whatever limited extent of giving instructions and giving evidence would you say they would give evidence? Then I suppose the difficulty may be distinguishing between evidence that does relate from the mental impairment, a totally fantasised account of what actually happened –

MR HAMLIN:

What happened.

GLAZEBROOK J:

– which might then have indicated a reasonable belief in consent, but it's a total fantasy – I mean I would suggest probably judges can assess that but I just wanted your take, what you say happens.

MR HAMLIN:

Two points I agree with, your Honour. Taking the first one, the dementia point, the person who subsequently develops dementia could have had a personally reasonable belief in consent at the time of the activity.

GLAZEBROOK J:

Of course, of course. That was my point.

MR HAMLIN:

Yes, but at the time of the section 10 hearing, because he's unfit for reason of dementia, traumatic brain injury, whatever, can't avail himself of that belief under the current – under the Court of Appeal's decision that said you don't look at that.

GLAZEBROOK J:

Well, I suppose there would have to be some evidence of that but, as I say, possibly a hearsay statement –

MR HAMLIN:

Yes.

GLAZEBROOK J:

– or the objective circumstances could indicate that a reasonable person would consider the complainant consenting.

MR HAMLIN:

Let's say he gave an interview to the police which stated that and if that was backed up by other evidence, for example, then there might be a basis, initially, when he wasn't unfit, but if he became unfit, and that accentuates the very point that I'm making. My learned friend, Ms Baird, is going to refer to this as well when we get to point number 10, but that is part and parcel of that issue. That would be unfair, shall I say, to not consider the belief or evidence of his belief if he were unfit subsequently. So that's the first point. I think that highlights it really well.

The other point is, is it a more, your Honour's correct, what evidence would you call and what would you be able to call at the section 10 hearing, and we'll address that in our point 10 as well, finding that intent. I don't think that's something difficult that the Court can do and in a case such as this we're gong

to deal with the reasonableness of the intent anyway, or the belief in any case. So if it's a fantasised version, as your Honours indicated, that's okay because the Court will be able to recognise that. Either it will be obvious, from the other evidence it's apparent, but the other aspect we're suggesting is that if a psychiatrist can give evidence about unfairness and insanity subsequently then he or she can also give evidence about their impairment at this stage and how that might affect, at the time of the offending, might have been affected. So yes, it's a little more complicated but that could happen.

KÓS J:

How would that be relevant on the answer you gave me before?

MR HAMLIN:

Because, using the best example that Justice Glazebrook's raised, at the time of the offending there was evidence of his reasonable, say in a police interview supported by other evidence, to show that he had a reasonable belief in the consent but subsequent is unfit. Now we, under the current law, would exclude that. That's a simple example. That would be unfair.

KÓS J:

I don't understand why a psychiatrist would have anything relevant to say here.

MR HAMLIN:

I agree on that point, other than the fact that he's got an unfitness, I agree. If it weren't that clear then we have to try and work out, and I don't think this is something that can't be done whereas the Courts have said it couldn't be done, but we try and work out that if he said he had a belief and it was alleged to be reasonable, whether the psychiatrist could give evidence about that and that's what I think can happen because they can talk about fitness and unfitness at the time of –

KÓS J:

I think the psychiatrist can talk about whether the belief was operative but I don't think –

MR HAMLIN:

At the time.

KÓS J:

Exactly, but I don't think the psychiatrist can possibly talk about whether what was in the man's mind was reasonable or not.

MR HAMLIN:

I agree, I agree, and I don't think the – the reasonableness is a judgment by the Court that has to be known. I accept that.

KÓS J:

Correct.

WINKELMANN CJ:

Mr Hamlin, I'm just conscious, where are you in your submissions and are these points that are going to be dealt with by your junior, the evidence?

MR HAMLIN:

Yes. We're going to, thank you, your Honour. I'm at point 4 but we've leapt ahead somewhat to point 9. I'm going to make – at 10. So thank you, your Honour. If I can, sorry, Justice Kós, if I can park that a little bit but come back to it, but yes, I –

WINKELMANN CJ:

Well, your junior will come back to it?

MR HAMLIN:

Yes, she will. So I'm going to move – so we're jumping around a bit but I think that's – your Honour, Justice Glazebrook, has anticipated exactly where we're going.

So my point really was in reference to the cases I was referring to under the interpretation, it's not simple but it can be made simple. What the Court has

done in interpreting this phrase is principally looked, done it. There's two solutions which I'll come to, and my first solution is at point 8 and the second solution is point 9.

The first solution is make it a mixed or composite mens rea offence, if we maintain that actus reus/mens rea distinction, if there is one, and we allow sexual violation, the belief to be considered at a section 10, or the second way of doing it is the defence way of looking at it and adding another category of reasonable belief under the defence section. So that's where I'm headed.

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WINKELMANN CJ:

Did you take us to *Goldsmith* because you were saying that was the analysis that you support?

MR HAMLIN:

Yes, it was a helpful analysis. I thought it set out the aspects of what we've just been talking about, to support, exactly your Honour, where I've got to, and so I've set that out in our submissions. Sorry, it's set out in our submissions. Also it's set out in the Court of Appeal helpfully in the judgment starting at paragraph 28. I don't think I need any more support for what I'm saying in a sense because there's a lot of judicial support. What I'm trying to do is go that next step and say why we should go there, that's where I'm at.

So if, your Honours, if I turn to point 6 of where I'm going. It's clear that, in terms of the purposes, and we touched on that before, this is not just a treatment option, it's a culpability assessment, particularly for those who will be permanently unfit at a section 10 stage, because they're not going to get any trial beyond that. So the treatment fallacy referred to in our submissions is just that. It's not as simple as just providing treatment. So we need to look at their culpability. We're looking at their culpability. We need to look at all these issues that ought to be there, not just –

GLAZEBROOK J:

Is it not as simple as providing treatment because of the detention aspect, is that the submission?

MR HAMLIN:

Yes. Bearing in mind the tension can come under the civil regime as well.

GLAZEBROOK J:

No, understand.

WINKELMANN CJ:

Is your submission that the implications for the defendant are profound, is that your submission? I mean, I'm just trying to understand what your submission is Mr Hamlin.

MR HAMLIN:

On that point, yes.

ELLEN FRANCE J:

Well it's more than that, isn't it, in the sense that you point out that an acquittal could result?

MR HAMLIN:

Significantly.

ELLEN FRANCE J:

So that suggests culpability.

MR HAMLIN:

Yes, so if you look at one side of it, he's going to be detained for up to 10 years as a special patient, which is what's happened. On the other side of it, he could have been entitled to an acquittal, which is a significant disadvantage for him, at the section 10 hearing, if that's not heard. Under section 6 I'm just going to –

WINKELMANN CJ:

I don't suppose anyone keeps statistics of the rate of acquittal at section 10 hearings as opposed to…

MR HAMLIN:

I haven't even looked I'm afraid your Honour.

WINKELMANN CJ:

No, no, I don't imagine you would be able to Mr Hamlin.

MR HAMLIN:

No.

WINKELMANN CJ:

It sounds like quite a bit of – it would be an interesting thing to know, wouldn't it.

MR HAMLIN:

Mmm, I was involved in *R v Tongia* [2020] NZHC 2382, [2021] 2 NZLR 743, and that did result in acquittal, and that comes up, of course, in part of what we're talking about, but it's probably unusual, and perhaps that issue is an important one because even in these cases if, to extrapolate how many defendants are going to be acquitted in the circumstances, it all depends on whether they had the belief, whether it wasn't affected by the mental impairment, and whether, if they had it, was it a reasonable belief in the circumstances.

Something that a jury does, taking away the impairment aspect, something the jury does all the time in our trials I might add, at a criminal level, but something that the judge alone could do clearly at this stage of the section 10 hearing, I didn't see the difficulty in a judge being able to make that judgment, and would do if it was a judge-alone trial anyway.

Can I just mention, as an aside, under point 6, the balance of probability, lower standard of proof, which is another factor in favour of the argument that the appellant makes in this case, there is some criticism in the *J v Attorney-General* case of that. I don't want to, that's not really where we are now, that's a legislative change, but accepting that we have a lower standard of proof in terms of making these determinations. Justice Kós, as we were talking about earlier, then the Crown has an advantage, shall we say, it doesn't have to prove, as in England, beyond reasonable doubt, these events occurred. So I think that probably helps the submission because we do have a lower standard of proof, setting aside the criticism of that.

Point 7 that I want to talk about briefly is the protection of public and treatment option, which is behind the purposes as well, and we've touched upon that, and I think it goes without saying, really, that public protection treatment can be dealt with under the civil regime. It doesn't have to be dealt with here, and the only reason we're here in CP(MIP) is because he's been charged. But I just want to keep that foremost there because there are other ways to deal with him and Mr Repia, for example, was found to have had a reasonable belief, he would still be detained, but under a different civil legislation. That's as I understand his likelihood. He would still be detained as a special care patient, not as a, in the way he is a special patient now, but he is likely to have been, because he still has schizophrenia, so he's likely to be still detained, and it depends, but there is a regime that we have that deals with those issues under the Mental Health (Compulsory Assessment and Treatment) Act 1992, it deals with people who are in that situation. So that's something I wanted to clear away because I think it is important. So that regime also achieves the goals of public protection, personal protection, and treatment. So we don't have to focus all that in on CP(MIP).

The two answers that I, and this is where I finish off, with points 8 and 9, the two answers that I want to give to the Court as to why this appeal should succeed, is you can do one or the other. So under the mixed composite/mens rea offences, is the problem is also the answer. You can see the different ways in which this is done. There's a range of offences which do not fit neatly into

an Act only, and involve a mental element, as part of it, this is one of them I say, and what we need, as the authorities suggest, and I've referred to them, an offence-specific analysis. So we look at an offence-specific analysis, why ought we not consider what the Crown has to prove in a sexual violation, is whether he has a belief and whether it's reasonable. That's all the Crown – sorry. All the Crown has to do is to present those three things. That ought to be considered as section 10 too for all the other reasons I've mentioned.

Can I mention just a subset of that, which I think highlights the point, and I think the subset probably is a violation of a prepubescent child. Let's suppose that happened, and that was the allegation. I just say compare the case, facts incoming, there's unlikely to be any suggestion of consent or reasonable belief in consent in those fact circumstances. There is no reason it shouldn't be considered, it's not going to be considered in any realistic fashion, but where the sexual violation is alleged to have occurred between two adults, albeit it both [REDACTED].

WINKELMANN CJ:
So your point is that the offence-specific analysis is not just statutory but also relates to the nature of the allegations?

MR HAMLIN:
Yes.

WINKELMANN CJ:
So that's what the Court says at subparagraph (f) of *Goldsmith* I think.

MR HAMLIN:
Yes. I think that's exactly right, and that's the injurious act idea your Honour.

KÓS J:
They do, but then Justice Ellenbogen goes at (i) to exclude mens rea elements, and the reality is that most of the crimes that we're dealing with here are going

to have been mixed actus rea/mens rea, and we're not talking strict liability offences.

