NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF ANY COMPLAINANT UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html

NOTE: ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 80/2023
[2024] NZSC 153

BETWEEN	L (SC 80/2023) Appellant
AND	THE KING Respondent

Hearing: 19 March 2024

Court: Glazebrook, Ellen France, Williams, Kós and Miller JJ

Counsel: H G de Groot and M J McKillop for Appellant
E J Hoskin and R K Thomson for Respondent

Judgment: 11 November 2024

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

ELLEN FRANCE, WILLIAMS AND MILLER JJ
(Given by Ellen France J)

Table of Contents

Introduction

[1] At his trial on a number of charges of sexual offending, the appellant was not permitted to offer evidence of a statement from a proposed witness, C, who was in Australia at the time of the trial and unwilling to give her evidence via audiovisual link.[1] Because the statement would have been put before the Court by someone other than C to prove the truth of its contents, the proposed evidence came within the definition of hearsay evidence in the Evidence Act 2006 (the 2006 Act).[2] Hearsay evidence is not admissible except as provided for in the 2006 Act, or by other statutory provisions.[3]

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1 *R v [L]* [2021] NZDC 13278 (Judge Bergseng) [DC reasons judgment].

2 A "hearsay statement" is defined in the Evidence Act 2006 as one "made by a person other than a witness" which "is offered in evidence at the proceeding to prove the truth of its contents"; and a "statement" is defined as "(a) a spoken or written assertion by a person of any matter; or (b) non-verbal conduct of a person that is intended by that person as an assertion of any matter": s 4(1).

3 Evidence Act, s 17.

[2] Section 18(1) of the 2006 Act provides that a hearsay statement is admissible if "the circumstances relating to the statement provide reasonable assurance that the statement is reliable" and, either, the person who made the statement is "unavailable" as a witness, or the court finds that requiring the maker of the statement to be a witness would cause "undue expense or delay". Section 16(2) of the 2006 Act sets out when a person is "unavailable". In particular, s 16(2)(b) provides that a person is unavailable as a witness where the person "is outside New Zealand and it is not reasonably practicable for him or her to be a witness".

[3] Following his conviction on all the charges, the appellant appealed to the Court of Appeal against these convictions. He argued, among other matters, that the hearsay evidence should have been admitted because C was "unavailable" within the terms of the definition in the 2006 Act, and its omission resulted in a miscarriage of justice.[4] The Court of Appeal dismissed the appeal, finding, relevantly, that it was reasonably practicable for C to be a witness, had she been willing to do so.[5]

[4] The appellant now appeals with leave to this Court.[6] The Court granted leave on the general question of whether the Court of Appeal was correct to dismiss the appeal, but said that counsel's argument should focus on whether or not s 16(2)(b) of the 2006 Act applied to the facts of this case.[7]

[5] On that question, the appellant's case is that someone who is overseas and is unwilling to give evidence may be unavailable under this subsection. Specifically, the appellant argues that if there is a reliable hearsay statement, the focus of the "reasonably practicable" requirement is on the adequacy of the conduct of the party trying to obtain the evidence, and whether sufficient steps have been taken to try to secure the attendance of the proposed witness. The appellant says this approach is consistent with the fair trial rights of a defendant under s 25 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights), and with jurisprudence in New Zealand and comparable overseas jurisdictions. Applying this analysis to C's proposed evidence,

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4 Criminal Procedure Act 2011, s 232(4).
5 *L (CA631/2021) v R* [2023] NZCA 246 (Cooper P, Ellis and Churchman JJ) [Second CA judgment].
6 *L (SC 80/2023) v R* [2023] NZSC 146 (Glazebrook, O'Regan and Kós JJ).
7 At [1].

the appellant says that it met the reliability requirement and that sufficient steps were taken to obtain the evidence, with the result that the Court of Appeal should have found that the test in s 16(2)(b) was met. The appellant says that the exclusion of this evidence has given rise to a miscarriage of justice.

[6] By contrast, the respondent says that s 16(2)(b) is focused on the logistical issues that arise if the overseas person is to give evidence. The question is whether it is feasible and within reasonable practical parameters for the overseas person to give evidence. The respondent says this approach is supported by the scheme of the 2006 Act and its legislative history. It is also consistent with the policy considerations underlying the approach to the admissibility of hearsay evidence. On this analysis, the unwillingness of C, despite steps taken to obtain her evidence, does not mean she was unavailable.

[7] It follows that the principal question posed by the appellant's appeal to this Court is whether C was unavailable as a witness in terms of s 16(2)(b) because although arrangements could be made for her to give evidence remotely, and steps had been taken to facilitate that, C nonetheless remained unwilling to give evidence. It is accordingly necessary to consider the factors that are to be addressed in determining whether, where a person is overseas, it is not reasonably practicable for them to be a witness. We discuss these matters after first setting out the background.

Background

[8] The trial to which this appeal relates was the appellant's second trial. An appeal against conviction from his first trial (the first appeal) was allowed, and a retrial ordered, on the basis the appellant should have been allowed to cross-examine the complainant, N, about her alleged sexual mistreatment by the appellant's son, S. N is the appellant's stepdaughter and niece.[8]

[9] At his retrial, the appellant faced seven charges of doing an indecent act on a young person under 16 (four of these charges were representative), six charges of

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[8] N's mother, M, was married to the appellant's brother. After he died, the appellant and N's mother formed a relationship and eventually married.

sexual violation by unlawful sexual connection (four of which were representative charges) and one representative charge of sexual violation by rape. The appellant was found guilty on all 14 charges. He was sentenced to a term of 12 years and four months' imprisonment.[9]

Narrative of events

[10] We adopt the description of the narrative of events as set out in the Court of Appeal judgments relating to each of the appellant's trials.[10]

[11] That narrative begins in April 2014 when the complainant told a school counsellor that she had been involved in sexual activity with the appellant's son, S. The sexual activity between N and S was said to have occurred over a year from February 2013 to February 2014. That overlapped with the period over which the offending involving the appellant was said to have occurred, namely, from 2012 to 2015 when N was aged between 12 and 15 years. Oranga Tamariki | the Ministry for Children was called in following the disclosure about the activity between N and S. An investigation was conducted which concluded that the sexual activity was consensual.

[12] The complainant said nothing at this time about also being involved in sexual activity with the appellant. Her account at trial about the lack of disclosure was that she was frightened of complaining because she thought her mother would side with the appellant. As the Court of Appeal said in the first appeal, "[i]t appears that this concern was not without justification, because her mother did side with the appellant and the complainant is now estranged from her."

[13] Following on from the disclosure about sexual activity with S, N went to live with her grandmother for a period of time. She later said she wanted to go home where the appellant lived. She did that. On occasions she was truant from school, appearing to prefer to be at home where the appellant usually was as he did not work.

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9 *R v [L]* [2021] NZDC 19185 (Judge Bergseng).
10 Second CA judgment, above n 5, at [5]–[14].

The offending involving the appellant was said to have ceased when she threatened to tell.

[14] The Court of Appeal explained how the allegations of sexual offending against the appellant came to light in this way:

> [6] About 18 months later the complainant disclosed the appellant's offending to her aunt, with whom she was staying in Australia. When asked, she denied that the appellant had raped her but said [S] had done so. She then returned to the family home although she could have gone to her grandmother's. Other family members were told of her allegations and she was "interviewed" by an uncle who is a police officer. Despite his leading questions she did not say that the appellant had raped her. She then went to the police in May 2017. The appellant was interviewed. He denied the offending. …

[15] Charges were laid. The first trial commenced and, as we have said, the appellant was convicted, but a retrial was ordered after his successful appeal. The hearsay evidence point arose in the context of the retrial as we now explain.

The hearsay evidence ground of appeal

[16] After the first appeal, counsel for the appellant learnt that the complainant's relative, C, might be able to give relevant evidence at the retrial. Defence counsel settled a brief of evidence with C. We will come back to the text of the statement but, in short, C said that she and the complainant were close, and that the complainant denied any sexual offending by the appellant but said that she wanted to find a way to get rid of him.

[17] C signed her brief of evidence on 28 January 2021. Some minor additions were made, and the revised version was forwarded to C in Australia on 8 February. The intention was that she would give evidence remotely from Australia at the retrial, scheduled for 15 February 2021. Defence counsel understood that she would cooperate in this respect. She was not summonsed to appear because she was living in Australia.

[18] The retrial was, however, adjourned because of COVID-19 lockdown restrictions. A new date of 19 April 2021 was set. In her affidavit filed with the Court of Appeal, Louise Freyer, then one of the appellant's counsel, said that just

before the trial was due to start, counsel learnt that C was depressed, would not come out of her bedroom and refused to see a doctor. She lived with her parents, but they could not get her to seek help. Ms Freyer accordingly sought an adjournment of the trial and, as an alternative, made an application for C's statement to be admitted and read at the trial.

[19] Judge Bergseng heard these applications on 19 April. He was able to speak with C's mother, A, in Australia by telephone in chambers. She told the Judge about C's mental state in a way that was consistent with the affidavit evidence before the Court from N's mother, M. The trial was adjourned. Essentially, the Judge saw the evidence as important for the defendant so that an adjournment was necessary to preserve a fair trial.

[20] A new trial date of 6 July 2021 was set. On 4 July, C signed the revised brief. On 6 July, C initialled the revised brief, and this was forwarded to defence counsel. However, on the new trial date, C was still unwell. C's mother had emailed defence counsel on 5 July, and that email was provided to the Court by counsel. It stated that C's mental health had not improved. In reliance on the email, defence counsel applied for C's statement to be admitted in her absence as hearsay on the basis that she was unavailable as a witness. As we have said, the application was rejected as was the application made in the alternative for a further adjournment of the trial. The trial went ahead on 6 July without C's evidence.[11]

The trial

[21] The trial took place over four days. The Crown case was that the complainant, N, was a believable witness who was consistent in what she told the police and what she said in court. The Crown also made the point that the appellant had access to, and the opportunity to offend against, N in the way she described. N's evidence was provided via her evidential video recording. She was cross-examined. In addition, the Crown called N's brother who confirmed N's evidence that she and others in the household would provide massages to the appellant but that the appellant would have N massage him when she and the appellant were alone. The aunt to whom N disclosed

[11] DC reasons judgment, above n 1.

the offending also gave evidence. The aunt said she asked N if the appellant had raped her and that N said no. Her evidence was that N described being raped by S. Finally, the jury heard evidence from the uncle who had questioned her regarding the allegations.

[22] The appellant gave evidence. He said that the incidents described by the complainant did not happen. He did not touch N in the way she described. He accepted that N sometimes massaged him when the two were alone. His evidence was that the massaging was as a form of pain relief, and it went nowhere near his genital area.

[23] In closing, the defence highlighted the inconsistencies in N's account and her non-disclosure of various aspects, and said that she had a motive to lie; namely, that she hated the appellant.

[24] As we have said, following conviction on the retrial, the appellant appealed against conviction to the Court of Appeal.

The Court of Appeal judgment

[25] In the Court of Appeal the appellant argued that C was unavailable on the basis that, being overseas, it was not reasonably practicable for her to be a witness under s 16(2)(b), and that she was unfit to give evidence by reason of her mental condition under s 16(2)(c).[12] The Court of Appeal dealt with the latter subsection first, stating that while sympathetic to the issues facing defence counsel in placing evidence of C's mental condition before the Court, it had not been shown that the District Court erred in concluding C was not unfit because of her mental condition. The appellant no longer relies on s 16(2)(c) as a standalone ground.

[26] In relation to s 16(2)(b), the Court of Appeal noted that arrangements were able to be made for C to give her evidence remotely, but for whatever reason C was uncooperative. The Court of Appeal said it was unclear whether the appellant had relied on s 16(2)(b) in the District Court. The District Court Judge had not addressed

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12 Second CA judgment, above n 5.

this issue but, after determining s 16(2)(c) did not apply, had turned to the application for adjournment of the trial. In declining the adjournment, the Judge had said there was still time for arrangements to be made for remote participation. There was no evidence about any additional attempt that may have been made in this respect before the end of the trial. The evidence of C's mother was that C could not give evidence because of her mental health, not because it was not reasonably practicable for her to do so.

[27] Against this background, the Court of Appeal saw the problem with unavailability under s 16(2)(b) as being that C was unwilling, rather than it not being reasonably practicable for her to give evidence.

The statutory scheme

[28] Before turning to the detail of the 2006 Act, it is helpful to say a little about its historical context.