MR HAMLIN:

Correct. I think the basis, can I proffer an explanation as to why that conclusion is made. I suspect most of the cases are based in the violence and homicide, and so the accident, mistake, self-defence exceptions, which I'll come to in the next section, arise from that. They don't apply in sexual violation cases really –

WINKELMANN CJ:

I must say I read (i) as not as a general rule out of mens rea, when you read it after what goes before, it seems to – because the preceding paragraphs say that where the mens rea is linked to the actus reus, so if you look at (g): "A state of mind which is not directly linked to the outward component of the act… which is not the reason for it – does not form part of the… charged as the offence…". So the reverse of that must be true. So there seems to be it's not a general ruling out of mens rea is my reading.

1020

MR HAMLIN:

No, and that's why I referred back, your Honour, to the concluding paragraph from *Smith, Hogan & Ormerod* back on paragraph 26 in the Court of Appeal which is at the top of that page which said if that's right it's hard to see – my learned colleague will find it – on the top of the page: "If this *dictum* is right, it is hard to see why any evidence, other than of a defect of reason from disease of the mind, suggesting the absence of mens rea, should not be admissible, thus undermining the whole decision." So, yes, your Honour.

WINKELMANN CJ:

Although it wouldn't, for instance, be appropriate. Well say you have very specific mens rea charges so say it's an assault but the person is charged with injuring with intent to cause grievous bodily harm, you wouldn't need to prove the mens rea, that would be – the intent to prove grievous bodily harm would be excluded by – on the approach set out in *Goldsmith*, wouldn't it?

MR HAMLIN:

Yes. Yes, I think that largely it would be and I'd say why, why can't we look at that at a section 10 hearing. It might because of the offence charged. So the offence charged involves that intent as opposed to a simple offence, a charge of an assault. So again you look at, with respect, you look at it individually and I think that's where we are looking at individual charges. Overall my submission is that we start –

GLAZEBROOK J:

Can I check your answer to that. You're saying that you could look at whether it was intent to cause grievous bodily harm –

MR HAMLIN:

Yes.

GLAZEBROOK J:

– but not anything related to the disordered mind –

MR HAMLIN:

Correct.

GLAZEBROOK J:

– it would have to be something outside of something related to the disordered mind. Is that the submission?

MR HAMLIN:

Yes, in the same fantasy example you gave before, your Honour, yes. That's fair. And at this point, interestingly enough, is a pause, section 10 hearing. We haven't had an assessment of insanity at the time of the offending so we haven't go to that point yet because he's unfit. That's a subsequent issue that has to be kept in mind. We're not arguing that should be raised at the section 10, we don't need to go there, but at the same point this hasn't, that analysis hasn't been made. We make that point in our submissions because some of the Courts seem to confuse that aspect of, at the time of commission of the offence

was he insane or not. We haven't got an answer to that but that seems to be involved and the reason the Courts have made it difficult to then look into the person's mind are because we don't know that. What I'm suggesting is we don't need to get there. We just need to consider the facts that we've got.

WINKELMANN CJ:
So on this analysis the act is injuring with the intention, that's the act that comprises the offence charged?

GLAZEBROOK J:
And that would have to be on your analysis proved excluding everything, however excluding in that consideration anything related to the impaired mind, is that –

MR HAMLIN:
Yes.

MILLER J:
So if you can state that proposition more generally it would be that a rights-consistent interpretation of this legislation is that, where the offence has a specific intent, then that must be addressed in a section 10 hearing subject to the question of mental impairment and, if that's the case, then you and the Crown are not so far apart –

MR HAMLIN:
No.

MILLER J:
– because the Crown says that the absence of reasonable belief in consent is the specific mens rea element of this offence.

MR HAMLIN:
I think that's right and I don't see that, and that enquiry isn't the difficult one. In fact we give it – in a criminal trial we ask the juries to do that all the time. So

it's not like – the only thing that I think drops a cloud over it in terms of the section 10 is the mental impairment aspect and the mentally impaired person's role in how that mental impairment might have affected that. So we haven't quite got the answer to that at the point of section 10.

WINKELMANN CJ:

Well –

MILLER J:

There's a very real question whether your approach is workable but –

MR HAMLIN:

It would take a –

MILLER J:

– that goes to Justice Glazebrook's question about what sort of evidence is admissible and what sort of proceeding are we going to have.

MR HAMLIN:

And if you jump ahead to my next point 9 which is the – can I just illustrate your point, your Honour, Justice Miller there on that. If we're going to use self-defence in a case of assault with intent to injure, for example, and we look at the mens rea elements involved at the section 10, the Courts have said oh and you can look at self-defence too. This a judicially created exceptions; mistake, accident, self-defence, involuntariness. When looking at the self-defence involved assessing the situation from the defendant's point of view, what he had in his mind, what he believed the situation to be and then the proportionate response. So even looking at self-defence under Lord Hutton's analysis, we're still looking at ironically a mens rea intentional element or understanding of –

MILLER J:

That seems to me quite a separate question because self-defence is a defence whereas accident –

MR HAMLIN:

Is there absence in the inter –

MILLER J:

– or mistake go to absence of mens rea. They don't really belong in the same basket at all.

MR HAMLIN:

No, they don't but that's interesting that they have arisen and been judicially created. So if – so my secondary answer is well we could go there and create an exception that if he had a reasonable belief in a sexual violation case, then that is a defence but I think, strictly speaking, the better response is at the beginning. It's a mixed mens rea offence and it ought to be considered at that stage which is my point 8.

WINKELMANN CJ:

So you don't need to put the matter as high as you're doing on this offence because in this case you're saying the act itself is not unlawful unless it's done with this state of mind.

MR HAMLIN:

Correct.

WINKELMANN CJ:

But say injuring with intent to injure would be unlawful, the act itself would be unlawful, without the mens rea?

MR HAMLIN:

The act of the assault, yes, in the same –

WINKELMANN CJ:

Yes.

MR HAMLIN:

– in the same, you would not have a homicide case in the same way, meaning someone's dead, they've been stabbed or shot, it's reasonably assumed that it's unlawful but even then, as in *Tongia*, there was self-defence raised, or defence of another as the case may be, that was successful in that case.

WINKELMANN CJ:

The graded assault things might be a good way of testing your statutory interpretation because I think this possibly favours you because the act or omission that forms the basis of the offence on your analysis is it's not just assault, it's the offence requires the act with the intent, the specific intent. It's a different offence if it's got a different intent.

MR HAMLIN:

Yes, it is, usually with a different penalty. So my point there under point 8 was if we look at the CP(MIP) then, both English and ours which tend to go together, the history really is homicide. They've created these exceptions; involuntariness, mistake, accident and self-defence which is another point but those tend to look at – Justice Miller and I were just talking about the absence of mens rea or some other form of belief in the circumstances self-defence is quite different but if the Court can create that then that's within the legislative purview, if you like, of where the Courts have gone already here and in England but my primary point is point 8 but I think that helps explain why we are there.

So that's really my next point, point 9. There are these judicially created exceptions which relate to mens rea or its absence. So that's my second answer, if you like, to where we ought to be, whether have a consideration of the mens rea under the mixed composite aspect of it and just deal with all the evidence, or we create an exception for a reasonable belief in consent for these sorts of charges. That's my point under point 9 really. So the Courts have created exceptions. When we are looking at those and talking about those, they inevitably involve that consideration.

The question of objective evidence, can I just talk about that briefly, because I think the request in *Antoine* and subsequent cases reinforce that, that deal with objective evidence, is looking at reliability and looking at reliability other than what the defendant has said. That's my analysis of it, or our analysis of it. So it doesn't have to be objective necessarily, it just has to be reliable, and the best example we've set out in our submissions relates to Justice Edwards looking at Tongia's statement to the police officer, was that reliable and admissible as to what was in his mind at the time and did it fit the other evidence that she heard as the trial Judge effectively, and it was, so she admitted that evidence at that point.

1030

So I think again when Lord Hutton and others have referred to the objective aspect, I think what they wanted to do was move something away from what was in the defendant's mind under a section 4A or a section 10(2) hearing. They wanted to look at, more specifically, was this evidence reliable, could we take this into account? I think that's what's being discussed there.

So I think the word "objective" is unhelpful because it suggests it has to be somebody other than the defendant that's giving that evidence and that's effectively what's been said in the cases.

WINKELMANN CJ:

Was that coloured, do you think, by the fact that it's a fitness context, so they're assuming the defendant can't give reliable evidence?

MR HAMLIN:

Yes, exactly. That's exactly the point. Your Honour's right. That's exactly what I want to say. The assumption is wrong that he can't give reliable evidence at the time and the comment that Justice Glazebrook referred to before about the person has a subsequent traumatic brain injury, whatever, could do so. So yes, it's not excluded. We are excluding it.

So the evidence is wanted to be, well, thought to be objective and independent. It doesn't have to be, and in a sexual violation where almost the majority of sexual violations occur when there's only two people present, the requirement of objectivity, ie, someone other than the defendant, is just not going to work.

ELLEN FRANCE J:

Do you – if you look at what Lord Hutton says about the nature of objective evidence that they are referring to, the examples given, so bottom of page 245 of whatever bundle we're in, he's talking about "if the defendant had struck another person with his fist", et cetera.

MR HAMLIN:

Yes, that example, in the handbag one.

ELLEN FRANCE J:

And then the woman charged with theft of a handbag, et cetera. I don't know whether another word for that would be "independent".

MR HAMLIN:

Yes. I think he's meaning independent of the unfit defendant, and what I'm suggesting that's not necessary. It just has to be reliable but not necessarily independent of the unfit defendant. I think what Lord Hutton was after was something reliable but he made that point because of the Chief Justice's reference to the unreliability of someone who's unfit which is not necessarily so. So there may be circumstances quite easily in which the now unfit defendant was giving, had a reliable narrative at the time that you could take into account but it wouldn't be independent of him.

KÓS J:

But it would also have to be independent of the circumstance giving rise to his unfitness.

MR HAMLIN:

Correct.

KÓS J:

Taking out therefore your deluded perception.

MR HAMLIN:

Correct, yes, and I might add a deluded perception probably wouldn't be reasonable anyway, but yes, it's two-way testing. But yes, I think going back to Lord Hutton's view, he takes a, I would suggest, a more restrictive view and what he – and the better view now, having reflected 25 years later, 2001 I think it was, is it talking about reliability and we can better assess reliability, and also, since then, we can better assess I think mental impairment as well, that science of psychiatry has got better, not worse, over the period of time.

MILLER J:

You are contemplating a process in which if we allow the scope of the hearing to extend to his belief at the time he can give evidence if he's able to do so at the time of a hearing. The complainant can be required to give evidence?

MR HAMLIN:

Yes, I would envisage – I would envisage at a trial process if the evidence were agreed then –

MILLER J:

Now the scope of the hearing is the same as it would be at trial, it's just that the standard of proof is the balance of probabilities.

MR HAMLIN:

Yes, and probably he's less likely to give evidence if he's unfit.

MILLER J:

Well, perhaps, but we've got to suppose –

MR HAMLIN:

Not necessarily.

MILLER J:

– he may do so. I mean if he were able – that's the only way in which he could get the statement to the doctor in here, right? If he's able at the time of the hearing to give evidence because otherwise it's just hearsay.

MR HAMLIN:

Yes, and that's perhaps an exception that we'd have to look at and consider that separately because that offends against him not giving evidence and then calling evidence about what he said. I accept that, and –

WINKELMANN CJ:

I mean, wouldn't it have to be the case if – because there might be a gap between being able to give evidence and being fit to stand trial in a broad sense because there's a lot more than that. It could be that the defendant could be sworn to give evidence but they couldn't be supported to participate effectively in a full trial, so if you were going to go down this path you'd have to accept that someone will be arguing that in the future.

MR HAMLIN:

I think that's possible, I do, and it might be that the unfit defendant could still give the narrative that he had given earlier, say, at a police interview, if that were the case.

WINKELMANN CJ:

And the complainant would give evidence but would in any case usually give evidence in a section –

MR HAMLIN:

Sorry?

WINKELMANN CJ:

The complainant would normally give evidence in a section 10 hearing.

MR HAMLIN:

Yes.

GLAZEBROOK J:

Although I understand normally it's read.

MR HAMLIN:

More often than not, yes, because there's not really an issue with it. But there are a number of cases in which the complainant is, as in this case, does give evidence and is cross-examined as they were at a trial, particularly if that issue arises as it did in this case.

So my point really – sorry, I just want to come back to where I –

GLAZEBROOK J:

Well, actually, that was one of the reasons they switched the hearing, wasn't it, so that they, you didn't have complainants giving multiple evidence in case somebody was afterwards found fit to stand trial?

MR HAMLIN:

I think that's always possible. Again, in –

GLAZEBROOK J:

Well, no, if there's going to be a trial later but when someone becomes fit, yes.

MR HAMLIN:

Yes.

GLAZEBROOK J:

Although that might be one reason why you wouldn't have a trial.

MR HAMLIN:

Correct, and –

GLAZEBROOK J:

And you don't have to.

MR HAMLIN:

Yes, and at that point we don't know that. That's an important point, at the unfitness hearing, because we're trying to deal with what do we do with him, the defendant, mentally impaired person, at that point, given the charge has been laid. Is he involved to that culpable level, and then we send him off as a special patient as Mr Repia has been sent. If that's the case, that's, that may require a trial process to take place with the necessary modifications. The modification, your Honour, Justice Miller, I'm referring to is that one we're talking about. Let's suppose, just as a theoretical side-point but I'll just briefly mention it, one can't call evidence about "one said" unless one gives evidence at their own trial. That might be one of the exceptions we'd have to argue to modify although I do deal with that now but it is a point that was raised in this case because at the point at which Mr Repia was facing a section 10 hearing he was not capable. So that's an interesting side-bar, if you like –

MILLER J:

But he also contends that he was unfit at the time.

MR HAMLIN:

Yes, he was, probably – we didn't deal with that directly. He had been sectioned effectively and was in [REDACTED] as a mental health patient because he might have been a danger to himself or others. So he was there receiving treatment [REDACTED] at the time of the incident that we're talking about now. [REDACTED]

MILLER J:

If we go back to the very beginning, if you like, on one view of this all that is needed to establish an injurious act is that intercourse happened without consent. Well, there seemed to be no public policy reason why you shouldn't regard that as sufficient, and if you couple that with the –

THE COURT ADDRESSES MILLER J – SPEAK UP (10:39:40)

MILLER J:

If you couple that with the proposition that the process you are contemplating, and let's take this case, for example, is simply artificial and unworkable, the idea that somehow you can separate out the effects of mental illness when you're considering the two jury questions. One, what did he believe, and two, was it reasonable, and how do you approach those questions if you're the fact-finder? On one view of it you should just say we can't.

1040

MR HAMLIN:

That's what's happened.

MILLER J:

Exactly, and there's no policy reason why we should be concerned about that, because the injurious act has happened.

MR HAMLIN:

I disagree on the injurious act. The injurious act is him, the defendant knowingly having sex with her in the absence of her consent.

MILLER J:

That's the argument you're making.

MR HAMLIN:

Correct.

MILLER J:

But I'm putting to you that there's a good policy basis for stepping back from that and saying, actually, here, consistent with the language of this section, there's no reason in this particular offence to go past the act of intercourse without consent, and there's another good reason for taking that approach,

which is the impossibility of the exercise you're asking a fact-finder to undertake.

MR HAMLIN:

Two answers. I think the policy reason requires you to go forward and look at this because of the interpretation of the section, and the mixed mens rea offences, and what the Crown has to prove, and I'll be discussing with the Chief Justice, that's the policy reason, we should deal with that, otherwise we can have an unfit defendant found involved when he had a defence of reasonable belief, and that's significant because he's detained and he hasn't presented an effective defence. So that's the policy reason that I disagree with. Secondly, without taking too much of my learned junior's opportunity before your Honours, is to say well we can look at this, and we can take this measurement, but I'll leave that latter point, if I can, to Ms Baird in a moment.

WINKELMANN CJ:

Yes because you've got half an hour, you've got 34 minutes left.

MR HAMLIN:

I think we'll finish within that time. Thank you your Honour for that. So where I was, dealing with Justice Miller there, relates to do we create re this exception, if we don't look at the beginning your Honours, Justice Miller, as I'm saying, we should be looking at it at the beginning, when then can we judicially create an exception such as a reasonable belief of consent to sexual activity, if that's the defence. Justice [C] did, in relation to the abduction charge – sorry, French in the *[C]* case did in relation to the abduction charge, but not in relation to the sexual violation charge, interestingly enough, because you had to show that there was intention to abduct for sex, which was part of the, one of the intentions that had to be proven, and I don't know why, for the reasons your Honours say that she didn't apply that to sexual violation when I suggest she ought to have for the reasons we've advanced.

MILLER J:

But she did put it in the same box as self-defence where –

MR HAMLIN:

Yes, mistake.

MILLER J:

– there was objective evidence, yes, and the Crown says she was wrong to do that.

MR HAMLIN:

I think she thought, tried to put it into mistake actually, but anyway whichever, but I – in answer, the secondary answer to my, to this appeal, is we'll put it in that box, and make it a defence of a reasonable belief in consent. I think in a matter of principle I think it should be the other way round, but judicially you can create that. Well, that's been created by Lord Hutton interpreting more or less the same provision. And, just pausing on the self-defence, and I'll finish on this, because that clearly does involve a consideration in a homicide or an assault/violence type charge, what did the, was there evidence of self-defence, was there evidence of his belief, or his understanding of the circumstances that he was acting in self-defence or defence of another, and did that fit everything else, and that's really what Justice Edwards did in the *Tongia* case, plus adding his reliability assessment of his evidence.

So in the end, if you're looking at self-defence in a homicide case, as you would look at reasonable belief in a sexual violation case, you're looking at mens rea factors. You've looking at what's in the man's head, what he's looking at, why can't we do that, we do that all the time, and we do ask jurors to do that as well, ironically, at a criminal trial, but if we got –

KÓS J:

Except what you're doing here is asking us to do take out of that man's head anything that's associated with his unfitness. But in self-defence when you're looking at the subjective perception of circumstance, plus subjective perception

of justification, it does become a very difficult exercise, it's just not the exercise in this case I guess.

MR HAMLIN:

I agree. It's not, it's an exercise that we would do in any case, anyway. So that's the cloud is the mental impairment.

KÓS J:

Yes.

MR HAMLIN:

I don't think that's an excuse not to do it, it just makes it a bit harder, and I think we can be helped by a psychiatrist, Ms Baird will address that in a minute, but yes, I think that's where we would go your Honour, to answer that question. But I don't think that makes it impossible, it just makes another step, that we would ask the jury to do anyway, but let's just look at the issue of what was in his head.

KÓS J:

This case is easier in the sense answering perhaps what Justice Miller proposed before, because you are looking at two things. One is was, did he have a reasonable belief. Well that's an objective question where we don't need to look inside his head at all. Then question is whether that reasonable belief, if it was reasonable, is in fact operative in relation to him. Reversing the way in which Justice Miller posed the two questions, that's harder, but you don't get there unless the belief can be reasonable.

MR HAMLIN:

Correct. So –

GLAZEBROOK J:

And one can, I would have thought, assume that if the belief was reasonable, then one could almost assume that he had that belief at the time, in a…

KÓS J:

Well, particularly if we're disregarding delusion.

GLAZEBROOK J:

Well exactly. Exactly.

MR HAMLIN:

Certainly there's got to be an assessment of that belief, but there ordinarily would be anyway in a jury trial, if it went to a – or by a judge-alone.

GLAZEBROOK J:

I think what's being suggested is you don't even look at whether he had that belief, you just see whether an ordinary person in those circumstances would have had a belief, and if that was reasonable, then you don't have to go any further. Because to go any further you're going into his mental impairment.

WINKELMANN CJ:

Unless he's like Mr Tongia and gives a statement at the time.

GLAZEBROOK J:

Well that's a different matter. That's not what we're talking about in this case.

WINKELMANN CJ:

But it might be.

GLAZEBROOK J:

It could be.

MR HAMLIN:

Yes, and I'm trying to cover the both.

GLAZEBROOK J:

No, I understand, I'm just suggesting that where we don't have anything else…

MR HAMLIN:

Yes it could be. Yes it could be that, absolutely. Perhaps the example your Honour gave before was the subsequent, that he was fine at the time he gave the police statement, but subsequently becomes unfit is an example of that. But even if he hadn't said anything the circumstances illustrate that, whereas if you had a child rape case, you wouldn't even get to that point, just to compare those two.

GLAZEBROOK J:

Yes. Well it wouldn't be reasonable.

MR HAMLIN:

No, no, even if he had that belief, and I think that's the test, if you like, it has to be reasonable in the same way, similar way Justice Miller talking about self-defence, it's got to be proportionate, so there's a reasonable test on it. So to sum up, it's that reasonableness that's a factor, and also the reliability factor, and as Justice Edwards illustrated in *Tongia* if you think it's reliable and it meets the circumstances, then it's reasonable. She probably would have said the same thing had the test been the same.

That brings me to the point I'd like to hand over to Ms Baird to give her the opportunity of addressing you on the last two points 10 and 11, and then I'll come for a little conclusion if I have time at the conclusion of that.

MS BAIRD:

Tēnā koutou katoa. Ka nui tāku mihi ki ngā Kaiwhakawā o tēnei kōti. Helpfully my learned senior has covered a lot of the background to my first point.

WINKELMANN CJ:

I did think he was rather moving into your area.

MS BAIRD:

Yes, I did try and kick him, but he was a bit far away. In terms of the background to point number 10 on that road map, as he has established, and each of

your Honours has noted, there is a thread of reasoning within New Zealand's case law and other jurisdictions that to consider any degree of mens rea would be unrealistic and contradictory, and that was adopted by the Court of Appeal in this case at paragraph 50 of that decision, but somewhat unhelpfully without any deference to reasoning for that. Now what's been discussed earlier is that simply because we're in the context of unfitness, the answer is we can't look there. It's too hard, and to link back to what Justice Miller said earlier, potentially impossible.