[29] As Te Aka Matua o te Ture | the Law Commission (the Commission) said in 2013, the position prior to the enactment of the 2006 Act was that "the former rule against hearsay generally prevented out of court statements being admitted to prove the truth of their contents".[13] The consensus appears to be that the rule against hearsay developed alongside the modern form of trial.[14]

[30] The Commission noted that the rule reflected the view at common law that evidence of the facts should be given "by the person with immediate knowledge of those facts under oath, in court, and subject to cross-examination".[15] In an earlier

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13 Law Commission | Te Aka Matua o te Ture *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) [NZLC R127, 2013] at [3.4].

14 There is division among legal historians as to the reasons for development of the rule against hearsay. Some refer to the development of the rule as primarily relating to the increasing tendency of juries to base their verdicts upon the oral evidence of witnesses and a distrust of jurors' abilities to evaluate that oral evidence; where others attribute the rule to the unfairness of being unable to obtain an oath from, or cross-examine, a witness. For the former view, see William Holdsworth *A History of English Law* (3rd ed, Sweet & Maxwell, London, 1944) vol IX at 215–216; and John H Wigmore *Evidence in Trials at Common Law: Chadbourn Revision* (Aspen Publishers, New York, 1974) vol V at 15–17; and see generally James Bradley Thayer *A Preliminary Treatise on Evidence at the Common Law* (Little, Brown and Company, Boston, 1898) at 518–519. For the latter view, see Edmund Morris Morgan *Some Problems of Proof Under the Anglo-American System of Litigation* (Augustus M Kelley Publishers, New York, 1969) at 110–112.

15 NZLC R127, 2013, above n 13, at [3.4], and see at [3.18]. See also Wigmore, above n 14, at 7.

report, the Commission, citing the Canadian Law Reform Commission, also discussed the dangers perceived to arise from the absence of cross-examination, including matters such as the danger that the person giving the evidence had no personal knowledge of the event, did not "accurately perceive" it, or may not be providing "a sincere account of" what they knew.[16] The identified dangers all related to matters that could be tested via cross-examination.

[31] Despite these dangers, there were recognised exceptions to the hearsay rule almost from the time of its inception. *Wigmore on Evidence* refers, among others, to the original exceptions for "[d]ying declarations", "[d]eclarations about family history" and "[o]fficial statements".[17] Exceptions along the lines referred to in *Wigmore* developed in recognition of the fact that otherwise relevant evidence could be excluded under the hearsay rule.[18] The Court of Appeal of England and Wales in *Regina v Horncastle* put the position in this way:[19]

> [9] The default rule of the criminal law of England and Wales has always been that hearsay is inadmissible. Unmodified, however, such a blanket rule created many examples of injustice so that it was always subject to many exceptions, some recognised by the courts as developments of the common law, and others created by statute. …

[32] As initially enacted, the Evidence Act 1908 did not address the rule against hearsay. The rule remained a creature of the common law. The subsequent legislative history in New Zealand, commencing with the Evidence Amendment Act 1945, reflects recognition of the need for departures from the rigours of the common law rule.[20] Illustrating this trend, s 3 of the Evidence Amendment Act 1945 relevantly provided that in civil proceedings documentary hearsay evidence was admissible if the statutory conditions were met. Those conditions included a requirement that the maker of the statement had personal knowledge of matters addressed in the

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16 Law Reform Commission of Canada | Commission de réforme du droit du Canada *Evidence: Hearsay – A Study Paper Prepared by the Law of Evidence Project* (Ottawa, May 1974) at 5 as cited in Law Commission *Hearsay Evidence* (NZLC PP10, 1989) [NZLC PP10, 1989] at [7].

17 Wigmore, above n 14, at 257. See also NZLC PP10, 1989, above n 16, at [9].

18 NZLC R127, 2013, above n 13, at [3.5].

19 *Regina v Horncastle* [2009] EWCA Crim 964, [2010] 2 AC 373.

20 See, for example, DL Mathieson *Cross on Evidence* (7th ed, Butterworths, Wellington, 2001) at 606: "the 1980 Act liberalised the exceptions". See also DL Mathieson *Cross on Evidence* (6th ed, Butterworths, Wellington, 1997) at [16.32].

statement,[21] and, relevantly, that the maker of the statement need not be called as a witness if:[22]

> … dead, or unfit by reason of [their] bodily or mental condition to attend as a witness, or if [they are] beyond the seas and it is not reasonably practicable to secure [their] attendance, or if all reasonable efforts to find [the maker] have been made without success.

[33] The provision replicated the United Kingdom approach at the time,[23] and its enactment constituted the first occasion on which the exception to the rule against hearsay now found in s 16(2)(b) of the 2006 Act appeared in New Zealand legislation.[24] There was no equivalent at common law to this exception for proposed witnesses located overseas. That presumably reflected the fact that at the time of the hearsay rule's origin, overseas travel was enough of a rarity so as not to cause significant issues for the operation of the courts. Notably, s 3 of the Evidence Amendment Act 1945 did not apply to criminal proceedings.

[34] Further relaxation of the hearsay rule followed from the recommendations of the Torts and General Law Reform Committee. Those recommendations were largely implemented by the Evidence Amendment Act (No 2) 1980. A key relevant recommendation was to expand the application of the exceptions to the rule against hearsay to cover documentary evidence in both civil and criminal proceedings.[25]

[35] The Committee also relevantly recommended that the category of persons unavailable to give evidence be expanded to include those unfit by reason of old age, or bodily or mental condition, and those who cannot with reasonable diligence be found.[26] The Committee did not discuss the approach to what is now s 16(2)(b) nor make any recommendations in relation to the definition of the unavailability of an overseas person. But, in agreement with the English Law Reform Committee on the same topic, the Committee explained that its recommendations for the expansion of

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21 Evidence Amendment Act 1945, s 3(1)(a)(i); but see subpara (ii).
22 Section 3(1)(b).
23 See Evidence Act 1938 (UK) 1 & 2 Geo VI c 28, s 1(1).
24 The Torts and General Law Reform Committee described the Evidence Amendment Act 1945 as "a cautious first step towards the more liberal admissibility of documentary hearsay evidence": Torts and General Law Reform Committee of New Zealand *Hearsay Evidence* (Government Printer, July 1967) at [9].
25 At [19]; and compare at [20].
26 At [9(i)].

the unavailability provisions were in recognition of the need to have a rational basis for excluding otherwise probative evidence.[27]

[36] The definition of "unavailability" in s 2(2) of the Evidence Amendment Act (No 2) 1980 as enacted read as follows:

> (2) For the purposes of sections 3 to 8 of this Act, a person is unavailable to give evidence in any proceeding if, but only if, [the person]—
>
> (a) Is dead; or
>
> (b) Is outside New Zealand and it is not reasonably practicable to obtain [their] evidence; or
>
> (c) Is unfit by reason of old age or [their] bodily or mental condition to attend; or
>
> (d) Cannot with reasonable diligence be found.

[37] In June 1989, as part of its review of the laws of evidence which led to the 2006 Act, the Commission published a preliminary paper on hearsay.[28] That paper canvassed various matters including codification of the law relating to hearsay evidence. The Commission suggested the definition of "unavailability" in s 2(2) could be broadened, but referred only to the possibility of broadening the business records exception; the definition of unfitness as a result of old age to include youth; and unavailability based on mental health condition to deal with older children too traumatised to take the stand.

[38] Several reports followed.[29] In the first of these reports, which explored the principles and policies the Commission thought should guide any prospective reform, the Commission described a general drift "towards a more receptive approach to evidence" and the "liberalisation of the common law" in the modern codes and draft codes.[30] The Commission noted its intention to continue this trend but without

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27 At [13].

28 NZLC PP10, 1989, above n 16.

29 Law Commission *Evidence Law: Principles for Reform* (NZLC PP13, 1991) [NZLC PP13, 1991]; Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991); Law Commission | Te Aka Matua o te Ture *Evidence: Reform of the Law* (NZLC R55, 1999) vol 1 [NZLC R55 vol 1, 1999]; and Law Commission | Te Aka Matua o te Ture *Evidence: Evidence Code and Commentary* (NZLC R55, 1999) vol 2 [NZLC R55 vol 2, 1999].

30 NZLC PP13, 1991, above n 29, at [42].

abolishing "rules which have a demonstrably rational foundation and which therefore promote rather than hinder fact ascertainment".[31]

[39] The Evidence Bill 2005 largely reflected the recommendations of the Commission in its draft evidence code, published in 1999.[32] In relation to the unavailability definition, the version recommended by the Commission in the draft code was adopted by Parliament without any substantive amendment and was ultimately enacted as s 16(2) of the 2006 Act.[33]

The current Act

[40] The starting point under the 2006 Act is that a hearsay statement is not admissible unless it meets the statutory requirements either in that Act, or in another Act. That is the effect of s 17, which reads as follows:

> **17 Hearsay rule**
>
> A hearsay statement is not admissible except—
>
> (a) as provided by this subpart or by the provisions of any other Act; or
>
> (b) in cases where—
>
> (i) this Act provides that this subpart does not apply; and
>
> (ii) the hearsay statement is relevant and not otherwise inadmissible under this Act.

[41] Section 5(1) makes it clear that if there is any inconsistency between the provisions of the 2006 Act and other legislation, the latter provisions prevail.

[42] Under s 18, a hearsay statement is admissible if it satisfies the test in subs (1), namely, where:

> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
>
> (b) either—
>
> (i) the maker of the statement is unavailable as a witness; or

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31 At [43].

32 NZLC R55 vol 2, 1999, above n 29. The two key departures from the draft code in relation to hearsay, as recommended by the Justice and Electoral Committee when considering the Bill, related to the exception for business records (Evidence Act, s 19) and prevention of a criminal defendant from offering their own hearsay statement when they elected not to give evidence (Evidence Act, s 21): see Evidence Bill 2005 (256-2) (select committee report) at 3–4.

33 Compare NZLC R55 vol 2, 1999, above n 29, at 46.

(ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

[43] The circumstances referred to in s 18(1) are defined in s 16(1) as including, among other matters, the nature and contents of the statement and the circumstances relating to the making of the statement.[34] For present purposes, the critical definition is that of the phrase "unavailable as a witness" in s 18(1)(b)(i). That term is defined in s 16(2) as follows:

> (2) For the purposes of this subpart, a person is **unavailable as a witness** in a proceeding if the person—
>
> (a) is dead; or
>
> (b) is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or
>
> (c) is unfit to be a witness because of age or physical or mental condition; or
>
> (d) cannot with reasonable diligence be identified or found; or
>
> (e) is not compellable to give evidence.

[44] Section 18 is subject to ss 20 and 22.[35] Section 20 deals with a specific aspect of civil proceedings and is not relevant here. Section 22 provides a further safeguard in relation to criminal proceedings, in which there is a requirement to give notice of the intention to offer a hearsay statement.[36]

[45] Even if these specific safeguards relating to the admission of hearsay are met, the evidence must also be relevant in terms of s 7, and the court will still have to consider the general safeguard in s 8, namely, whether the probative value of the evidence is outweighed by its prejudicial effect.

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34 Evidence Act, s 16(1) definition of "circumstances", paras (a)–(c).

35 Section 18(2).

36 Admissibility of hearsay statements in business records is dealt with in s 19. Section 22A addresses the admissibility of hearsay statements against a defendant.

The New Zealand jurisprudence

[46] At this point we summarise the findings of the key New Zealand authorities. We will return later to some of the detail of the reasoning in these decisions and how that impacts on the case before us.

[47] We begin with the decision of the Court of Appeal in *Union Steam Ship Company of New Zealand Ltd v Wenlock*.[37] In that case the Court was considering the equivalent to s 16(2)(b) in the Evidence Amendment Act 1945; namely, whether it was "reasonably practicable to secure [the] attendance" of the proposed witness.[38] The defendant, in an action for negligence arising out of an accident on a ship, sought to have admitted a letter written to the defendant by the fourth engineer of the ship. The engineer had since left the defendant's employment and gone to Australia prior to trial. The Court of Appeal upheld the ruling of the Court below that the engineer was not unavailable as a witness.

[48] In doing so, Gresson P considered the alternative condition to establish unavailability in respect of an overseas statement maker under the Evidence Amendment Act 1945; namely, that "all reasonable efforts to find [the proposed witness] have been made without success". He suggested that the "juxtaposition of [that] condition" meant that the "reasonably practicable" test may be directed to situations where the whereabouts of the maker of a statement were known, but there were difficulties in procuring their attendance.[39] Gresson P expressed some doubt about whether the finding of the trial Court, that the proposed witness was not unavailable in this case, was correct where their whereabouts had not clearly been established. However, Gresson P did not see this as a basis for overturning the, essentially factual, finding of the trial Judge.