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Now the thrust of this section of the appellant's submissions is it is not universally impossible and we have experts to assist with that process. If I take a step back to contextualise with a very similar example as has already been discussed but rather than dementia I've picked a car accident and a traumatic brain injury. If we suppose that a defendant is charged with sexual violation, upon arrest he provides a lengthy police interview providing a basis for a reasonable belief in consent, he attends his first two court appearances, he instructs a lawyer, there's a clear defence present, he's then unfortunately hit by a car and suffers a traumatic brain injury and he is no longer fit to stand trial. What was in that defendant's mind at the time is entirely unrelated to why he has now been found unfit. So there's no correlation, if I can phrase it in a Venn diagram of sorts, between the impairment that causes unfitness and the state of the mind at the time of the offending and at the time the statement was provided, They are separate circles.

Now what we do know, based on the current interpretation of section 10(2) and the interpretation that my learned friends from the Crown advocate for, is that if his fitness was maintained that argument could be advanced but now that that fitness is not in the absence of any evidence unconnected to that police statement, there is currently no recourse for that reasonable belief in consent. An argument is present, reliability can be considered, but on the narrower interpretation of section 10(2) there is no scope to do so. That, in my submission, is discriminatory and in opposition to fair trial rights for those with mental impairments.

Now in terms of the discussion on what evidence would be advanced, that thought experiment makes it a bit easier than perhaps we have in this scenario. We have a police interview and, as Justice Miller said, if they're unable to give evidence, how are we getting that statement in. Fortunately section 10(3) of the CP(MIP) Act enables for a flexible approach to evidential rules at involvement hearings. We see that utilised already at involvement hearings. In the general interpretation within case law is that evidential procedure can be modified to ensure that the procedure works for those involved in it. Section 10(3) is somewhat intentionally, I would submit, broad enough to enable that adaptation.

ELLEN FRANCE J:

So that gets you around section 21 of the Evidence Act 2006 you'd say?

MS BAIRD:

Yes, yes, or perhaps it could be read into section 21 of the Evidence Act as a form of unavailability thus admitting a hearsay statement. Taking it a step even further back, at paragraph 31 of the appellant's submissions is a brief discussion on what evidence is available at a standard criminal proceeding of this type. What those submissions canvas there is that "requisite mens rea is rarely proven directly by prosecution. It is especially rare that it is derived from the accused person" and their evidence. There is no requirement for a defendant to give evidence and certainly in some cases they do not. That does not preclude findings of guilt. It does not preclude examinations of mens rea.

So, as Justice Glazebrook was saying earlier, there may be scenarios in which you can take a situation at face value and you can see that there is objectively a reasonable belief based on evidence entirely unrelated to the accused. In my submission, it doesn't need to be that narrow. We have scenarios in which statements are provided either just following the offending, as was the case here, to the police sometime later. Those aren't universally overlapping with the impairment which later forms the basis of the unfitness finding.

Now here we have someone with a mental impairment, not a traumatic brain injury. That is clearly more complex. So how do we assess reliability and potential coalescence of the impairment with the state of mind at the time of the offending? In my submission that's what we have psychiatrists for. Now I'm –

WINKELMANN CJ:

What do we have psychiatrists for? How do we assess? What was your question, sorry?

MS BAIRD:

If I can phrase it as a Venn diagram again. State of mind at the time of the offending, the mental impairment which forms the basis of unfitness. What degree do those circles overlap, and if that overlap is just one circle, then we've clearly got an issue and we're not going to give recourse to the defendant's account of the events. But if that Venn diagram only has a small overlap, we've potentially got a very reliable account from someone who has subsequently been found unfit.

Now the specifics of how an impairment manifests is within the realm of psychological evidence. It's provided routinely throughout procedure for those with mental impairments. It is provided and examined at contested fitness hearings under section 8A. It is provided again at disposition hearings. Psychiatrists and psychologists are already providing evidence very similar to what we would seek to adduce at the involvement hearing. That, in my submission, would form the basis of how the fact-finder is then to assess reliability. In the same manner as at a fitness hearing, the fact-finder is to determine whether the statutory test is met based on psychological evidence. At the involvement hearing the fact-finder could determine what degree of reliability to place in any explanations from a defendant based on the overlap between the basis of the finding of unfitness and state of mind at the time. Those are not always one circle in the Venn diagram analogy and, of course if they were, that would be the realm of insanity which, as my learned senior has established, is not what we are arguing here.

Now if we look overseas to test this proposition, in New South Wales, Tasmania and Victoria the equivalent procedure to section 10 is a full trial as closely as possible to standard proceedings. Now our legislation does not allow that and I am not submitting that it does at this stage. That is, of course, in the realm of the legislature.

WINKELMANN CJ:

Why do you say it doesn't allow it?

MS BAIRD:

Because it has specifically created a separate procedure. We can't go as far as saying in every single scenario everything must be proven including, for example, an insanity defence could be available.

WINKELMANN CJ:

Right.

MS BAIRD:

Yes.

WINKELMANN CJ:

Well we know it's not a standard criminal procedure because it's got a different standard of proof.

MS BAIRD:

Exactly, and that's perhaps the simplest way to look at it. It cannot be the functional equivalent in all detail because of that balance of probability standard but, in my submission, it can be as close as we can get within the interpretation of the legislation and that includes at reasonable belief in consent and any other mens rea elements which are inherent to the injurious act. But what looking to overseas jurisdictions does establish is there is clearly feasibility within the concept of being able to consider what was in a defendant's mind. There is clearly feasibility in a defendant who has been found unfit giving evidence, as

some of those procedures allow that, and certainly in some circumstances of unfitness, appropriate supports may enable that here too.

WINKELMANN CJ:

It's the morning adjournment time so we'll take 15 minutes now and we have 15 minutes when we come back, or you have, yes.

COURT ADJOURNS: 11.00 AM

COURT RESUMES: 11.18 AM

MS BAIRD:

Fortunately we left off just as I was transitioning to my next point. By way of summation of point 10, if it is feasible to examine whether a reasonable belief in consent was present, and for a judge to then assess reliability. To not consider it, therefore, amounts to discrimination, and is a breach of rights without justification.

That brings me to point 11, which concerns discrimination against those a disability, encompassing those with various mental impairments. I want to clarify from the outset of this submission that the appellant is not contending that the imposition of this alternative procedure as a whole is discriminatory. Simply that the removal of opportunities for acquittal, which would otherwise be available, is. Whether this is done in an offence-specific manner, or otherwise, in any circumstance where it is feasible to examine a potential basis for acquittal, and it is not then done, in my submission that is discriminatory.

Now I note my learned friends for the respondent's submissions seek to follow a broader approach to this examination, and that's at 85 of their submissions. Throughout those paragraphs they contend there is no material disadvantage to this procedure. If I may just steal the respondent's submissions from my learned senior. At paragraph 85.1 of their submissions a suggestion is made that: "By excluding this non-integral mens rea from consideration… the unique needs of unfit defendants are better accommodated." With respect, I do not

see any connection between the removal of mens rea and the accommodation of an unfit defendant's needs.

In the appellant's submission, amendments to process are captured by section 10(3) of the Act, and that bears no relevance to the scope of the enquiry, or the ability to accommodate for people with mental impairments within criminal process.

At paragraph 85.2 a suggestion is made that: "An involvement hearing and a trial can result in an acquittal, but only a trial can result in conviction and punishment." The appellant absolutely accepts that the risk of a conviction is removed, as it should be. Again, however, the corollary between the removal of a conviction, and the simultaneous removal of an opportunity for acquittal, is not clear. In my submission an absence of a risk of conviction should not be used as a bargaining chip to simultaneously remove a feasible opportunity for acquittal.

KÓS J:

Now we keep talking about acquittal but section 13 talks about dismissal of the charge which is, of course, different.

MS BAIRD:

Yes. For the purposes of this relatively synonymous but dismissal, stopping of the process, and not being subject to detention as a special patient.

At paragraph 85.3 the respondents step through the more advantageous outcomes of the involvement hearing procedure. Now it appears that the comparator group here is a convicted defendant charged with sexual violation. However, given the question is regarding a potential dismissal, the comparison should arguably be someone who's been acquitted in a standard procedure. Irrespective at paragraph (a) there's a discussion of not being exposed to imprisonment, then the appellant accepts this is not imprisonment, however it is a functional equivalent to imprisonment, and there is a lesser opportunity than fit defendants to not be exposed to detention.

WINKELMANN CJ:

It may not be a functional equivalent, but it's detention. You only need to go that far, don't you?

MS BAIRD:

Yes. Correct. So in some ways they are exposed to more risks, despite it not being detention in prison in the traditional sense. At (b) of that same paragraph the respondent suggests that detention only occurs when it is in the public interest. Detention of fit defendants is only ordered where it is the least restrictive circumstance required for the defence. In my submission it's an equivalent to sentencing principles and purposes. Imprisonment is only used where it must be.

At (c) there's a suggestion there's no punitive purpose. Respectfully this matters little when the conclusion is detention. Irrespective of the label that is applied to it.

At (d) there is a discussion of more regular reviews of special patients and their status. This understates the complexity of reclassification, which requires the Attorney-General and the Minister of Health to sign off. However, the appellant does accept that this is beneficial. This is protective to an extent. Again, however, how does this logically link to the removal of a chance for dismissal. Two things can be true. It can be a beneficial procedure, and there can still be element of discrimination, which in the appellant's submission can be fixed by a broader interpretation of section 10(2).

Finally at (e) there's a discussion of the availability of rehabilitation. There's no evidence on this point. Yes, treatment is provided at some of the facilities, disposition can occur too. However, we're also contemplating people with intellectual disabilities when we consider the involvement hearing for which treatment and rehabilitation looks quite different, and in some cases is non-existent. In my submission that point cannot assist.

What the respondent does helpfully establish is that there is a clear drive to accommodate for people with mental impairments. There are advantages of this procedure, the appellant accepts that, but currently this comes at the cost of a potential dismissal that an otherwise fit defendant would have, or could have, secured. It's this absence that is discriminatory, not the procedure as a whole. As there's no justification to exclude the consideration beyond the conflation between insanity and unfitness, which in the appellant's submission has been made in error, there is no demonstrable justification to exclude consideration of a potential dismissal, acquittal.

WINKELMANN CJ:

So practicality, you say, is not a justification. The Court should do its best, but you accept that anything which is logically linked to the disability is, could be a justification.

MS BAIRD:

Yes. But convenience and administrative burden is not a sufficient justification for an infringement on rights. As I've previously discussed, and my learned senior has too, in our submission it is inherently feasible to ask the question, was there a reasonable belief in consent, and to query by reference to psychological evidence, is that reasonable belief reliable. Is the evidence that we have available able to establish the opportunity for a dismissal.