[49] North J said that the section imposed two cumulative requirements, that is, being beyond the seas, and that it was not reasonably practicable to secure the attendance of the proposed witness. North J did not consider it would be "not reasonably practicable" to secure a witness's attendance in a case where there is a

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37 *Union Steam Ship Company of New Zealand Ltd v Wenlock* [1959] NZLR 173 (CA).
38 Evidence Amendment Act 1945, s 3. See above at [32].
39 *Union Steam Ship Company of New Zealand Ltd v Wenlock*, above n 37, at 191.

claim for £4,500 in general damages unless "all reasonable efforts had been made" to find the person without success.[40] North J was not satisfied that reasonable efforts to find the person had been made in this case. North J went on to say that:[41]

> If the witness refused to travel, although offered his expenses, clearly it would not be "reasonably practicable to secure [their] attendance". In other cases, practicability will depend on the nature of the suit, the importance of the evidence … [and] financial and other relevant considerations.

[50] Cleary J also considered that the two requirements were cumulative; that is, it had to be shown both that the proposed witness was overseas, and that securing attendance was not reasonably practicable. Cleary J continued:[42]

> … even where a person is willing to come to New Zealand … it might not be reasonable to expect that [they] be brought, having regard to the nature of the evidence to be given or the distance to be travelled, or other matters of practical convenience.

[51] The approach in *Union Steam Ship Company* was considered by the Court of Appeal in *R v M*.[43] Richardson P noted that the Court in *Union Steam Ship Company* was considering a narrower expression, that is, "secure [their] attendance", than that in issue in *R v M*. By that point, the statute referred to "obtain [the] evidence".[44] But the Court took the view that the "underlying considerations" were the same, namely:[45]

> Whether it is "not reasonably practicable to obtain [the] evidence" of the witness turns on the nature of the case, the nature and significance of the evidence the witness could give, what measures were taken and could have been taken to obtain the evidence, and the time, effort and cost involved.

[52] The Court said the test was an objective one. In that case the test was not met. The Court noted that, in July 1995, the proposed witness had been intending to return to New Zealand to give evidence at trial. She went to a travel agent in December 1995, apparently still intending to travel to New Zealand, but "then felt she could not do so" and wrote a letter to that effect.[46] That was over three months prior to trial and any

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40 At 195.
41 At 196.
42 At 199.
43 *R v M* [1996] 2 NZLR 659 (CA).
44 At 662. See Evidence Amendment Act (No 2) 1980, s 2(2); and see above at [36].
45 *R v M*, above n 43, at 662.
46 At 663.

"direct evidence of her attitude as at the date of hearing" was lacking.[47] The police had not contacted her and there was no explanation as to why she had not returned. The Mutual Assistance in Criminal Matters Act 1992 could have been invoked, but was not.

[53] Given this was a criminal case involving allegations of serious sexual violation to which the evidence of the proposed witness was "of crucial significance", fair trial considerations and the right of the defendant to examine witnesses under s 25(a) and (f) of the Bill of Rights were "highly relevant in assessing whether reasonably practicable steps" had been taken.[48] There was, ultimately, insufficient factual foundation to meet the unavailability threshold.

[54] *Clout v New Zealand Police* is a High Court judgment which illustrates the application of the type of analysis envisaged by the Court of Appeal in *R v M*.[49] That was an appeal against conviction on the basis that the hearsay statement of the complainant was wrongly admitted. The proposed witness was overseas but able to give evidence by audiovisual link. The High Court said that whether or not calling the proposed witness was reasonably practicable in that case "was partly one of expense and partly one of time and inconvenience; he would have to travel what seem[ed] to be a significant distance and give evidence at night".[50] The Court also noted the need to consider whether admission of the evidence would create a substantial risk of unfair prejudice in terms of s 8 of the 2006 Act.

[55] In that case it was relevant the charge "was not especially serious" and the "expense and inconvenience" of giving evidence via audiovisual link "were moderate".[51] It was also relevant that there were two eyewitnesses, both of whom the trial Judge had found reliable and whose account corroborated that of the overseas person except in one respect. In the end, the Judge was not persuaded a miscarriage of justice may have resulted from the admission of the statement of the overseas person.

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47 At 663.
48 At 663.
49 *Clout v New Zealand Police* [2013] NZHC 1364.
50 At [17].
51 At [18].

[56] In *Solicitor-General v X*, the Court of Appeal found the Crown had not shown it was not reasonably practicable to obtain the evidence of the proposed hearsay witness.[52] In that case, the proposed witness was in China. The Crown had made requests to China's Central Authority under the Mutual Assistance in Criminal Matters Act but the Authority had not responded. The Court said the issue was "what steps had been taken to secure [the proposed witness's] attendance at trial, whether in person, or by some technological means, such as video-link".[53] The Crown had the contact details for the proposed witness, but no evidence was adduced as to why direct contact with them was not permissible or practicable, or demonstrating that they were unresponsive. It was insufficient in these circumstances simply to rely on the absence of a response from the Central Authority.

[57] Finally, reference can be made to *Gao v Zespri Group Ltd*.[54] In that case, the Court of Appeal upheld the finding of the trial Judge that the proposed witness who was in China, Mr Shu, was unavailable under s 16(2)(b).[55] The issue arose in the context of civil proceedings brought by Zespri Group Ltd seeking an injunction against future infringements of the Plant Variety Rights Act 1987 and damages. Mr Shu had admitted to New Zealand investigators that he was growing varieties in his orchard in China to which Zespri had exclusive rights but would not say where he had obtained them.

[58] On appeal from the findings in favour of Zespri in the High Court, the Court of Appeal said it was agreed Mr Shu could not be the subject of testimonial compulsion. Further, there was evidence he was a co-conspirator and had agreed with his co-conspirator not to hand over documents. He said he would not voluntarily give evidence without a commercial settlement or "partner" agreement.[56] The Court said that, in these circumstances, the prospect of his giving evidence by remote technology was "beside the point"; there was sufficient evidence to show he "was unwilling to give evidence and, being beyond compulsion, thereby unavailable".[57]

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52 *Solicitor-General v X (CA173/2009)* [2009] NZCA 476.
53 At [36].
54 *Gao v Zespri Group Ltd* [2021] NZCA 442, [2022] 2 NZLR 219.
55 *Zespri Group Ltd v Gao* [2020] NZHC 109, (2020) 151 IPR 495.
56 *Gao v Zespri Group Ltd*, above n 54, at [53].
57 At [53].

The United Kingdom authorities

[59] It is also helpful at this point to say something about the approach in the United Kingdom to the equivalent provision there, being s 116 of the Criminal Justice Act 2003 (UK) (the UK Act). That section provides that a person will be unavailable as a witness in various circumstances, relevantly, where any of the five conditions mentioned in s 116(2) are satisfied. As will be seen, the first four of these conditions are reflected in the 2006 Act, but the final condition, s 116(2)(e), is not. The conditions in s 116(2) of the UK Act are as follows:

> (a) that the relevant person is dead;
>
> (b) that the relevant person is unfit to be a witness because of [their] bodily or mental condition;
>
> (c) that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure [their] attendance;
>
> (d) that the relevant person cannot be found although such steps as it is reasonably practicable to take to find [them] have been taken;
>
> (e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence.[58]

[60] The appellant relies on this observation from JR Spencer:[59]

> … the question is not whether it is physically possible to transport the witness to England, but whether [they] can be persuaded to come voluntarily: so "the word practicable is not the equivalent to physically possible".

[61] The lead-in to this observation is the statement that there is no legal mechanism available to force a person to travel from abroad to the United Kingdom to give evidence in person if that person is not prepared to do so. Spencer makes the point that this is the case not only in respect of countries that are more distant but also countries which are nearby like France or the Republic of Ireland.

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58 Section 116(3) provides that "fear" is to be "widely construed".

59 JR Spencer *Hearsay Evidence in Criminal Proceedings* (2nd ed, Hart Publishing, Oxford, 2014) at [6.16] citing *R v Maloney* [1994] Crim LR 525 (CA), as cited with approval in *R v Castillo* [1996] 1 Cr App R 438 (CA) and *R v Yu* [2006] EWCA Crim 349.

[62] Spencer goes on to note the factors a court will consider in determining whether it is reasonably practicable to secure the attendance of an overseas person at a trial in the United Kingdom.[60] These include:

(a) what steps were taken by counsel to secure the physical presence of the person at the trial, and what other steps could have been taken; and

(b) if there were other steps which could have been taken, whether it was reasonable to take them. This involves balancing:

(i) any cost and delay involved;

(ii) the importance of the case (comparing, for example, a murder trial against a shoplifting trial);

(iii) the importance of the evidence, whether it is prejudicial, and how prejudicial it would be to the defence if the person did not attend; and

(iv) the potential impact of cross-examination and the identity of the person.

[63] Spencer's description draws on the leading cases of *R v Maloney*,[61] *R v C*,[62] and *R v Yu*.[63]

[64] *R v Maloney* dealt with the proposed evidence of Greek officer cadets who had returned to Greece. Summonsing the proposed witnesses to appear in court in the United Kingdom would necessitate an application being made to the commander of their base, whose decision would in turn depend on the Greek Navy's commitments. The Court found it was not reasonably practicable to secure their attendance. In this context the Court described the test in this way:[64]

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60 Spencer, above n 59, at [6.17].
61 *R v Maloney* EWCA Crim 92/3264/Y2, 16 December 1993.
62 *R v C* [2006] EWCA Crim 197.
63 *R v Yu*, above n 59.
64 *R v Maloney*, above n 61, at 7.

> … the word "practicable" is not equivalent to physically possible. It must be construed in the light of the normal steps which would be taken to arrange the attendance of a witness at trial. Reasonably practicable involves a further qualification, of the duty to secure the attendance at trial by taking the reasonable steps which a party would normally take to secure a witness's attendance having regard to the means and resources available to the parties. Such steps, of course, are not merely to be judged at the date when the application to admit the statement is made; a party to proceedings before the court may have taken all reasonable steps to secure the attendance of a witness to give oral evidence, and for one reason or another that witness may fail to attend and it is not then reasonably practicable to secure [their] attendance.

[65] In *R v C*, the proposed witness, P, was in South Africa. While he had initially agreed to travel to England to give evidence, he subsequently had a change of heart. The Court accepted that what was "reasonably practicable" in s 116(2)(c) of the UK Act was to be judged based on the steps taken, or not, by the party wanting to secure the attendance of the proposed witness. But that was only the first stage of the inquiry. The UK Act required other issues as to fairness to be considered and the Court found it would be premature to address those.[65] The Court also considered that further inquiries, including inquiries as to why the proposed witness had changed his mind, needed to be made.

[66] In *R v Yu*, the Court was dealing with potential witnesses who were in China, none of whom had a valid passport or travel document. There were also issues as to the cost of travel and as to the practicability of arranging audiovisual links in the very short timeframe available. The Court upheld the decision of the trial Judge that the evidence was admissible on the basis it was not reasonably practicable to secure the attendance of the proposed witnesses.

[67] In a more recent case, *R v Aboagye-Bediako*, the proposed witness had given evidence at the applicant's first trial but by the time of the retrial was living in the Czech Republic, pending a move to Canada.[66] He said he had already given evidence, had no recollection of events and had done all he could in relation to the trial. The transcript of his evidence at the first trial was admitted and this was challenged on appeal. The Court of Appeal of England and Wales in upholding the evidence said this:

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65 This is a reference to s 126 of the Criminal Justice Act 2003 (UK) and s 78 of the Police and Criminal Evidence Act 1984 (UK), which require consideration of fairness.

66 *R v Aboagye-Bediako* [2021] EWCA Crim 81.

> 30. We turn, therefore, to the first ground of appeal which relates to the hearsay evidence of Mr Novak. In the written submissions it is noted that hearsay evidence which is of decisive importance in a case must be admitted only with great care. That is common ground. It is also submitted that prejudicial evidence should rarely be admitted when the maker of the statement is alive and well, but simply reluctant to attend court, where the reluctance is not attributable to fear.
>
> 31. In our judgment, the Recorder was entitled to admit the hearsay evidence of Mr Novak. The evidence from the police showed the efforts that they had made to secure Mr Novak's attendance. For instance, they had asked whether they could do anything to change his mind. Section 116(2)(c) was clearly satisfied. The Recorder made a careful evaluation of the factors set out under section 78 of the [Police and Criminal Evidence Act 1984 (UK)] and section 114(2) of the [Criminal Justice Act 2003 (UK)]. He adopted the approach set out in *R v Riat and others* [2012] EWCA Crim 1509; [2013] 1 WLR 2592 at [22]. It might be noted that the hearsay evidence included the full cross-examination which had taken place at the first trial. In our judgment, the Recorder was entitled to admit this evidence.

The approach to s 16(2)(b)

[68] From the statutory scheme, its history, and the authorities we draw the following conclusions about the approach to s 16(2)(b) of the 2006 Act.