Now unlike the clear statement of it being a balance of probabilities standard of proof, the section 10(2) wording is sufficiently ambiguous, and the parliamentary intention sufficiently unclear, and in saying that I refer back to Justice Kós' comments that there is discussion of physical responsibility, and then there is a discussion of not having committed the alleged offence within the parliamentary debate on this provision.

There is sufficient ambiguity to enable a rights-consistent interpretation without doing violence to the legislative scheme. This is already been done through the developed parameters that my learned senior has discussed, and it still maintains consistency with the overall purpose of the regime.

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Now perhaps the simplest way to establish that is the Court of Appeal quote at paragraph 9 of their judgment, that the purpose of the provision is "to minimise the risk of a person who was unfit to stand trial being placed into secure care, even though they had not committed any offence".

There is a connection to culpability. There are detention elements and in the appellant's submission there is no demonstrable justification for this exclusion. To promote equality for mentally impaired people within this provision requires consideration of a reasonable belief in consent and an assessment with the assistance of experts as to what degree can be taken from any statements made by the accused.

That helpfully brings me to the end of my section. I will pass back over to my learned senior just to conclude unless any of your Honours have any questions.

WINKELMANN CJ:

Thank you, Ms Baird.

MR HAMLIN:

Ms Baird's concluding comments are really mine as well. What the appellant is seeking is a fairer procedure given what we now know and how it can be changed I've proffered in the earlier parts of my submissions.

I don't wish to say anything more unless your Honours have got any further questions.

WINKELMANN CJ:

Thank you, Mr Hamlin. Good morning, Mr Lillico.

MR LILLICO:

Good morning, your Honour. So I was intending, subject to the Court's questions and concerns, to deal with five broad areas.

Firstly, I was going to deal with two textual pathways, if I can put it that way, to reading in mens rea that were suggested. So, firstly, the mixed mens rea/actus reus idea and, secondly, the *Antoine* defence exception. So that was the first thing I was going to address. Secondly, I was going to address the idea of an "injurious act" which Mr Hamlin's used and which I agree is a useful term. Thirdly, I'm going to deal with Justice Glazebrook's enquiry about the evidence that might be called in an involvement hearing; fourthly, the argument that's been put before you by the appellant about the denial of a defence; and lastly I'd like to address the Court's suggestion essentially to my friends that there is a way forward in terms of reasonable belief in consent being provable, looking past, if I can put it that way, the mental state of the defendant. So reasonable belief in consent considering the usual objective standard that's employed in criminal law.

So just firstly, in relation to the two pathways that have been suggested to you, firstly there was the mixed actus reus/mens rea element and Mr Hamlin read to you the excerpt from the English text, *Smith & Hogan*, which is a good starting point for the discussion. It was also employed by Justice French in the *[C]* decision. So the classic example of a mixed. So my submission to you is that this isn't, we're not in the mixed actus reus/mens rea realm here and the example you might recall from *[C]* was possession, possession of an offensive weapon, and that's expanded on in the *Smith & Hogan* excerpt that was read to you, because the argument is that words that are redolent of action or behaviour by defendants and which seem on their face to be purely actus reus do, in fact, to make any sense at all in a criminal context, also import states of mind, mens rea, and possessory offences, possession of drugs, possession of weapons, are one of those because knowledge, classically a mens rea element, has to be read in to make any sense of it in a criminal context, and what I say to the Court – and, sorry, before I get onto that, that is why in *Goldsmith* those principles that are – (a) through to (f) – that is why the *Goldsmith* principles ask us to carry out a textual statutory interpretation analysis to help the Court assess whether we are in a mixed mens rea situation, and what I say to the Court is that we aren't if we are looking at the offence in Mr Repia's case because Mr Repia is more analogous to the specific intent assaults that the

Chief Justice raised. So actus reus are actions, also consequences, and circumstances.

So here, if we think about the three elements of sexual violation, we have the act. No difficulty there. It's the violative act by Mr Repia. No difficulty. That's behaviour. We all understand that is actus reus. Secondly, we have the lack of consent, which must be proven, we all agree, even in an involvement hearing, of the complainant. Also actus reus because while it is easy to spot a behaviour, such as a violation, as actus reus, actus reus also involves consequences of actions and circumstances of actions. So here it's a violation and either consequence or circumstance. It's a bit hard to conceptualise which it is really. There's no consent from the complainant. So those two elements are actus reus elements, one very straightforwardly so, secondly becomes apparent because we need an actus reus to also avert ourselves to circumstances. Thirdly, the third element stands out by itself as a mens rea, as a classic mens rea element, because it is about knowledge or, as it's couched in the Act, belief, and knowledge and belief are classically mens rea, and importantly, and this is more vital to the argument about whether we can tack on this mens rea element to the *Antoine* defence's mistake, accident, self-defence, importantly we know from this Court's decision in *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315 that it is always an element, whether it is raised by the defence or otherwise whether it's raised by the evidence in the case. So it's an essential element but a mens rea element.

And what the Crown do is refer to *Wells* which is all of a piece, we say, although it's earlier, all of a piece with *Goldsmith* and the principles and some of the principles draw on *Wells*. *Wells* is useful because it is a case of sexual violation, and in *Wells* the Court said: "Although we recognise that there are instances where it is difficult to distinguish between the actus reus of an offence and its mens rea," so the possessory offences are a great example of that, "the question of a reasonable belief in the consent of the complainant to sexual touching clearly falls into the realm of the latter and does not require a finding in the" – in the English and Welsh equivalent of section 4A, sorry equivalent of

our section 10, theirs is 4A. So that's from *Wells* which is at tab 3 of the respondent's bundle.

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So very difficult, well we say impossible, to fix that very classic mens rea element reasonable belief in consent and the complainant's consent into a mixed mens rea scenario. There are mixed mens rea offences. They will fall to be dealt with on this statutory or text analysis that's suggested in *Goldsmith* but this isn't one of them.

WINKELMANN CJ:

Why?

MR LILLICO:

For the reasons I've outlined.

GLAZEBROOK J:

Well do you want to go back a step and say "who cares"?

MR LILLICO:

Parliament, your Honour.

GLAZEBROOK J:

So you'd start with whether in fact the section says you don't have to prove mens rea in any circumstance?

MR LILLICO:

Sorry, your Honour?

GLAZEBROOK J:

Well you say it's not a mixed mens rea –

MR LILLICO:

Mixed actus reus I think is probably the best way.

GLAZEBROOK J:

– what the appellant is saying is well it really doesn't matter what it is but if you're depriving somebody of a way of being acquitted, or having the charge dismissed that an otherwise fit defendant would have, that's discriminatory and we would have to be compelled to interpret the legislation that the only way that it can be interpreted is that whatever the mens rea is it's excluded in the circumstances you're talking about.

MR LILLICO:

Yes, so I am going to get onto the denial of the offence idea number 4.

GLAZEBROOK J:

Well I don't care if it's a defence or what it is –

ELLEN FRANCE J:

Well I understood you were responding to the specific argument that you can carve this out on the basis that it's mixed actus reus and mens rea and you are responding to that at this point in time.

MR LILLICO:

Yes, yes, so it's suggested that this is a –

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

No, no, I understood that. I was saying for me you'll have to go back and say, and show to me that that is, that the legislation says whatever, however you characterise it, you take out any mens rea element.

MR LILLICO:

The wording of the statute I suppose is the best argument and the explanatory note.

GLAZEBROOK J:

Well I presume you'll come to that.

WINKELMANN CJ:

But can I ask you a follow-up question to my earlier question which is you say it's clearly distinguishable from the kind of cases you're talking about, possession et cetera, well can you articulate how it's distinguishable because I'm struggling to see it?

MR LILLICO:

Well it's distinguishable because those possessory cases are on the face of them actus reus elements. So just off the top of my head, possession of an offensive weapon, and so on the face of it that's an actus reus.

WINKELMANN CJ:

The act is itself requires knowledge.

MR LILLICO:

Yes.

WINKELMANN CJ:

But here why does it deserve a separate category where this would not be a criminal act were it not for the mens rea element?

MR LILLICO:

I'm not sure if there's an answer to your Honour's question but the statute doesn't of course require – it's not like the Australian statutes, which my friends very fairly said were quite different, which do require a criminal act. We don't. On the words of the statute –

WINKELMANN CJ:

Would you accept – you were going to come onto discrimination so I won't start to ask any more questions.

ELLEN FRANCE J:

Sorry, which are the words you're relying on in relation to that on the words?

MR LILLICO:

So “cause the act or omission that forms the basis of the offence” and so – and that’s reinforced. or tends to be reinforced we say by the subheading which talks about involvement in the offence rather than proof of an offence in itself.

WINKELMANN CJ:

When you look at those words and you look at the statutory development of them which I think can be traced back to English statutory development –

MR LILLICO:

Antoine, yes.

WINKELMANN CJ:

Yes, it seems to be motivated really by a concern that you don’t have to prove mens rea where the insanity aspect is going to be a problem. So, you know, how can the Court prove mens rea – be satisfied of mens rea when the person is insane by definition, so sort of a tautology, but if you excise that what's the social, what's the policy interest being pursued by excluding mens rea outside of that?

MR LILLICO:

Yes, so we can, I think I'll endeavour to answer that under 5, but the short answer I suppose is that we can conceive, and to get away from the uncomfortable facts of the present case which I'll go into, my friend has, and you have a better set of facts perhaps in *Bailey v R* (SC 120/2024), which is before you for a different issue, we can conceive of people who were perfectly capable, perfectly competent at the time of the offending and at a later point are not and this is a point I will say later on. Parliament has drawn a line as they must in a policy sense and said well usually this is difficult territory where rather incongruously talking about mens rea elements in the context of someone

who's unfit to plead, we are not going to require that on an involvement. So that's the short answer.

So the other path, sorry, your Honour, that's –

KÓS J:

But that means what we have is a person who's stuck in the CP(MIP) process who, if they were otherwise fit, would not be and I would have thought the underlying policy, which to some extent is supported by the Minister of Justice's statement in the House, was that it's about whether in the involvement hearing you were shown that the person has committed the offence and that's wider than simply the question of the actus reus. Isn't really the policy driver here asking yourself is there a reason why this person should remain in the CP(MIP) process and, obviously, if the underlying excuse is the reason why they haven't committed the offence, in Mr Goff's expression, is because of their deluded views, their insane state, then obviously they would stay in the CP(MIP) process but otherwise why keep them in it?

MR LILLICO:

Well I would have thought the overall policy, as I'll get onto in 5 which the Bench is more interested in than I am, I was going to, for structural reasons, end on a high note and I'm conscious that if I start now then the rest of my submissions will be disappointing for everyone but the –

WINKELMANN CJ:

That's very candid of you, Mr Lillico.

MR LILLICO:

Although it has to be said I'm not very good at spotting what my high point is. I would say, your Honour, that a better policy conception of the CP(MIP) process is not as a functional equivalent to trial which I say, with the greatest of respect and meaning it to Mr Hamlin, that that's a word or a phrase that he's come up with, it's not a functional equivalent to trial –

GLAZEBROOK J:

Well it came from *Rafferty* I think, didn't it?