[69] The starting point is that the inquiry to be undertaken under s 16(2)(b) is a contextual one. There is no real disagreement among the parties about this. Whether the proposed witness is unavailable on this basis requires consideration of what is reasonably practicable as a matter of fact in the circumstances. Given that the basis for this claim to unavailability is that the person is overseas, we see the inquiry as one primarily directed to the logistics or practicalities of obtaining the evidence in light of that factual premise. As the respondent put it, the problem to which s 16(2)(b) is directed is that the proposed witness is overseas. Hence, in its 1999 report, the Commission made the point that s 16(2)(b) "assumes that persons within New Zealand would not be prevented by practicalities from being witnesses".[67] As the Commission said, "[a]dvancing technology may mean that this will increasingly be the case for overseas residents as well".[68]

[70] While the inquiry must address the logistics, the matters to be considered also need to reflect the purpose underlying the inquiry, namely, to mitigate the risks seen

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67 NZLC R55 vol 2, 1999, above n 29, at [C80].
68 At [C80].

to be associated with hearsay, and the importance in our adversarial system of ensuring evidence can be tested by cross-examination. The factors commonly referred to in the authorities and in the commentary are a useful guide. The list which follows is not exhaustive, as we shall discuss, but generally the matters which would require consideration include the following:

(a) the steps taken to obtain evidence from the proposed witness and the steps that could have been taken, taking into account the means and resources available to the party who wants to call the proposed witness;

(b) the effort and cost involved in the proposed witness giving evidence;

(c) any resulting inconvenience to the proposed witness;

(d) the nature of the case; and

(e) the importance of the evidence to the case.

[71] In terms of the first factor, the steps taken or that could have been taken, we note that there was some debate before us about whether different rules should be applied for a defendant seeking to call evidence than those applicable to the Crown. Although the appellant did not ultimately pursue this point, we make some brief observations about the position.[69]

[72] With regard to the legislative history, we note also that the Torts and General Law Reform Committee considered it generally "undesirable in criminal cases to have one evidentiary rule for the prosecution and a different rule for the defence".[70]

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69 In the written submissions, the appellant referred to *R v Foreman* HC Napier CRI 2006-041-1363, 21 May 2008 (Ruling No 17), where Simon France J ruled against the admissibility of what would have been hearsay evidence for the defence. As illustrative of a lighter touch being applied to the calling of defence evidence, the appellant relied on the observations of the Judge that he was "naturally hesitant to make this ruling because one prefers to facilitate the calling of defence evidence": at [11]. We do not read this observation as supporting any different legal standard.

70 Torts and General Law Reform Committee, above n 24, at [7(ii)]. The question of differing standards between defence and prosecution was raised by the Law Commission in its 1989 preliminary paper, but was not included explicitly in any subsequent recommendations: see NZLC PP10, 1989, above n 16, at [15]–[16]; NZLC PP13, 1991, above n 29, at [44]; and NZLC R55 vol 2, 1999, above n 29, at [C88].

We agree with the respondent that there is one standard for the admission of evidence on the basis of unavailability, but that the way in which that standard bites in a factual sense may differ as between a defendant and the Crown.[71] That approach is consistent with the 2006 Act, which makes it clear that the standards applicable to defence, as opposed to Crown, evidence can differ. For example, s 38(1) and (2) provide for a different rule as between Crown and defence in the context of offering veracity evidence, as do ss 41 and 43 in addressing propensity evidence. Indeed, within the sections addressing hearsay evidence there are different tests for particular statements made by or against the defendant in criminal proceedings.[72]

[73] As to the way in which the standard applies, the reality is that the Crown may have more options available to it in a logistical sense, so that what would be required of the Crown under s 16(2)(b) in a particular case may differ from that of the defence for those practical reasons. For example, the Crown may be able to use the Mutual Assistance in Criminal Matters Act to obtain the evidence. That route is not available to a defendant.

[74] We interpolate here that we do not see that Act as aiding the appellant's argument. The submission was that s 11 of the Mutual Assistance in Criminal Matters Act and s 16(2)(b) of the 2006 Act must be read in a complementary way. Section 11 provides for the Attorney-General to request assistance from a foreign country in obtaining evidence. The appellant says that the Court of Appeal's approach in this case has the potential to undercut s 11. We see nothing in this. It will be a factual question whether the Crown could and should have used s 11 in a particular case. The Court's decision here does not affect that.

[75] In terms of the second factor, we note there is some potential for overlap between "the effort and cost involved in the proposed witness giving evidence" and s 18(1)(b)(ii). The latter provides for a hearsay statement to be admissible if it meets the reliability test in s 18(1)(a) and, relevantly, "the Judge considers that *undue*

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71 A similar point is made in *Williams v R* [2014] EWCA Crim 1862 at [92], where the Court noted that the hearsay provisions applied "equally to both the prosecution and the defence" but that when the court is applying the provisions "the identity of the party may well be relevant" to what is in the interests of justice. But, the Court said, there was nothing "structurally" favouring the defence over the prosecution. See also *R v Y* [2008] EWCA Crim 10, [2008] 1 WLR 1683 at [59].

72 Evidence Act, ss 21 and 22A.

expense or delay would be caused if the maker of the statement were required to be a witness".[73] As the authors of *Adams on Criminal Law* note, where this ground is met a hearsay statement may "be admitted in a case where the statement maker is not 'unavailable'" in terms of s 16(2).[74] In other words, s 18(1)(b)(ii) provides a more general catch-all focused on cost and expense for the party seeking to offer the hearsay statement.

[76] To explain the approach to the fourth factor, the nature of the case, it is sufficient to set out the example Spencer gives to illustrate this part of the inquiry — namely that while "it may be reasonable to fly a witness across the world to give evidence in a murder trial", it is not likely "to be so where the charge is shoplifting or careless driving".[75] The seriousness of the charges will be a part of the inquiry into this factor.

[77] In relation to the final factor, the importance of the evidence to the case, we consider that this part of the inquiry will encompass consideration of indicators of reliability. We accordingly need to address at this point the submission for the respondent that reliability should not inform the way the Court deals with unavailability. Instead, the respondent says, the two matters — reliability and unavailability — stand alone as two distinct safeguards.

[78] We agree that the Court must be satisfied the evidence meets the threshold tests in both s 18(1)(a) and (b) — so there are two inquiries to be made. The 2006 Act makes that clear, just as it is clear that the proposed evidence must also be admissible in terms of ss 7 and 8. But some overlap is inevitable given the common purpose of these thresholds, that is, as safeguards against the risks associated with untestable hearsay evidence. Further, as we shall discuss, consideration of the factors identified as relevant under this unavailability head is a means of ensuring consistency with fair trial rights.

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73 Emphasis added.

74 Mathew Downs (ed) *Adams on Criminal Law – Evidence* (looseleaf ed, Thomson Reuters) at [EA18.08].

75 Spencer, above n 59, at [6.17]; and see above at [62].

[79] It follows that we agree with the submission for the appellant that the Court should not "shut its eyes" to the inherent reliability (or otherwise) of a statement when deciding whether it is reasonably practicable for the overseas person to be a witness.

[80] Under s 16(2)(b), consideration of indicators of reliability will be viewed against matters such as the sorts of steps undertaken or that could be undertaken so that the proposed witness can give the evidence. What might be reasonably practicable for an overseas person whose proposed evidence is supported by independent evidence, such as records of bank transfers as in *R v Yu*, is likely to be different from that where the prospective witness was at one time considered a suspect (and therefore someone with a vested interest) as in *R v C*, just to give two examples.[76]

[81] Further, we note that how the specific factors apply will depend on the particular facts of a given case. For example, the importance of the evidence may cut both ways, sometimes meaning it may support the admission of hearsay evidence and on other occasions not. To illustrate the point, the evidence might be important but there may be other ways of testing it so, if it is evidence for the prosecution, fair trial rights are not compromised. Or, the evidence might be important and there may be no other way of testing it, with the result that fair trial rights are compromised where that evidence is for the prosecution.

[82] Finally, in considering broader factors, such as the indicators of reliability, it will be important to keep in mind that the focus under s 16(2)(b) is on the reasonable practicability of the overseas person giving their evidence. Reflecting this proposition, the appellant says s 16(2)(b) applies where there have been both sufficient steps taken to have the proposed witness give their evidence, and the statement is inherently reliable. In other words, it is not contended that reliability on its own renders a proposed witness unavailable.

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[76] *R v Yu*, above n 59; and *R v C*, above n 62. In the list of factors from Spencer, above n 59, set out above at [62], the author includes reference to the potential impact of cross-examination. That factor seems to be directed primarily to cases where there is no need for cross-examination and those where there plainly is a need for cross-examination, although in some cases that factor too will raise elements of reliability. Further, by contrast, the inquiry under s 18(1)(a) is directed to the circumstances, as that term is defined in s 16(1), relating to the statement itself. However, there will likely be situations in which both inquiries consider the same or similar factors.

An unwilling proposed witness

[83] On the appellant's case, once sufficient steps have been taken to obtain the evidence, the willingness of the proposed witness to give evidence would be added to the factors we say should be considered under s 16(2)(b).

[84] As we shall discuss, *Gao v Zespri Group Ltd* illustrates that the fact a proposed witness is ultimately unpersuadable may, in particular factual situations, be relevant to availability under s 16(2)(b).[77] However, differing from Kós J in this respect, we consider the primary focus of "reasonable practicability" is on the sorts of matters which the ordinary meaning of that phrase suggests. In other words, a contrast can be drawn between the person who is not willing to travel hours through the night to give evidence via audiovisual link, and the person who simply says "I am not willing to cooperate".

[85] To explain our reasoning, the first point we make derives from the fact that hearsay statements are only admissible in specified circumstances; namely, those set out in the 2006 Act or in another statute.[78] The approach in the 2006 Act, which is to specify the circumstances in which a proposed witness will be unavailable, reflects the view that, in addition to the general safeguards set out in ss 7 and 8 of that Act, the admission of hearsay statements requires further specific safeguards. While the legislative history over time shows a liberalisation of the exceptions, the legislature has nonetheless retained a relatively confined set of exceptions.

[86] The specific safeguards have two aspects and, as we have said, the court must be satisfied as to both. To reiterate, the first aspect is the requirement for some assurance as to reliability, as provided for by s 18(1)(a). The second aspect of these safeguards is that traditionally seen as underpinned by the principle of necessity.[79] The

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77 Below at [102].

78 Evidence Act, s 17.

79 NZLC PP15, 1991, above n 29, at [24]. These two features, reliability and necessity, reflect the discussion in *Wigmore on Evidence* of the theoretical underpinnings of the exceptions. Wigmore notes that there may be no need for the rule against hearsay where the statement is reliable, that is, "free enough from the risk of inaccuracy and untrustworthiness", and that departures may be necessary: Wigmore, above n 14, at 251. At one point, the Law Commission considered the prospect of allowing reliability to largely dictate when the rule would be departed from but that was not the approach ultimately recommended: see NZLC PP15, 1991, above n 29, at [31].

references in s 16(2) to where the proposed witness is dead, unfit or not compellable in terms of s 73(1) of the 2006 Act suggest that what is meant by unavailability under the other heads in s 16(2) takes its colour from what is necessary, rather than what would be convenient.[80]

[87] The Court of Appeal in *R v Manase* preferred to use the term "inability" rather than "necessity", but the approach in that case provides support for our view that unavailability is to be approached primarily as a question of inability or necessity.[81] *Manase* pre-dated the 2006 Act. It is nonetheless relevant for two purposes.

[88] First, *Manase* is relevant for the Court of Appeal's rejection of the Canadian approach. Having reviewed the authorities, the Court said the Canadian notion of necessity "reaches well beyond the idea of the primary witness being unavailable".[82] Rather, it covered "cases in which the primary witness is available, in any ordinary sense of the term, but the Judge considers it would be unduly onerous to require that person to give evidence".[83] The Court considered there was some force in the submission for the appellant "that in Canada the grounds for admission of hearsay have been diluted to little more than relevance coupled with a sufficient degree of reliability".[84] The Court did not consider the New Zealand common law should be developed in that way.

[89] Second, *Manase* is relevant for the Court's rejection of the notion that unwillingness on its own was generally sufficient to constitute unavailability. The Court of Appeal said this:[85]

> (b) **Inability.** This requirement will be satisfied when the primary witness is unable for some reason to be called to give the primary evidence. If the primary witness is personally able to give that evidence, it will seldom, if ever, be appropriate to admit hearsay evidence simply because the witness would prefer not to face the ordeal of giving evidence or would find it difficult to do so. To adopt that approach would be to tilt the balance too far against the accused or opposite party who is thereby deprived of the ability to cross-examine.

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80 This point was made in *R v M-T* [2003] 1 NZLR 63 (CA) at [35]–[36].
81 *R v Manase* [2001] 2 NZLR 197 (CA) at [30(b)].
82 At [17].
83 At [17].
84 At [17].
85 At [30(b)].

[90] That the notion of necessity underpins the concept of unavailability is not surprising given the fact that, as the 2006 Act makes clear, the admissibility of a hearsay statement is an exception to the ordinary exclusionary rule, which stems from the principle that oral evidence is the ordinary way of giving evidence.[86] Albeit in the context of addressing the relevance of demeanour, this Court in *Taniwha v R* referred both to the "fundamental importance of transparency in the administration of justice through the courts" and the assumption that the fact-finder "is likely to benefit from seeing and hearing witnesses give their evidence".[87]

[91] Our next point is that we see the policy considerations as supporting the approach we take. It would be odd, at best, if a potential witness being overseas could result in hearsay statements being admitted in circumstances where those statements would not be admitted as hearsay were the person in New Zealand.[88]

[92] In its third review of the 2006 Act, the Commission has recommended changes to the hearsay rules. Specifically, the Commission discussed possible amendments to clarify, and expand, the scope of the exceptions to the rule against hearsay. The Commission first considered that s 18 of the 2006 Act should be amended to include a new ground for admitting a hearsay statement when the maker has a reasonable fear of retaliation which means they do not intend to give evidence, and it is in the interests of justice to admit the statement.[89] That change would bring the New Zealand position into line with that in the UK Act.[90]

[93] The Commission also considered whether the unavailability definition under s 16(2)(d) (when a person cannot with reasonable diligence be identified or found) required amending to clarify the reasonable diligence requirement.[91] The Commission concluded that there was no need for such clarification. Finally, the Commission recommended that a new exception be inserted into s 17 providing that the rule against

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86 Evidence Act, s 83(1)(a).

87 *Taniwha v R* [2016] NZSC 121, [2017] 1 NZLR 116 at [1].

88 We do not resolve here the place of s 165 of the Criminal Procedure Act in the analysis: see *Awatere v R* [2018] NZHC 883.

89 Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006* | *The Third Review of the Evidence Act 2006* (NZLC R148, 2024) [NZLC R148, 2024] at [9].

90 See Criminal Justice Act 2003 (UK), s 116(2)(e).

91 NZLC R148, 2024, above n 89, at [11].

hearsay does not apply to statements offered to prove the existence or content of mātauranga or tikanga.[92] Despite clearly having directed its attention to the unavailability exceptions, the Commission made no recommendations in relation to s 16(2)(b) of the 2006 Act, or regarding expansion of these exceptions more generally. Accordingly, bearing in mind the primary purpose of this exception, we see no need for a more expansive approach to s 16(2)(b) than has been the case to date, albeit that advancements in technology are likely to diminish the utility of s 16(2)(b).[93]

[94] Nor do we see the Bill of Rights as affecting this approach. The relevant rights are the right to a fair trial;[94] the right to be present at trial and to present a defence;[95] and the right to examine the witnesses for the prosecution and obtain the attendance and examination of defence witnesses on the same basis.[96] The contextual nature of the inquiry we envisage ensures consistency with the Bill of Rights, because matters such as the importance of the evidence and the nature of the case must be assessed.[97] It is relevant also that the defence can argue that it would cause undue delay and expense to obtain the evidence, in accordance with s 18(1)(b)(ii) of the 2006 Act. Finally, as we have said, the Court will always have to go back and consider s 8, which, in turn, requires the Court to "take into account the right of the defendant to offer an effective defence".[98] We do not see any pressing need for change to this aspect of the hearsay rule.[99] It follows that we see no basis for interpreting the Bill of Rights as providing an additional basis for the admission of hearsay statements.

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92 At [3]–[4].

93 If, for example, the cases coming within what Kós J at [130]–[131] below terms "impracticability" (as opposed to "unwillingness") dwindle, we see no need, at least as matters stand, to expand the approach to "unwillingness".

94 Section 25(a).

95 Section 25(e).

96 Section 25(f).

97 The position reached in the United Kingdom was that the hearsay regime there was consistent with the fair trial rights in the European Convention on Human Rights: *Regina v Horncastle* [2009] UKSC 14, [2010] 2 AC 373. See also the discussion of *Horncastle* in *Al-Khawaja v United Kingdom* (2012) 54 EHRR 23 (ECHR).

98 Evidence Act, s 8(2).

99 The Law Commission in its three reviews of the Evidence Act 2006 has not seen the need to make any recommendation about unavailability of a proposed witness who is overseas. All three reviews saw the Evidence Act 2006 as, generally, working effectively: see NZLC R127, 2013, above n 13; Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006* | *Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019); and NZLC R148, 2024, above n 89.

[95] The appellant also suggests the 2006 Act does not exhaustively define what is meant by "unavailable as a witness". This submission relies on the omission of the words "if, but only if", wording not carried over from s 2(2) of the Evidence Amendment Act (No 2) 1980 into s 16(2) of the 2006 Act. We agree with the respondent that nothing turns on this drafting change, which is one of style rather than substance. That is quite apparent from the wording of the 2006 Act, which says a person is unavailable for the purposes of the hearsay subpart if that person comes within the definition in s 16(2).

[96] For the proposition that the 2006 Act is not exhaustive, the appellant also relies on the discussion in *Manase* of a general residual exception. As we have said, that case pre-dated the 2006 Act. But in any event, it is clear the Court in *Manase* was envisaging the type of approach now reflected in the Act under which admissibility would turn on the specific safeguards (inability/necessity and reliability) and the general safeguards (relevance and the prejudicial/probative balance).[100]

[97] The Court in *Manase* also rejected the suggestion of the trial Judge in that case that the authorities supported:[101]

> … a general exception to the hearsay rule where the evidence is such that the dangers of hearsay evidence are either not present or can be dealt with through a direction to the jury.

[98] The Court saw the latter proposition as "difficult".[102] This was because it had long been recognised:[103]

> … that the dangers of hearsay evidence [could not] be dealt with adequately by a direction to the jury that the law has consistently withheld hearsay evidence from the jury unless it qualifies as a recognised exception.

[99] We agree with the respondent that if it intended to include a residual category, Parliament would have done so explicitly, as is the case in the United Kingdom.

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100 In *Cross on Evidence*, the authors describe the general exception in s 18 as "effectively codifying the residual exception created in *R v Manase*": Donald L Mathieson (ed) *Cross on Evidence* (looseleaf ed, LexisNexis) at [EVA18.1].

101 *R v Manase*, above n 81, at [45].

102 At [45].

103 At [45].

[100] The appellant says the authorities to which we have referred also support the appellant's case that if sufficient steps have been taken and the reliability test is met, unwillingness will suffice.

[101] In terms of the New Zealand authorities, to the extent there are references to the effect of the proposed witness being uncooperative, two points can be made. First, observations to this effect in *Union Steam Ship Company* were made in the context of considering logistical matters of convenience to the proposed witness. Second, the reason why there is a focus in cases such as *R v M* on the extent of inquiries made by police about the reasons for the proposed witness's lack of cooperation is because it is not, generally, going to be sufficient simply to say that the person is unwilling. The same point applies to the observations in *Solicitor-General v X*.

[102] Where, however, as in *Gao v Zespri Group Ltd* the proposed witness was not prepared to give evidence except on terms not acceptable to the very party wishing to call the evidence, the Court of Appeal found that the lack of cooperation or unwillingness was sufficient to meet the test in s 16(2)(b). In the circumstances of that case, this outcome is not surprising. But, as the Court of Appeal said in this case, *Gao* reflected circumstances "so removed from" those in the present case that it does not assist the appellant's argument that s 16(2)(b) applies in this case.[104]

[103] With reference to the United Kingdom authorities, and the observation by Spencer in particular, it is correct that the focus is not whether it is physically possible to secure the attendance of the proposed witness.[105] But that is because it is necessary to consider, also, the reasonable practicability of that course. It is not simply an inquiry into whether the proposed witness could return, but as to whether that is reasonably practicable. Read in context, Spencer says no more than that. We add that there is a subtle difference in the wording of the relevant provision in the United Kingdom legislation and that in New Zealand. The former refers to what is reasonably practicable "to secure"[106] the attendance of the proposed witness — wording that Richardson P in *R v M* saw as narrower than "obtain [their] evidence". The wording

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104 Second CA judgment, above n 5, at [39].
105 Spencer, above n 59, at [6.16].
106 Criminal Justice Act 2003 (UK), s 116(2)(c).

in the 2006 Act refers to whether it is reasonably practicable "for him or her to be a witness".[107] That difference may, arguably, explain the reliance in the United Kingdom authorities on the sufficiency of the steps taken by counsel to secure the attendance of the proposed witness — in that the wording of the United Kingdom provision is arguably less focused on practicalities relating to the would-be witness, and more on practicalities relating to those wishing to call them.

[104] In any event, it does not follow that unwillingness on its own (unless coming within the final category of s 116 of the UK Act; namely, that the proposed witness is fearful) will generally suffice.[108] In this respect, the United Kingdom approach reflects the recommendations of the Law Commission of England and Wales in 1997.[109] The Law Commission said this:[110]

> We explained that a test of practicability alone would be unduly onerous: for example, it might be practicable for a foreign declarant to give evidence by live television link, but the expense might not be justified if the evidence was very short and on a minor issue.
>
> 8.39 We believe that the merit of a test of *reasonable* practicability is that it would require the party to make reasonable efforts to bring the person concerned to court, but would also enable the court to take into account all the circumstances of the case. The sort of factors that might be taken into account would include the expense of adducing the evidence by alternative procedures, the seriousness of the case, and the importance of the information in the statement. Another factor to be considered is whether it would be reasonably practicable to secure the evidence for trial at a later date, if that possibility is raised by either party. On consultation, the vast majority of respondents who dealt with the point agreed with the test of reasonable practicability. …

[105] The reason given by the Law Commission for the addition of the requirement for "reasonable practicability" also explains why the primary focus of s 16(2)(b) of

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107 Evidence Act, s 16(2)(b). Compare above at [51].

108 In *R v Gyima* [2007] EWCA Crim 429 at [26], for example, the Court said the expense of making arrangements for a young witness (who was 14 years old at the time of the incident he witnessed giving rise to the charges) to give his evidence via audiovisual link from the United States meant the trial Judge "would have been entitled to find that it was not reasonably practicable to secure" attendance by this means. It was accepted in that case that a police officer would have had to go to the United States to make the necessary arrangements and to be present when the witness gave evidence. The Court went on to say that the fact the parents of the witness would not cooperate presented "a very considerable difficulty in communications … and the ability of the police to persuade them to co-operate". This meant the police had taken all reasonable steps to secure the attendance of the witness.

109 Law Commission of England and Wales *Evidence in Criminal Proceedings: Hearsay and Related Topics* (Law Com No 245, 1997).

110 At [8.38] (footnotes omitted; emphasis in original).

the 2006 Act is not on the factual non-compellability of the proposed witness. It is a given that the section only applies when the proposed witness is overseas, but the issue is not their non-compellability, but rather the feasibility of nonetheless obtaining their evidence.

[106] To conclude, we accept that in some cases the unwillingness of the prospective witness will be relevant in considering the availability part of the exception to the rule against hearsay. That said, the focus of the contextual inquiry required by s 16(2)(b) will primarily be on the logistics or practicalities of obtaining the evidence because the proposed witness is overseas. Several factors, set out at [70(a)–(e)] above, will be relevant in determining whether the proposed witness is unavailable in terms of s 16(2)(b).

Application of the relevant factors to this case

[107] In terms of the first factor, the steps taken, there was no real challenge to the measures undertaken by the appellant. That was not the key focus of this case although the respondent made the point that an attempt could have been made to subpoena C.[111] However, the respondent accepted that may well have been to no avail, and that point was not pursued.

[108] The effort, cost and inconvenience involved in the proposed witness giving evidence can be addressed together. The timeline shows there was no real effort or cost or inconvenience to C. She was, in fact, ready to go having very recently signed her statement. The issue really was that she would not leave her room and her parents had been unable to get her to seek medical assistance. These were matters going, potentially, to unfitness under s 16(2)(c) of the 2006 Act, but the appellant failed on that ground in the Court of Appeal and did not pursue the point before us. In these circumstances, the appellant cannot seek to rely on unfitness. Rather, it must be assumed that, as the Court of Appeal found, C was unwilling to give evidence.

[109] The nature of the case would support admissibility, in that these were serious allegations. However, the importance of the evidence is a much more finely balanced

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[111] Under ss 154–156 of the Evidence Act.

question. To develop this point, we need to say a little more about the statement provided by C.