MR LILLICO:

Well I stand corrected and my faith in him has been repaid. But that it is a health outcome-based alternative to trial, is the phrase that I would prefer, and so that the policy basis behind the CP(MIP) railroad is really to allow people to – allow the Courts to respond to people who have a mental health or disability need where there is an overlay of suspected criminal offending and the threshold that's been set is in relation to physical acts although, as the Chief Justice says, that has been altered to include other things as well including some things that are relevant of mens rea.

KÓS J:

Well let's take an example. In *Cook v R* [2025] NZSC 44, [2025] 1 NZLR 75 we didn't end up deciding whether sane automatism went to the volition part of the actus reus or was a matter of mens rea but the preponderance of the *Cottle v R* [1958] NZLR 999 (CA) case and *Police v Bannin* [1991] 2 NZLR 237 (HC) suggests that it's a mens rea point. So if a defendant suffers an episode of sane automatism immediately before they commit what otherwise would be an offence, on your basis that mens rea defence of sane automatism would be excluded so they would be stuck in the CP(MIP) process when a person who was otherwise fit to stand trial would not be and I can't understand the sense of that for myself.

MR LILLICO:

Well perhaps if I go through the next point I was going to make and that would help because I think – because if sane automatism – the short answer I think is, if sane automatism on a, and if it's on a mens rea, or an actus reus basis, I don't see that it makes too much difference to the analysis, but if sane automatism is raised evidentially from what we will call objective evidence, then no, the Crown accepts that that has to be negatived because it is a defence, not an element.

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KÓS J:

But it's a mens rea based defence on the current state of the law.

MR LILLICO:

Yes, and perhaps I'll just get on to my second point. My second point was that there is a pathway suggested by Mr Hamlin and Ms Baird and Ms Gray where they essentially, this is picking up on the Chief Justice's point, that the apparent strictures of section 10, which focus on, we say, actus reus effectively, the strictures of that have been expanded by the English, in particular, the common law in *Antoine* where we now have, classically accident, mistake, and self-defence. Now the argument I would like to run, but can't, is that they all go to, and this is the quote from the Attorney-General's reference was read to you by Mr Hamlin, the idea is that these all go to the act, but again mistake, for one, is very clearly a mens rea defence. Self-defence has important mens rea elements. Actus reus sometimes is an actus reus defence, but sometimes it's mens rea as well. So that's not the differentiation, and the reason I say you can't take on this mens rea element and squeeze it into the *Antoine* defence exception. The reason I say you can't squeeze reasonable belief in consent into the *Antoine* exception is because it is an element, and because all of those defences, accident, mistake, self-defence, they all have to be raised on an evidential basis. Self-defence will be very familiar to you, and you won't require any authority for that. The others were not familiar to me, at least, and so I considered what would be needed, but again they all have attaching evidential burdens. It's often said to be –

GLAZEBROOK J:

What's say there is – I don't understand that as a distinction in the sense that if there wasn't even an evidential foundation for reasonable belief in consent, then it would be negative anyway, wouldn't it?

MR LILLICO:

Yes. In the end it's just a question of how it's raised. But my –

GLAZEBROOK J:

And if there is, then it would have to be looked at, wouldn't it? I mean if you look at the, I mean the absolutely clearest example is somebody who becomes incapacitated through a traumatic brain injury well after the process has started.

MR LILLICO:

Yes the –

GLAZEBROOK J:

So there could be all sorts of evidential indications of reasonable belief in consent, couldn't there, in those circumstances?

MR LILLICO:

Yes, the limit of my argument is that I'm saying that this isn't, it's put to you that this is some sort of logical and measured development of the in time defence exception. I'm saying it's not because it's not a defence, it's a mens rea element.

GLAZEBROOK J:

But I – I mean yes, but so what, is what I'm asking you.

MR LILLICO:

It goes only that far, my argument, that it's not as suggested – well, so what I suppose is, that it is suggested to you by Mr Hamlin that all the Court would be doing is developing the *Antoine* defence exception and you wouldn't be. That, that's so what.

WINKELMANN CJ:

So Mr Lillico, we've taken you away from your submissions, so do you want to regroup and take us back to your submissions?

MR LILLICO:

Because I spent a long time trying to find them, can I give you the citations first, the evidential burden?

WINKELMANN CJ:

Yes.

MR LILLICO:

Kaitai is the accident reference, *Kaitai v R* [2024] 1 NZLR 559.

WINKELMANN CJ:

This is authority for what proposition?

MR LILLICO:

That there is an evidential burden for mistake. Self-defence. Sorry, probably a better reference for that is *Primeau v R* [2017] QCCA 1394, and it's at [32].

GLAZEBROOK J:

Sorry I don't think I – Primeau sorry.

MR LILLICO:

Primeau, P-R-I-M –

GLAZEBROOK J:

No, no, I got that, the 2017 what sorry?

MR LILLICO:

[2017] QCCA, so the Québécois have had to deal with accidents, 1394 at [32]. Self-defence you're all, we're all familiar with, and mistake, *Kahia v R* [2019] NZCA 612 at [63] to [65].

ELLEN FRANCE J:

So do you say then that if you proceeded on the basis of well this is a further exception along the lines of *Antoine*, that there would effectively then be no limit to the exceptions. Is that the logic of your argument, all sorts of things would then…

MR LILLICO:

Yes, that's a better argument then the one I've raised. So we would have all the specific intent, assaults for example, and of course the other, just to pick up on your Honour's point, the end point is that we're proving all three elements. So we are proving the offence, which we say, whatever the Minister said at the time, is reasonably apparent from the text that it wasn't the exercise, it wasn't a requirement, as it is in many Australian states, to prove the offence. Full, as in full criminal culpability, which included all elements, actus reus and mens rea.

WINKELMANN CJ:

Now, back to your submissions?

MR LILLICO:

Yes, thank you your Honour. It's a short point, but relates to the discussion about mens rea and actus reus. There is a flavour of, there is a flavour in the submissions, or at least the written ones from the appellant, that there is no injurious act here unless we bring in the mens rea element, and what we would say to you about that is that we have an injurious act in terms of *Antoine*, because we have the first two elements. We have sexual violation, or a sexual act to put it more neutrally, that of course is not anything like, it's not adjacent to a criminal act, it's not an injurious act, perfectly lawful, but then we have the lack of consent, which we say is also an actus reus element which uncontroversially does need to be proved in an involvement hearing, so just a short point. We say the *Antoine* requirement for an injurious act is satisfied because it isn't controversial that both of those two elements must be proven.

R v Te Moni [2009] NZCA 560 is probably the best law for the Crown there, and that's referred to at paragraph 33 of the submissions where we say significantly in *Te Moni*, notwithstanding the differing approaches that were discussed, the Court had no difficulty concluding that the section 9, then section 9, purposes the charge of rape required proof of non-consensual penetration because non-consensual penetration is qualitatively different from consensual penetration, they are different acts.

So the third point I wanted to make was in relation to Justice Glazebrook's question about what evidence might be called usefully given that we are dealing with someone who is at the very least at the time of the involvement hearing mental impaired, and Justice France later raised *Antoine*'s answer to this.

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The decision in *Wells*, though, is also useful and might be useful to bring up. This is in the respondent's bundle, paragraph 15 of *Wells* which is at tab 3. So referring to Lord Hutton's example of an eye witness but also: "CCTV, cell site," so we get some more modern examples, "scene of crime or expert forensic evidence are all available to assist a defendant." And then usefully for our purposes the Court also deals with what would not fall into it: "What would not fall within the category," this is half way through the paragraph, "within the category of objective evidence are the assertions of a defendant who, at the time of speaking, is proved to be suffering from a mental disorder of a type that undermines his or her reliability and which itself has precipitated the finding of unfitness to plead."

MILLER J:

So it's enough there that the disorder undermines the person's reliability?

MR LILLICO:

Yes, it seems to be, and *Tongia* is an example of a case where reliability, notwithstanding the dicta in *Wells*, was thought to be enough. Just so that the Court has a range of examples, this case itself illustrates why unreliability concerns are ordinarily present with a self-report from a defendant who is unwell and the main item here is that, perhaps, is that Mr Repia's state of mind lent itself to unreliability in his own self-report. So you might recall that a concern of the doctor's was that he was delusional and psychotic and had auditory hallucinations at least. So there's that, but also Mr Repia's account was inconsistent even within itself. Mr Tongia, who had low IQ, he wasn't psychotic or delusional, he just was suffering from a disability. The Judge in that case found some support from what Mr Tongia said from other witnesses.

GLAZEBROOK J:

Wouldn't this be the normal process that a Judge would just go through to see whether in fact there was – that the account could be relied on rather than saying whether reliable or not, ie, a statement made at the time somebody was perfectly capable of and not suffering under any type of delusion, should just be excluded because they have the unlucky car accident or whatever has caused – or descended further into dementia?

KÓS J:

Or indeed there may be a third party who is the source of the observation who is entirely reliable.

MR LILLICO:

Yes, by itself, Sir, that would fit into Lord Hutton, I think he was concerned with third party so yes, that would definitely fit in, to answer Justice Glazebrook's question.

GLAZEBROOK J:

But if we can't look at mens rea, just per se –

KÓS J:

Yes.

GLAZEBROOK J:

– which is what the Crown says is the case, then however reliable that third party account is could not be taken into account.

MR LILLICO:

That's right. I think the question, or as I detected it anyway, was if we accept that the law is as stated in *Antoine* what does the Court mean by "objective evidence" and that's simply what I was asking –

GLAZEBROOK J:

No, no, but my understanding was that your submission was no matter what mens rea is out –

MR LILLICO:

Yes, yes, your Honour.

GLAZEBROOK J:

– unless it fits within those exceptions. Those exceptions can only be shown by objective evidence, ie, independent evidence under Hutton…

MR LILLICO:

Yes.

GLAZEBROOK J:

But not generally.

MR LILLICO:

But not generally, no, no.

GLAZEBROOK J:

So actually whether it's objective evidence or not on the Crown's submission because you can't consider mens rea it's out?

MR LILLICO:

A mens rea element, yes. As I said –

GLAZEBROOK J:

So whether there's objective evidence of it or not, you just can't consider it as the Crown's submission on the effect of the statute which is why I asked you if you could go to the statute and tell me that was the intention and purpose.

MR LILLICO:

No, of course, you can't go from what is possible in the world evidentially speaking where there are a range of defendants who are – some may be

perfectly competent at the time. You can't, in my submission, go from that to then interpreting the statute which uses the term "acts or omissions". So in other words your ability to discover evidence doesn't drive the interpretation.

GLAZEBROOK J:

So what you say is "acts or omissions" means acts or omissions, excludes mens rea unless it happens to be the very narrow defences that are recognised exceptions. Is that the submission?

MR LILLICO:

No, because I think I accepted Justice Kós' suggestion of automatism is whether sane or insane.