[110] C explained, first, that she and the complainant were very close. She said that the complainant would "tell [her] everything". C added that the complainant had a poor relationship with her aunt, saying it was surprising she had disclosed the appellant's alleged offending to that aunt. She also said that the complainant told her that she wanted to find a way to get rid of the appellant. C asked her then, and on other occasions, whether the appellant had ever hit her or done anything to her which would explain why she wanted to get rid of him, and the complainant said no. Rather, the complainant said she just could not stand him as he was lazy and expected her mother to cook and clean. On other visits, the complainant repeated her wish to come up with something to get rid of the appellant as well as her denial that anything had happened between her and him.

[111] C also explains that because of a family rift she did not know about the first trial. She said that she would have come forward earlier if she had known about that.

[112] The potential importance of this evidence is, in our view, diminished somewhat by the fact the key issues raised by C's statement were addressed at trial. In particular, the complainant was cross-examined about non-disclosure to the school counsellor. She said in evidence that she hated the appellant but did not want to do something to get rid of him. She also said that she had been close to C but was at the relevant time not as close.

[113] The appellant says that what is missing from what the jury heard is, first, the context of the brief. The argument is that the mere fact of C coming forward is itself significant. Second, the poor relationship with the aunt to whom the complainant disclosed the alleged offending would have supported the appellant's case. Finally, C's statement provided a motive for a false complaint by the complainant.

[114] As to the first point, it was plain to the jury that the complainant's family was divided over her complaints. The fact this family member was willing to come forward (at least initially) did not add particularly to the picture. For the same reason,

the second point does not advance matters either, especially where non-disclosure to the school counsellor, who was an independent and obvious recipient of such a complaint, was highlighted. There was also evidence from the aunt that the complainant did not make as full a disclosure to her as she ultimately did to the police. Finally, there was evidence the complainant hated the appellant and the family dynamics at play would also have been clear.

[115] Any consideration of the indicators of reliability is constrained in this case. That is because it was not a focus of the argument and there are no findings on the point. The appellant's position is that the evidence is reliable. The respondent acknowledges there are indicators of reliability, such as the fact that the statement is signed and written in the first person, and that it appears on its face to contain truthful evidence. On the other hand, the respondent points out there was no evidence about how the statement came into being and there was no statement in fact taken until later in the piece. The respondent was not willing to concede the point if it was an issue.

[116] That said, given the family dynamics at play, we consider if the evidence of C had been admitted, it may have been the subject of a reliability warning under s 122(2)(a) of the 2006 Act.

[117] When all these matters are considered, our view is that the Court of Appeal was correct to conclude that C was not unavailable under s 16(2)(b), and that her statement was not admissible.

[118] On this basis, it is not necessary for us to consider whether the omission of this evidence has given rise to a miscarriage of justice. In that context, we need only briefly address two points made by the appellant.

[119] The appellant says first that there has been a miscarriage because the unavailability of the proposed witness only arose arbitrarily, that is, because the initial retrial had to be adjourned because of the COVID-19 lockdown. Given our conclusion that the evidence was properly not admitted, nothing turns on this.

[120] Next the appellant says that the exclusion of this evidence trespassed on the right to offer a defence, and this also led to unfairness in the Crown's closing address. Again, it follows from our approach that there is nothing in this point. The right to advance a defence has not been impermissibly affected.

Result

[121] For these reasons, in accordance with the views of the majority, the appeal is dismissed.

KÓS J

Table of Contents

Introduction

[122] I agree with the result reached in the primary reasons delivered by Ellen France J. I differ on the way in which a statement maker unwilling to give evidence should be dealt with under s 16(2) of the Evidence Act 2006.

[123] A hearsay statement is admissible only if it clears three hurdles. The first is that it is relevant, in the sense that it tends to prove or disprove something consequential in issue.[112] The second is that the circumstances relating to the statement provide "reasonable assurance that [it] is reliable".[113] The third hurdle is cast in the alternative: either the maker of the statement is "unavailable as a witness" or the judge decides their attendance would cause undue expense or delay.[114]

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112 Evidence Act 2006, s 7.

113 Section 18(1)(a).

114 Section 18(1)(b). There are of course other potential hurdles: unfair prejudice, primarily assisting the defendant in criminal trials, under s 8; and applicant party complicity in unavailability, under s 16(3) (see below at [141(d)]).

[124] This appeal concerns the first part of the third hurdle: unavailability, in the context of a statement maker who is unwilling to give evidence.

When an unwilling statement maker is "unavailable"

[125] Unavailability should be judged from the perspective of the party trying to call the witness. It is about more than physical possibility. It should be satisfied where that party has made all reasonable efforts to secure attendance, without success.[115] It should therefore be satisfied where it is logistically "practicable" to call a witness, but they simply refuse to cooperate and cannot be compelled to do so.

[126] In addressing the third hurdle, we may take it that the statement has already cleared the prior hurdles of relevance and reliability. If it has not, the final hurdle simply does not arise. And any concerns about the applicant party's complicity in the statement maker's unavailability will be dealt with under s 16(3).

Statutory scheme

[127] For ease of reference, I set out the relevant parts of ss 16 and 18 again:

> **16 Interpretation**
>
> …
>
> (2) For the purposes of this subpart, a person is **unavailable as a witness** in a proceeding if the person—
>
> (a) is dead; or
>
> (b) is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or
>
> (c) is unfit to be a witness because of age or physical or mental condition; or
>
> (d) cannot with reasonable diligence be identified or found; or
>
> (e) is not compellable to give evidence.
>
> (3) Subsection (2) does not apply to a person whose statement is sought to be offered in evidence by a party who has caused the person to be unavailable in order to prevent the person from attending or giving evidence.

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[115] As Beldam LJ observed in *R v Maloney* in the passage cited at [64] of the primary reasons: *R v Maloney* EWCA Crim 92/3264/Y2, 16 December 1993 at 7.

> **18 General admissibility of hearsay**
>
> (1) A hearsay statement is admissible in any proceeding if—
>
> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
>
> (b) either—
>
> (i) the maker of the statement is unavailable as a witness; or
>
> (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.
>
> …

[128] Section 16(2) treats the statement maker as "unavailable" if they are unavailable to the party wishing to call their evidence for any of a number of compelling reasons. Death, unfitness and disappearance—s 16(2)(a), (c) and (d)—are compelling physical excuses. But s 16(2)(b) and (e) will typically deal with something different: a statement maker who has been located and who could give evidence, but who resists doing so.

[129] In the case of s 16(2)(b), an overseas statement maker's refusal to testify cannot usually be cured by compulsion. As the Law Commission has observed, due to New Zealand's omission to accede to the relevant international treaty it will usually not be possible to compel overseas witnesses to give evidence if they will not do so voluntarily.[116] Parties to New Zealand proceedings have few options when faced with an unwilling statement maker located overseas—with the exception of the Attorney-General, who can request mutual assistance (but even that is at the corresponding state's discretion).[117]

[130] Assuming the statement maker is overseas, the cases suggest s 16(2)(b) will apply if they are effectively unavailable to the applicant party, despite reasonable efforts made by it, where:[118]

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116 Law Commission | Te Aka Matua o te Ture *International Trade Conventions* (NZLC SP5, 2000) at [87] referring to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 847 UNTS 231 (opened for signature 18 March 1970, entered into force 7 October 1972).

117 Mutual Assistance in Criminal Matters Act 1992, s 11(1).

118 I agree with the primary reasons, above at [70(a)], that what amounts to reasonable efforts will differ according to the means of the party: Beldam LJ made the same point in *Maloney*, above n 115, in the passage quoted at [64] of the primary reasons.

(a) the statement maker is willing to give evidence, but the steps required to enable that to happen exceed what reasonably may be expected of the witness or applicant party (impracticability cases); or

(b) despite reasonable efforts by the calling party, the statement maker simply declines to make him or herself available to give evidence (unwillingness cases**)**.

Three further points should be noted.

[131] First, most cases about unavailability pre-date modern digital technologies which have facilitated the convenient and inexpensive taking of evidence from overseas; most of the reported cases therefore concern impracticability due to inconvenience and cost. But now, if a statement maker is willing to give evidence, it is not hard to call them, via an audiovisual link, without having to fly them back to New Zealand. That means unwillingness cases will now become more prevalent than impracticability ones.

[132] Secondly, for an unwilling statement maker to be considered unavailable as a witness, the applicant party will still have to show that they cannot practically be compelled or persuaded to give evidence in the foreign jurisdiction (or, at least, that to go further down that path would exceed reasonable efforts required by the court).

[133] Thirdly, there is a drafting overlap between s 16(2)(b) and the s 18(1)(b)(ii) requirement that there would be undue expense or delay if the statement maker were called. As the primary reasons suggest, s 18(1)(b)(ii) appears to provide a more general catch-all exception to the exclusionary rule against hearsay in s 17.[119]

Unwillingness unavailability in the cases

[134] The broader approach I suggest above at [125] for receipt of hearsay statements from makers unwilling to give evidence receives some support in the English cases. They are based on virtually identical legislation to that later adopted here.[120] To the

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119 Above at [75].

120 Criminal Justice Act 1988 (UK), s 23(2)(b); and Criminal Justice Act 2003 (UK), s 116(2)(c).

extent the primary reasons suggest there is a material difference between the New Zealand ("not reasonably practicable for him or her to be a witness") and United Kingdom ("not reasonably practicable to secure his attendance") formulations, I disagree.[121]

[135] That, I think, is a drafting distinction without a difference. First, both are equally concerned with the practicalities of physical attendance of the statement maker, and the "not reasonably practicable" part of the text has not changed since the Evidence Act 1938 (UK)[122] and Evidence Amendment Act 1945 (NZ).[123] Secondly, as the primary reasons explain, New Zealand copied the United Kingdom "to secure his attendance" formulation in 1945, then adopted the words "to obtain his evidence" in the Evidence Amendment Act (No 2) 1980[124] and settled on the "to be a witness" formulation in the Evidence Act 2006.[125] No material difference exists in these three formulae: they are all concerned with the statement maker giving oral evidence. The changes reflect drafting style, not substance.

[136] *R v Gokal* concerned the out-of-court statement of a key witness in a prosecution arising out of the Bank of Credit and Commerce International collapse, who had fled to Pakistan and refused to return.[126] The statement was admitted as part of the prosecution evidence, the Court of Appeal of England and Wales confirming the first instance finding that it was not reasonably practicable for the Crown to do more than offer to pay the witness's airfare and out-of-pocket costs. Likewise in *R v Gyima*, where the parents of a 14-year-old eyewitness would not cooperate with the prosecution, which sought to have him travel from the United States to England to give evidence—and his out-of-court video statement was admitted instead.[127]

[137] In New Zealand, in *Gao v Zespri Group Ltd*, the statement maker was a co-conspirator of the defendant and was unwilling to give evidence against him for

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121 See above at [103].
122 Evidence Act 1938 (UK) 1 & 2 Geo VI c 28, s 1(1).
123 Section 3(1)(b).
124 Section 2(2).
125 Above at [32]–[36].
126 *R v Gokal* [1997] 2 Cr App R 266 (CA).
127 *R v Gyima* [2007] EWCA Crim 429 at [13]–[26].

Zespri unless his unreasonable commercial demands were met.[128] He was located in China and could not be compelled under Chinese law to give evidence. The Court of Appeal upheld the High Court's conclusion that these circumstances amounted to s 16(2)(b) unavailability.[129] As it noted, practicalities of using remote technology were irrelevant when the proposed witness himself was unwilling to cooperate.[130] As I note later, the statement was inherently reliable, being an admission against interest.[131] So it cleared all hurdles for admission.

[138] The obiter passage from *R v Manase* quoted at [89] of the primary reasons needs to be read in context.[132] That case concerned a then-five-year-old complainant of sexual offending (perpetrated when she was three) whom the Crown did not wish to call, principally because she had no independent memory of the events at all. The trial Judge held her out-of-court statements admissible. The Court of Appeal reversed that ruling. The case does not deal with s 16(2)(b) or its predecessors: the statement maker was not overseas, and she could have been called by the Crown. It was not that she was demonstrably unwilling to give evidence; rather it was that she simply had nothing probative to say if she did so. As the Court of Appeal judgment in *Manase* makes clear, the sole rationale for exclusion of the evidence was that it lacked sufficient apparent reliability—i.e., the second hurdle.[133]

Prior law reform proposals

[139] In 1999 the Law Commission mooted, but did not pursue, the idea of expanding the definition of unavailability to include cases where the potential witness refuses to testify. But the proposal was directed at including unwilling statement makers within New Zealand.[134] It is entirely understandable why that was not pursued: the orthodox response to an unwilling statement maker still present in New Zealand is to compel attendance by a summons. A mentally fit witness physically located within

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128 *Gao v Zespri Group Ltd* [2021] NZCA 442, [2022] 2 NZLR 219.
129 At [52]–[54].
130 At [53].
131 Below at [141(c)].
132 *R v Manase* [2001] 2 NZLR 197 (CA) at [30(b)].
133 At [33] and [47].
134 Law Commission | Te Aka Matua o te Ture *Evidence: Reform of the Law* (NZLC R55, 1999) vol 1 at [57] and [59]; and see Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [C7] and 32 (draft code, s 1(2)(e)).

the jurisdiction is not "unavailable" in the relevant sense, and the party wanting their evidence must summons them unless the hearsay statement is uncontroversial and able to be adduced via a s 9 statement. If the statement maker is called to give evidence, their prior statement is not of course then hearsay, and may be put to them subject to the rules relating to prior consistent and inconsistent statements.[135]

[140] In any case, the policy justification for the Law Commission's omission of the proposed exception—that it would encourage statement makers to refuse to give evidence—is not especially convincing. Of course, a statement maker who wants their evidence to be admitted as hearsay evidence without being subjected to cross-examination could achieve that end by leaving the country. As I note below, that action would be futile if, as is likely, it simply led to the inference that the statement was unreliable.[136] But in any case, the point cuts both ways: a statement maker who does *not* want their evidence before the court *at all*—an equally or perhaps more likely scenario—could just as easily achieve that end on the approach set out in the primary reasons.