GLAZEBROOK J:

Well, I think that there is – they do have involuntariness there. I presume that would be automatism.

MR LILLICO:

Yes.

GLAZEBROOK J:

I presume that's what was meant by –

MR LILLICO:

The Crown would be delighted if that was gotten rid of as well but it's the law and it's accepted to be the law. It seems odd because they deal with mens rea and they don't seem to fit with the scheme of the Act, but that is the current state of the law.

GLAZEBROOK J:

I understand.

MR LILLICO:

And if I could make an oral submission for that to be expunged, I would be very happy to be heard on it.

The fourth aspect that I was going to deal with was the denial of the defence idea and so I've touched on this already. It should be borne in mind in terms of the broader scheme that the hope, or one outcome that – the most satisfactory outcome, especially for the complainants and possibly also a defendant, is that there will be an opportunity to have the case heard and for a decision to be made against the full range of facts, any defence that is available at trial, and there is no binary choice here. That is a possible outcome, the hoped for outcome if I can put it that way, for someone who is unfit to plead. Now it is not possible, was not possible for Mr Bailey, it won't be possible for people with intellectual disabilities often, but that is the hoped for outcome. So it is not – when we say there is a denial of a defence, the first thing to recognise is that that will not always be the case and that there is a full expression of defence is allowed if a trial is possible, if a fair trial is possible.

The second point to be made about this is that the word "defence" is slightly awkward because it is a reason for denying involvement in a health-centred process and inevitably there are going to be different procedural safeguards and procedural hopes and obstacles in a system that is aimed at something completely different from the criminal justice setting.

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So essentially the lack of ability for the defendant to rely on a full range of defences, used in a broad sense, because here we're saying it's mens rea and it's an element, has been taken on a policy basis, and this was identified by Justice Miller in discussion with my friend. So Parliament have not built in a proviso, if you like, or built in a requirement into section 10 that before mens rea is walled off and made unavailable, there needs to be a requirement into the individual capabilities and capacities of the defendant. Parliament seem to have said to themselves, there is a basic contradiction in examining mens rea, state of mind, belief, knowledge, where we have someone who is unable to participate in an ordinary criminal trial because of their lack of capacity through disability or mental impairment, and that difficulty, which I acknowledge will not be present for all defendants, because some defendants in historical cases will

be perfectly competent at the time of the offending, and some, although it's quite difficult to, we wouldn't want to close off the possibility that there may be borderline impaired defendants who are, globally speaking, unable to instruct, but could for instance maybe give some sort of narrative of their defence to their counsel, although ordinarily of course that's quite a central item in the checklist. But what I am saying is Parliament have said, look, in general this is the policy setting. We are going to wall off mens rea as an element, albeit the English have later developed exceptions, defence exceptions, and in my submission this case illustrates why because Mr Repia's disability really does hone in on both these points, because he was a civil, he was civilly committed at the time of the offending, and so firstly he hits that first policy concern and this Court's case on appeal at page 121, paragraph 17, traverses some of the evidence about this.

GLAZEBROOK J:

Sorry, can you just remind me what the first policy concern was, that he hits?

MR LILLICO:

Oh, well…

GLAZEBROOK J:

That he was impaired at the time of the offending –

MR LILLICO:

That's he was impaired at the time.

GLAZEBROOK J:

Okay.

MR LILLICO:

So we can, I acknowledge that we can imagine other defendants who don't have this, yes.

GLAZEBROOK J:

No, no, I just was just checking, so he was impaired at the time of the offending?

MR LILLICO:

He was impaired. He was civilly committed and the – he was at his baseline state essentially.

GLAZEBROOK J:

Sorry, what do you mean by "baseline state"?

MR LILLICO:

That was the term used. So at the time of the offending he was in his baseline state. He wasn't acute. He wasn't suffering an acute episode at the time.

GLAZEBROOK J:

Okay, understood.

WINKELMANN CJ:

Is this the Court of Appeal judgment where you're taking us to? What is that document?

MR LILLICO:

Yes, that's the Court of Appeal judgment. So we see there that – sorry, this is rather to the second point which is about instruction to counsel but Mr Repia's responses, this is when the report writers were trying to take a history: "Mr Repia's responses quickly became thought disordered and meaningless. Dr Whiting's view is that Mr Repia's thought disordered replies would make meaningful dialogue impossible… cognitive impairment means his thinking is very concrete…" and that would compromise his ability. So Mr Repia is not one of those people who is at a borderline and might nonetheless be able to conjure up a narrative to assist counsel with.

GLAZEBROOK J:

"Conjure up" is probably not exactly the right term in these circumstances.

WINKELMANN CJ:

Provide a narrative.

GLAZEBROOK J:

Provide a narrative.

MR LILLICO:

Provide a narrative, yes. So –

WINKELMANN CJ:

Is your point here that his aspect, whilst he might have been presenting at this time and the time of the fitness assessment, the doctor's description of him makes it clear that there were some aspects of his disability which were persistent. Is that what you're saying about paragraph 17?

MR LILLICO:

My point is really that Mr Repia himself illustrates why the reason for the policy that, although we can conceive of other people who it wouldn't affect so much, he illustrates why Parliament might not have wanted to allow mens rea as a reason to deny involvement.

WINKELMANN CJ:

But what does paragraph 17 show?

MR LILLICO:

Well paragraph 17 shows that, as Parliament anticipates, there are people who are just, who when they are unfit, are just unable to give a meaningful instruction to their counsel.

WINKELMANN CJ:

But you were saying to us earlier that he wasn't acutely unwell at the time of the events?

MR LILLICO:

Yes.

WINKELMANN CJ:

So how do we know as to – because there are two concerns, aren't there? There's the Venn diagram concern, as Ms Baird very usefully put it, but there's also the ability for him to give objectively reliable evidence.

MR LILLICO:

Yes.

WINKELMANN CJ:

So the Venn diagram concern how do we know anything about that?

MR LILLICO:

We know that when he was spoken to he was in his baseline state. We don't, I think, know whether he was in an acute state when he was allegedly raping the complainant.

WINKELMANN CJ:

But his baseline state tells us what about him? What's the evidence about his baseline state?

MR LILLICO:

In terms of instructions, that passage from Dr Naidu. I don't think, I can't put my hands on it at the moment anyway but we do have evidence about when he's acutely unwell and that's at 56 of this Court's case at 17. So that's where we get, as I adverted to earlier, your Honour.

GLAZEBROOK J:

Can we get that up if we're referring to it?

WINKELMANN CJ:

Is that again the Court of Appeal? No, it's not the Court of Appeal. What is it?

MR LILLICO:

No, that – page 56.

GLAZEBROOK J:

Of what? Of the case on appeal?

MR LILLICO:

Of this Court's case.

GLAZEBROOK J:

Okay, which is not what we've got up there.

MR LILLICO:

Sorry, no, it's the same passage.

WINKELMANN CJ:

What is 56 of this Court's case?

ELLEN FRANCE J:

It's from the Court of Appeal judgment, isn't it?

WINKELMANN CJ:

Okay, it's again the Court of Appeal judgment, is it?

GLAZEBROOK J:

Do you mean the actual case on appeal with a report from a doctor because that's not what we've got up.

MR LILLICO:

No, no. Yes, no it's just –

GLAZEBROOK J:

You're referring to the Court of Appeal decision again?

MR LILLICO:

It's just the Court's summary of it. There was another passage but I might just check where it is so I can find it myself.

GLAZEBROOK J:
So that's just paragraph 17 again, okay.

MR LILLICO:
Yes, we don't have the – we've got the notes of evidence but we don't have the actual –

GLAZEBROOK J:
The actual reports.

MR LILLICO:
– reports there.

WINKELMANN CJ:
Wasn't one put in?

MR LILLICO:
There were two, yes.

WINKELMANN CJ:
Yes.

GLAZEBROOK J:
But we don't know whether he was acutely unwell?

MR LILLICO:
I don't believe so but Mr Hamlin might be able to –

GLAZEBROOK J:
Either at the time of the offence or at the time he was being interviewed or…

MR LILLICO:
To be fair he wasn't acutely unwell when the psychologist, the psychiatrist, spoke to him, Dr Taylor. So you'll recall that there's a note from Dr Taylor and she didn't think he was.

WINKELMANN CJ:

Dr Taylor's reports, where it's in the bundle of – is that Dr Taylor, the one that was filed late?

MR LILLICO:

Yes.

WINKELMANN CJ:

For my part I can still only see paragraph 17 of the Court of Appeal's decision. I don't know, are we meant to be looking at something else?

MR LILLICO:

No, no thanks. So perhaps it's probably –

GLAZEBROOK J:

So can I just, just to help me.

MR LILLICO:

Yes.

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GLAZEBROOK J:

Your submission is that the policy decision just to look at –

MR LILLICO:

Actus reus, yes.

GLAZEBROOK J:

– the acts effectively and not to look at mens rea was because of an assumption –

MR LILLICO:

Yes.

GLAZEBROOK J:

– in the legislation –

MR LILLICO:

Yes.

GLAZEBROOK J:

– that either all or most would not be able to give any sort of coherent narrative about mens rea because it would be clearly affected by their impairment and therefore that was a policy decision that the Crown didn't have to prove that in any case.

MR LILLICO:

Yes, but the – yes, that's correct, your Honour, thank you. And the second part to that would be that there would be also another group who, because of their own inability to perceive truly what other people are doing via delusions, hallucinations –

GLAZEBROOK J:

Well I think I'd include that in the – than not be able to give any coherent evidence or reliable evidence because obviously a delusion can't possibly be reliable so.

MR LILLICO:

Yes, and I don't understand my friends to be saying that they could rely on that, yes.

GLAZEBROOK J:

No, no, in fact they –

MR LILLICO:

Being careful not to.

GLAZEBROOK J:

– I think when I mentioned it explicitly said: "No, of course not."

MR LILLICO:

Yes, thank you, your Honour. And then the fifth aspect I was going to deal with was, as I detected, a position really that's presented by the Court that we could focus on the objective test, the objective part of the mens rea test. So we could – the Court in an involvement hearing could ask itself effectively, well having heard the evidence would the reasonable person, putting our impaired defendant aside, would the reasonable person understand that sex was being consented to, I think is essentially the position that was being put to my friend.

We've gone through the first answer. The first answer is that the text and purpose of the statute don't allow it, the policy doesn't allow it but, aside from that, the other objection or the other things to say about it are twofold. Firstly, it severs the mens rea element in half and, secondly, on the facts of this case, it's not available. But the first point is that it severs the mens rea element in half and the reason I say that is related to the standard direction that juries are given about this, which is repeated at footnote 67 of the Crown submissions which is on page 13. So you'll see there that the – I wonder if we've got the facility to zoom in because that's quite small. So we see there that in the time honoured way we've got X and Y up to no good, or at least X is. At the time X penetrated the genitalia of Y with his penis, X did not believe that Y was consenting. So the Crown could address that and that would be satisfactory in terms of proving the offence negativing the idea that X did not – negativing the idea that X believed that Y was consenting, and then the other way, which is the way that we've been focused on, the objective pathway.