The other hurdles: relevance, reliability and complicity

[141] It is right to be concerned about reliability where a statement maker is unwilling to submit to cross-examination. However:

(a) First, that enquiry lies outside the bounds of s 16(2), which is just concerned with witness unavailability—the third hurdle. To reiterate, relevance and reliability are the prior hurdles, addressed by ss 7 and 18(1)(a).

(b) Secondly, as noted above, the circumstances in which the statement maker refuses to give evidence may well mean the statement cannot be considered reliable under s 18(1)(a), with the result that it will not be admitted in evidence. For instance, where an inference may be drawn

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135 Evidence Act, s 4(1) definition of "hearsay statement" and ss 35, 37(3)(c) and 96. See also *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [79] per McGrath, William Young, Chambers and Glazebrook JJ.

136 Below at [141(b)].

that the statement maker is not cooperating to avoid being cross-examined on the statement.

(c) Thirdly, in many cases, the opposite inference may be drawn: there may be every reason to regard the original statement as reliable. For example, the original statement might be an admission against interest. The ensuing unwillingness to give evidence could therefore be viewed as a contrivance to avoid that evidence seeing the light of a courtroom. Exclusion here would be contrary to the interests of justice. *Gao v Zespri Group Ltd* was just such a case: the out-of-court statement was an admission against interest made by a co-conspirator of the defendant, and demonstrably reliable.[137]

(d) Fourthly, s 16(3)—a party may not rely on s 16(2) if that party has caused the person's unavailability—is obviously focused on s 16(2)(b) and (d) and is an important protection against abuse in the case of a statement maker apparently "unwilling" to give evidence.

(e) Finally, even if the hearsay statement makes it across the second hurdle—apparent reliability—the absence of cross-examination goes to weight and may always be the subject of further judicial direction and warning.[138]

[142] I therefore see no need to take a restrictive approach to admission in cases involving unwilling statement makers. That category is likely to become the more pressing issue, as digital audiovisual platforms have largely solved the parallel issue of impracticability. Unavailability should be viewed from the perspective of the party calling the witness. Assuming (1) the statement is relevant and reliable, (2) unavailability is not contrived by the party seeking to adduce the evidence (in which case s 16(3) applies), and (3) the party has made all reasonable efforts to secure oral evidence (especially where a mechanism to compel attendance exists in the foreign jurisdiction), the statement should be admitted under ss 16(2)(b) and 18(1).

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137 *Gao v Zespri Group Ltd*, above n 128.
138 See Evidence Act, s 122(2)(a).

Viewed from the stance of the party making the application, the unwilling statement maker is unavailable, and necessity justifies admission. A dichotomy between the willing and the unwilling is neither justified nor necessary.

This case

[143] The Crown's argument here was that C was physically and technologically accessible, and that her unwillingness to leave her room to give evidence by audiovisual link was insufficient to engage s 16(2)(b). I disagree. So long as C refused to cooperate and could not with reasonable efforts be compelled to do so, it was not reasonably practicable for her to be a witness for the defence.[139] C's hearsay statement should have been admitted, with a tailored direction as to weight (in the absence of cross-examination).

[144] In fact, however, little of what C had to say remained in contention after the complainant's evidence. The two most important matters in C's statement were admitted by the complainant in her evidence: that she had told C that she hated the appellant and that she had not told C about the appellant's offending. In her statement C also said the complainant told her she wanted to get rid of the appellant. The complainant was not asked about that, but it adds little to the first point, and she was challenged generally on that motive in any event.

[145] I accept the submission by Ms Hoskin that the absence of C's evidence did not prevent the appellant from presenting an effective defence. He gave evidence on his own behalf denying the offending. Defence counsel had emphasised that the complainant hated the appellant, that her disclosures were inconsistent, and that she was not a credible witness. He also highlighted the fact that the complainant had disclosed rape by another person but, when asked, said the appellant had not raped her.[140]

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139 The Crown accepted that seeking a subpoena addressed to C under ss 154–156 of the Evidence Act was feasible but "unlikely … [to] have had any practical effect" in the face of C's assertion of ill-health as a basis not to cooperate.

140 I set aside the further argument for the appellant that C's willingness to give evidence would have demonstrated familial support for the appellant to the jury. That unwillingness has to be assessed at the time of trial, when for whatever reason C was no longer willing to give evidence. Further, the complainant's mother's support for the appellant was both more relevant and already evident to the jury.

[146] Accordingly, I do not consider there is a real risk that the hearsay statement's admission might have led to different verdicts.[141]

[147] For that reason, I too would dismiss the appeal.

GLAZEBROOK J

Table of Contents

Summary

[148] I agree with Kós J that, where a proposed witness is overseas, unavailability, in terms of s 16(2)(b) of the Evidence Act 2006, is judged from the perspective of the party wishing to call the person as a witness.[142] I thus agree that the test will be satisfied where that party has made all reasonable efforts to secure attendance, but the proposed witness simply refuses to cooperate and cannot be compelled to do so.[143] I agree that this approach receives support from the English cases, on what is very similar wording.[144]

[149] This means that the maker of a statement will be unavailable in two circumstances, as described in Kós J's reasons:[145]

> (a) the statement maker is willing to give evidence, but the steps required to enable that to happen exceed what reasonably may be expected of the witness or applicant party (impracticability cases); or

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141 Criminal Procedure Act 2011, s 232(4)(a).
142 Above at [125].
143 See above at [125]. I also agree with Kós J's analysis above at [128]–[133] and at [139]–[142].
144 Above at [134]–[136]. I also agree with Kós J's comments on the New Zealand cases discussed above at [137]–[138].
145 Above at [130].

(b) despite reasonable efforts by the calling party, the statement maker simply declines to make him or herself available to give evidence (unwillingness cases**)**.

[150] In this case, agreeing with Kós J, I am of the view that C's statement should have been admitted.[146] I consider that the appellant, Mr L, made all reasonable efforts to secure C's attendance, but she refused to make herself available as a witness.

[151] Contrary to the view of the majority and Kós J, I consider that C's statement was important corroborating evidence for Mr L and that it was of a different nature to the other evidence he relied on at trial. The failure to admit the statement was therefore an error that "created a real risk that the outcome of the trial was affected".[147] It also meant the trial was unfair.[148] This means that the failure to admit the statement led to a miscarriage of justice.

[152] In these reasons I turn first to the events leading up to the trial and then outline why I consider that C's statement should have been admitted as hearsay before turning to the consequences of it not being admitted.

Events leading up to the trial

[153] The Court of Appeal had before it two affidavits, the first from the complainant's mother. C is her niece, the daughter of her brother, B, and his wife, A. The second affidavit was from one of Mr L's trial counsel, Ms Freyer.

[154] Mr L's retrial was originally set down for 15 February 2021. C was not summonsed as she was living in Australia. According to Ms Freyer, her colleague had briefed C's evidence by email and by telephone. C signed her statement on 28 January 2021 but did not initial each page as she had been asked to do. The complainant's mother said in her affidavit that C was willing to give evidence at the trial from her home in Australia by audiovisual link. That was also the understanding of trial counsel. The trial had to be adjourned, however, because of COVID-19 lockdown restrictions.

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146 Above at [143].
147 Criminal Procedure Act 2011, s 232(4)(a).
148 Section 232(4)(b).

[155] A new trial date of 19 April 2021 was set. The complainant's mother's affidavit, drawing from a conversation she had with C's mother, said that C had a "breakdown" (which she defined as C becoming "mentally unwell and unable to function normally") just before that second trial date.[149] The complainant's mother said that C had had some "mental health issues" when she was 15 or 16 and had received treatment at that time (at the time of the scheduled April trial she was 20). The week of the trial, C's mother told the complainant's mother that C had become suicidal and that she and her husband, B, were taking it in turns to stay with her in her room. They had tried to get medical help but, as C was 20 at the time, were not able to force her to get help. Lockdown restrictions also made it difficult to get care for C. One morning C had agreed to go to the hospital, but because of COVID-19 restrictions her father was not able to go into the hospital with her. She was not prepared to go in by herself and they had to return home.

[156] Trial counsel had been advised of the position and made a successful application for an adjournment on 19 April 2021. Judge Bergseng was able to hear from C's mother in Brisbane by telephone in his chambers. Her account of C's mental state was consistent with that in the complainant's mother's affidavit.[150] The Judge set out his reasons for granting the adjournment in a minute issued that day:[151]

> [4] The basis of the application is that there is an important defence witness, [C] who is unavailable. She is the complainant's cousin. Her evidence is in respect of dealings that she had with the complainant in late 2016 into early 2017. *The evidence that she proposes to give is important evidence for the defendant, and without that evidence it would impact on his ability to receive a fair trial.*
>
> [5] The issue that has arisen is that on 11 April, it seems very unexpectedly, [C] became mentally unwell. She has a history of mental illness going back to 2015.

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149 There had been a difficult relationship breakup just before.

150 *L (CA631/2021) v R* [2023] NZCA 246 (Cooper P, Ellis and Churchman JJ) at [10].

151 *R v [L]* DC Auckland CRI-2017-004-7073, 19 April 2021 (Judge Bergseng) [DC adjournment minute] (emphasis added).

> [6] I have spoken this morning with her mother. This witness is based in Brisbane. She is now 20 years old. In the past, her parents have still retained guardianship rights, which have enabled them to force the issue of treatment. At this stage, [C] is refusing treatment. Her mother describes her as presenting with suicidal thoughts. Her mother is of the view that she would not be well enough, even later this week, to give evidence.
>
> [7] I am conscious of the length of time that this matter has been before the Court, and just as a defendant has a right to receive a fair trial, a complainant has a right to expect an expeditious hearing. However, in the case that I am faced with, *the right of [Mr L] to receive a fair trial would be compromised* whereby it would almost be inevitable that if we proceeded to trial this week and the witness was not available, there would be a subsequent appeal on the basis of a miscarriage of justice. It seems to me that would have a very strong possibility of being granted.
>
> [8] The application is opposed by the Crown, on the basis of perhaps a lack of detail in terms of the medical situation of the witness. That has been explained by her mother, in that [C's] father attempted to take her to hospital on Sunday the 11th. Because of the COVID-19 situation that was present in Brisbane at that time, they refused to admit her to hospital and the family has not been able to progress the matter since then.
>
> [9] Accordingly, I am vacating this week's trial. I would ask that the registry, in conjunction with the jury trial liaison judge, look to give the rescheduling of this matter some priority, given the length of time it has been before the Court. However, that needs to be balanced against the availability of [C] as a defence witness. It may be that if her situation does not improve, then the application for her statement to come in as a hearsay statement could be further pursued. But that is for another day, not today.

[157] A new trial date of 6 July 2021 was set. Ms Freyer's colleague had repeatedly tried to contact C's mother to see if C would be able to give evidence and also to get her to initial each page of her statement. When he did finally get hold of C's mother, he was told C was still unwell and that the trial should go ahead without her. An email from C's mother confirmed that C had signed her statement of evidence in her presence both earlier in the year and on 4 July. She said that nothing had changed in terms of C's mental state since earlier in the year and that C was still refusing to get medical help. She said that, because C is an adult, they could not force her to get treatment.