So the difficulty with the idea that we could reduce, that we could conceptualise reasonable belief and consent, emasculates the mens rea element. It means that in cases, which won't be common, but you could conceive of a case where the defendant say makes comments during the sex act which indicate that he just doesn't care, or is indifferent is the time honoured phrase, indifferent to consent. He says these things and they are reported by the complainant. They would not be considered on that conception where we're looking only at reasonable belief. We wouldn't –

WINKELMANN CJ:

Well they could be though, couldn't they, because if you took the approach, which is hinted at in the *Goldsmith* case, where you look at each case, each charge and each statutory offence on a case-by-case basis, you could proceed to other elements because you could say well there is objective, reliable – there is objective evidence here which suggests that the Crown can negative it on the basis that there was no – he did not reasonably believe there was consent.

MR LILLICO:

So it would be allowed if there was objective evidence to use the *Wells*/*Antonine* formulation. It wouldn't though allow us to deal with situations, less likely to be sure, but those situations where admissions are made perhaps to the police by the – during the course of their enquiries that from the defendant themselves that indicated they did not themselves actually believe that the person was consenting. And so you would have the situation where, ordinarily in the ordinary run of things in a standard criminal trial, evidence that would point strongly to guilt could not be considered and the person would be declared uninvolved and the charge dismissed.

GLAZEBROOK J:

I'm just not sure why you couldn't consider it but that's why I'm having difficulty with that.

WINKELMANN CJ:

Mmm, no.

GLAZEBROOK J:

Because…

WINKELMANN CJ:

Why couldn't you consider it, Mr Lillico?

GLAZEBROOK J:

Because I just can't see why you couldn't.

MR LILLICO:

The statute, acts and omissions.

GLAZEBROOK J:

But what is it – why – well I suppose what you say is the statute is decided no matter what mens rea – mens rea is not to be considered because in many cases there'd be no reliable evidence on that. Well I mean I think if there's no reliable evidence on it, then you couldn't decide that it was proved in any event especially if you got rid of the impairment side of it. But leaving that aside, then you say because that's been the idea and there's only narrow exceptions to it, we shouldn't expand it any further no matter the sort of difficulties that we've been discussing?

MR LILLICO:

Yes, because what is possible doesn't drive the rather clear, in my submission, wording of the statute, acts and omissions and coupled with the explanatory note, speech in Parliament, physical acts. acknowledging immediately that Justice Kós' point is the other part, the latter part of the explanatory note, but I say that that was not affected in terms of the drafting, and the main point would be that in the context of a specific intent assault or rape, we have just read in by statutory interpretation driven by what is possible by objective evidence, we have read in the whole of the offence which is, whatever we say about the difficulties of the Minister's speech, is plainly not the intent of the section.

WINKELMANN CJ:

So I'm looking at your time. We've been questioning you too much, Mr Lillico.

MR LILLICO:

Yes, well that was the promised crescendo to the Crown submissions so we don't want to get onto lesser material.

ELLEN FRANCE J:

I suppose you –

MR LILLICO:

Should we file the –

WINKELMANN CJ:

Well Justice France just has a question for you.

MR LILLICO:

Sorry, your Honour.

ELLEN FRANCE J:

Sorry, I was just going to say, I suppose in terms of that last submission you could say you potentially end up with a level of artificiality because if you have, for example, admissions, well I suppose one answer would be well you treat those as coming within the objective evidence but that, of course, might be disadvantageous to the defendant. In other words, you're not in a full trial situation but you, how much of that do you sort of bring into the process, I suppose is the question?

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MR LILLICO:

Yes, I would have to acknowledge that we do bring in a lot of the trial process because, although uncomfortable with what turns out to be the *Rafferty* functional equivalent wording, if it's an alternative to a trial and we know that detention is a consequence, then there are necessary modifications and I think your Honour wrote the decision in, is it *Jefferies*, a Court of Appeal case where ordinarily you could – the giving of viva voce evidence by the complainant, as was given here, is controlled by the oral evidence provisions but that was modified in *Jefferies* because we had detention in the offing and there were consequences for the defendant. So I do acknowledge that there have to be some modifications to allow trial-like protections because there is a possibility of adverse consequences, if we can put it that way, even though we say they're health ones, but yes there is some artificiality given that we’re not in a criminal trial.

WINKELMANN CJ:

Mr Lillico, the purpose of this regime is, as the Court of Appeal says at paragraph 9 I think, which is "…the involvement hearing was to minimise the risk of a person who was unfit to stand trial being placed into secure care, even though they had not committed any offence" and the reason for the particular way it's formulated is as explained in *Antoine* which was the two policy reasons you've identified which is that it's –

MR LILLICO:

This is the incongruity of considering mens rea?

WINKELMANN CJ:

Yes, the incongruity of pursuing, trying to prove mens rea where the very fact of disability means it's impossible to prove and the other issue is the ability of the person to defend themselves at trial if they're not fit to stand trial. Why would the Court not, particularly in light of the provisions of the Bill of Rights Act and the prohibition and discrimination on prohibitive grounds, not interpret this provision to meet those policy objectives and no more broadly than that?

MR LILLICO:

I suppose the short answer is because there's little soil for ambiguity to arise or for this new interpretation to grow in because of what we say about the wording of the statute. I think that's probably the most straightforward answer. It's squarely before the Court in *J v Attorney-General* [2024] NZSC 34 which –

WINKELMANN CJ:

The issue of discrimination is but not this part of it.

MR LILLICO:

Yes.

WINKELMANN CJ:

Because it's not ambiguity under section 6 that's required, it's a meaning if it can be given.

MR LILLICO:

Yes, if it can be and we say it can't be because –

WINKELMANN CJ:

So that's your answer?

MR LILLICO:

Yes, so that's my answer. I was going to suggest – sorry your Honour.

KÓS J:

The trouble with that, it seems to me Mr Lillico, is that you've got even firmer words in section 4A in the UK and yet there turned out to be soil there for some mens rea defences.

MR LILLICO:

Yes, mens rea defences, yes, and there was yes.

KÓS J:

Yes.

MR LILLICO:

And our discussion about what this is being an element but yes I take your point, your Honour. Would it be helpful for Mr Hamlin and I to get before the Court the I think two section 38 reports? You have words of the Court who have given their own summary of it but probably useful to have the actual words perhaps.

WINKELMANN CJ:

Yes, I think it would be, thank you.

MR LILLICO:

Okay, as the Court pleases.

MR HAMLIN:

The two section 38 reports have very little to do with the assessment of the activity at the time of the alleged offending. They're just down –

WINKELMANN CJ:

So I mean if you object to it coming in, do you object to them coming in and you're free to do so?

MR HAMLIN:

I do because I think that's a distraction from the principle that we're dealing with and the principle we're dealing with is whether the question is whether his reasonable belief should be excluded and the answer is no. Your Honour Justice Glazebrook raised the issue of reliability. You can assess that at the involvement hearing so does it – my learned friend has said well Mr Repia was acute or wasn't acute or has this baseline. We don't know what that means. There's no evidence about that and my point simply is this, that that ought to be considered at the involvement hearing and it wasn't and that would inform the Court as to how to assess his belief and whether it was reasonable. So you've got two guards there in a sense. You're looking at an assessment of how that belief, if it were impacted, the Venn diagram style by his illness at the time, or it wasn't. Now there's obviously an overlap and that's the extent to which you would probably require some evidence. But other than that, the point your Honour the Chief Justice has raised is that this is something that can be assessed, can be looked at and ought to be given our rights-based approach, and Justice Kós pointed out latterly that well the English developed all these defences that deal with mens rea or its absence, why can't we? And why are we restricted the way in which my learned friend says don't look at mens rea where that's not excluded under section 10. The act or omission has that broad interpretation and I'm not going to repeat my submissions. And that's really all I want to say in response.

WINKELMANN CJ:

I suppose one thing I would be interested to hear and perhaps also from Mr Lillico because I didn't ask him this question is about the practicalities of it. So say you did have a more broad ranging enquiry and, could it be criticised because it's traumatising and re-traumatising people who are giving evidence, and it did occur to the Court that the new processes in relation to the pre-recording of evidence et cetera might ameliorate that.

MR HAMLIN:

Indeed, and we do have re-trials too. That's not an uncommon situation. So if you're looking at a section 10 and then later perhaps, when fit, a trial, that would be akin for the witnesses to a re-trial where there's no decision. So that does happen.

WINKELMANN CJ:

We don't really know how many people are found unfit to stand trial and then come back and stand trial do we?

MR HAMLIN:

No. I had one recently but no [REDACTED]. Just as an –

ELLEN FRANCE J:

That's the one that we've had another – we've had the –

WINKELMANN CJ:

Other –

ELLEN FRANCE J:

– other two defendants, haven't we, I think?

MR HAMLIN:

Yes, I think you have, your Honour, quite right. Mr Niven and I ended up with the remaining youngster five years later. So yes it does happen and they could come back for a trial in the criminal justice system but at the point at which, the point I made earlier, we don't know that at the time of the section 10(2) whether that's ever going to happen. That's why it's important to make the appropriate assessments of mens rea at that stage. Anyway, I don't want to repeat what I've said.

WINKELMANN CJ:

Anything else, Mr Hamlin?

MR HAMLIN:

No.

WINKELMANN CJ:

Thank you very much. We thank counsel for their very helpful submissions and we will reserve our decision.

MR HAMLIN:

As your Honour pleases.

WINKELMANN CJ:

And Mr Lillico, you didn't want to say anything? I did say I was going to give you an opportunity, did you want to say anything about that practical –

MR LILLICO:

I didn't, no your Honour, not in particular.

WINKELMANN CJ:

No.

MR LILLICO:

Did the Court – will the Court issue a minute as to whether the (inaudible) –

WINKELMANN CJ:

So do you want to apply to have that?

MR LILLICO:

Yes, I think so. You have before you the –

WINKELMANN CJ:

Which Court was it before?

MR LILLICO:

All of them. Well sorry was it, it was before – sorry, it was only before the District Court in the disposition hearing.

WINKELMANN CJ:

Okay.

ELLEN FRANCE J:

Well I think at least some of that material is in the Court of Appeal file.

WINKELMANN CJ:

Is it?

ELLEN FRANCE J:

Yes.

WINKELMANN CJ:

I mean I think we should just have it Mr Hamlin.

MR HAMLIN:

It's a matter of record. Look I'm happy with it.

WINKELMANN CJ:

We take your submission.

MR HAMLIN:

You'll take my submission. I'm happy to make them available. They were made for the fitness hearing but –

WINKELMANN CJ:

Do you have any issue with that?

MR HAMLIN:

I don't mind providing them, I just don't think they're relevant and that can help.

WINKELMANN CJ:

Right, so we'll take that submission on board and just, I think just file them Mr Lillico.

MR HAMLIN:

Sure, happy to do so. As the Court pleases.

MR LILLICO:

As the Court pleases.

COURT ADJOURNS: 12.39 PM