[158] As a consequence, Mr L's counsel applied for admission of C's statement and alternatively for an adjournment of the trial. The application to admit C's statement was declined. This was on the basis that there was no sufficient evidential foundation on which to find that C was unfit to give evidence.[152] The Judge noted that there was no medical evidence available to support the contention that C was unfit to give evidence.[153] He also noted that C was available to sign her statement on 4 July, that she had initialled each of the pages of her statement on 6 July and that she made no mention in that statement of mental health issues.[154]

[159] The application for a further adjournment was also declined. The Judge noted that the trial had "been long outstanding".[155] The complainant was ready to give evidence, had already given evidence (and been cross-examined) in the first trial and had also been ready to give evidence when the trial was previously adjourned.[156] It was therefore in the interests of justice to refuse the application for an adjournment.[157]

Should C's statement have been admitted?

[160] I consider that all reasonable efforts were made by defence counsel to secure C's attendance at trial. C refused to seek medical help and, because she was an adult, her parents could not force her to do so. This meant that there was no medical evidence available as to her current condition and, unless she changed her mind about seeing a doctor,[158] no means of getting any. It would perhaps have been possible to ask C's permission to seek a report from her medical team which had treated her for mental health issues as a teenager, but that would have said nothing about her current state of mental health.

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152 *R v [L]* [2021] NZDC 13278 (Judge Bergseng) [DC reasons judgment] at [26]–[33]. The judgment cited here gives reasons for the decision. These were given on 29 July 2021. Whether or not Judge Bergseng was wrong in the conclusion that there was not a sufficient evidential foundation to find C unfit to give evidence is not before us.

153 At [31] referring to the type of evidence available in *R v Harmer* [2002] 3 NZLR 560 (HC).

154 At [32]. The Judge commented at [39] that there had been sufficient time when the ruling was issued to make arrangements for C's evidence to be heard by audiovisual link and that any evidence called by the defence would not have started before 8 July 2021.

155 At [38].

156 As noted in the majority's reasons (above at [8]) the trial that started on 6 July 2021 was a retrial.

157 DC reasons judgment, above n 152, at [39].

158 C's mother's email confirmed that C had not changed her mind about seeking medical attention: see above at [157].

[161] The efforts made by Mr L's counsel to brief C's evidence and to get the brief signed and initialled have been outlined above. It is difficult to see what else they could have done. C had, it appears, been willing to give evidence by audiovisual link if the trial had proceeded in February. That she was having mental health issues in April was accepted by the trial Judge when he granted the adjournment. Her mother's email indicated that C's condition had not improved by July.

[162] Whether or not C's mental distress reached such a level that it made her unfit to give evidence, it clearly made her unwilling to do so. I thus agree with Kós J that, as long as C refused to cooperate, and could not reasonably be compelled to do so, it was not reasonably practicable for her to be a witness for the defence.[159] I comment that it seems difficult to justify why, as a matter of principle, the hearsay statement was admitted in *Gao v Zespri Group Ltd*, where the proposed witness was fully able to testify and merely put unreasonable conditions on giving evidence, but not the hearsay statement in this case from a young person who was not well.[160] The Court of Appeal in that case put the point straightforwardly: "on the balance of probabilities, … [the proposed witness] was unwilling to give evidence and, being beyond compulsion, [was] thereby unavailable".[161] The same is true here. Indeed, the unwillingness here is in a sense starker — in *Gao* the proposed witness was unwilling but for certain (unacceptable) conditions, whereas here C appears to simply be unwilling altogether (and due to what had been accepted by the Judge in April as reasons of mental distress).

[163] As Kós J says, we must deal with the appeal on the assumption that the relevance and apparent reliability hurdles have been met.[162] Indeed, there is nothing to suggest that they were not. C's evidence was obviously relevant, as recognised by Judge Bergseng in his minute of 19 April.[163] In terms of the circumstances of the making of the statement, C had signed a full brief of evidence, both in January and in July 2021.[164] There is nothing on the face of the statement to suggest it may be

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159 Above at [143].
160 *Gao v Zespri Group Ltd* [2021] NZCA 442, [2022] 2 NZLR 219 at [53]. See above at [84].
161 At [53].
162 Above at [126]. See Evidence Act 2006, ss 7 and 18(1)(a).
163 Above at [156].
164 See above at [154] and [157].

unreliable. She explained in her statement why she had not come forward before the first trial.[165] She was apparently ready, willing and able to give evidence by audiovisual link at the original retrial date in February.[166] The circumstances are such that there is reasonable assurance that the statement is reliable. Whether it was in fact reliable would of course have been for trial.

[164] There is one further point as to the statement's reliability. I accept that C's statement was a hearsay statement: a statement made by a person other than a witness (C) and offered in evidence to prove the truth of its contents.[167] In terms of the latter requirement, C's brief of evidence would have been tendered on the basis that it was proof that the complainant had made the statements to C on the relevant occasions and, by implication, that the complainant had done so because those statements were true. It is also important in this case, however, to remember that, from the point of view of the complainant, her statements to C would not be hearsay statements because they would be statements made by a witness. The definition of "hearsay statement" in s 4(1) of the Evidence Act excludes statements made by witnesses. Because the complainant was a witness, she would have had the opportunity at trial to deny she had made the statements to C or to explain them if she accepted that she had made them. This means that some of the traditional concerns surrounding the inability to cross-examine on hearsay evidence would not apply.[168]

[165] I turn now to the consequences of C's statement not being admitted. First, I set out what her statement covered in more detail. I then summarise the relevant portions of the complainant's evidence at trial, before considering whether the absence of C's statement caused a miscarriage of justice.

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165 See below at [169].
166 See above at [154].
167 Thus fitting the dual requirements of the definition of "hearsay statement" in s 4(1) of the Evidence Act.
168 See above at [30].

C's statement

[166] C said in her statement[169] that she had been living in Brisbane in 2016 but had travelled back to New Zealand in October for a family reunion. She had stayed with the complainant and her family. She said that at that time she and the complainant "were very close. We were best cousins. … [The complainant] would tell me everything". She said:

> 11. While at this house in the bedroom that my cousin [the complainant] was staying in, my cousin … had told me that she wanted to find a way to get rid of her mother's husband.
>
> 12. I asked her if he had ever hit her or done anything to her as to why she wanted to get rid of him and she replied, "No."
>
> 13. She then said that she just cannot stand him as he is lazy and expects her mum to cook and clean, and that everything that he asked from her she would do, and she hates him for it.

[167] C said that the complainant moved to Australia from New Zealand in December 2016 and that she stayed with C and C's family before moving next door to stay with another uncle, D. During this period, she and the complainant would "visit one another almost every day". She said:

> 18. During these visits, [the complainant] would tell me how she wanted to come up with something to get rid of her mother's husband [Mr L, the appellant].
>
> 19. I would continue to ask her why.
>
> 20. Her response was the same as it was before; that she cannot stand him, and she hates him, and that he is not her real father and that he is her real father's brother.
>
> 21. Again, I asked if there was something that's happened between her and him ([Mr L]).
>
> 22. She again replied "no".
>
> 23. She said that she could not stand seeing her mum work and do the same thing over and over while he just sits there and watches TV.
>
> 24. She also told me that she told her mother to tell [Mr L] to get a job to help her with the rent, and her mother told her not to worry, and just focus on herself.

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169 This was the version of the statement she had signed in July 2021: see above at [157].

> 25. This is why she says that she moved away from her mother and [Mr L] to Brisbane as she was sick of seeing her mum constantly do everything for [Mr L]. She wanted to give her mum an ultimatum her or [Mr L].

[168] C then said that, just after Christmas of 2016, she found out that the complainant had told her uncle D's partner, F, that Mr L had molested her. She could not understand why the complainant would tell F anything, as she had earlier said that she hated F. She said the complainant told her that F would only cook for her own children and would make the complainant and her siblings sit at the table and watch. F would also, when they were living back in Auckland, make them clean up mess made by F and F's children. C expressed the view that the complainant was "unlikely to confide everything [sic] deep with any adults at the time. I am really surprised that she told [F] about these allegations."

[169] C then outlined a disagreement that occurred around March 2017 between her parents and D and F. She described how, as a result of this, C's mother and F stopped speaking, although her father and D still spoke at this point. She said that in April 2017, D and F had a fight with her parents. C said that she and her parents stopped speaking to the "wider family", the complainant's mother and Mr L because of the argument. She thought this fight was about the complainant's allegations about being molested but was not sure. She said her parents did not believe the allegations. C said she tried to reach out to the complainant but was blocked on multiple social media platforms by her. C and her family did not have any contact with the wider family until after Mr L's first trial in, C thought, early 2018. C was told then that there had been a trial concerning the complainant's allegations against Mr L:

> 48. Up until that point, I did not realise that there had been a trial involving [Mr L].
>
> 49. I was upset about hearing of the allegations because I knew that [the complainant] was going to do something to get rid of [Mr L], but I was not expecting it to be what [F] said [the complainant] told her.
>
> 50. This is why I did not come forward earlier as I did not realise that there had been a trial.
>
> 51. Had I known, then I would have made a statement or made contact with [the complainant's mother or Mr L].

[170] At the end of the brief C confirmed that:

> … the above is true and correct to the best of my knowledge and belief and will be used to question me during [Mr L]'s trial. I also confirm that I have had the opportunity to correct, amend or add any further information to this document.

Complainant's evidence at trial

[171] In examination in chief the complainant was asked why she had not told the school counsellor about the allegations against Mr L. She said that she did not tell her because she was more worried about "what was going on for [her] and [Mr L's son]".[170] She said that she was scared because she "knew it was going to be bigger" and that she did not want her mother to know as she was not going to believe her.

[172] The complainant said she had felt able to tell F what had happened with Mr L because she felt free. She felt like she was "more safe" because she was in Australia and not New Zealand. She and F "had grown pretty close and I just felt like … it was time to let this all off my chest".

[173] The complainant was asked in cross-examination whether she hated Mr L and why:

> Q. So apart from things that he would do for you, was it the case that you hated him?
>
> A. Yes.
>
> Q. But you never told him you hate him, did you?
>
> A. No.
>
> Q. And you never told him "you will never be my father"?
>
> A. No.
>
> Q. And the reason you really hated him was that you thought he was lazy and your mother –
>
> A. No, it was (inaudible …)
>
> Q. – put him first?

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[170] See above at [11] of the majority's reasons for background in relation to sexual activity between the complainant and Mr L's son.

A. Yes.

…

Q. And you didn't see [Mr L] as a role model of any kind, did you?

A. No, because he was always at home. He was doing stuff he shouldn't have been doing.

Q. And your mother would be working and doing things for him?

A. Yes.

Q. And you didn't like seeing your mother do all those things for him?

A. No.

Q. And you also felt that she put [Mr L] first before you and the other kids?

A. Always.

Q. So you really hated him for that?

A. I hated him, yes.

Q. And wasn't it the case that you wanted to – to do something to get rid of him?

A. No.

Q. Get him out of your life and out of your mother's life?

A. No.

[174] The complainant was then asked about going to Australia in December 2016. She agreed that she was particularly excited about going to Australia because she would be seeing her cousin C and agreed that they had always been close:

Q. And you were particularly excited about going to Australia because you would be seeing your cousin, [C]?

A. Yes.

Q. And [C] is the daughter of [A] and [B]?

A. Right.

Q. She's a cousin that's had, come to visit before in New Zealand and –

A. Correct.

Q. – you knew her very well?

A. Yep, yes. Sorry.

Q. Is she a little older than you?

A. No, she's younger.

Q. Oh, she's younger. You and [C] had always been very close?

A. Yes.

[175] She also said that she was living with D and F in Australia right next door to C and C's family, that she went on a daily basis to see C and that it made her happy to be with her cousin:

Q. Now when you got there you went to stay with [D] and [F]?

A. Yes.

Q. And right next door were living [B] and [A] and their daughter, [C]?

A. Yep, and their three sons.

Q. And their three sons. So because they were next door, you went on a daily basis to [C] and could catch up with her and spend time with her?

A. Yes.

Q. And that made you very happy, didn't it, to be with your cousin?

A. Yes.

[176] The complainant agreed that she had become aware of tensions between D and F and C's parents. She also said that F was the only person "who I told the truth to" and was cross-examined at length about why she did not disclose to F all the allegations she now made. She was also cross-examined about her relationship with Mr L's son.

[177] At the end of the cross-examination, the complainant said that she remembered telling C she hated Mr L but that she did not tell her about the allegations. She said she did not know why and then said it was probably because C and her were "close, really close" but when she got to Australia they were not as close as before:

Q. Now I want to ask you about your cousin [C]. You said you saw her daily while you were in Australia?

A. Correct.

Q. And you were very close to her, weren't you?

A. Correct.

Q. And you would have told her that you hated [Mr L]?

A. Yeah, I remember telling her I hated [Mr L].

Q. But you didn't tell her that [Mr L] had done sexual things to you, did you?

A. No.

Q. But this was somebody you were really close to, and you were free and feeling safer in Australia, so why–

A. Okay.

Q. – did you not tell [C] about all these things?

A. I don't know. Probably 'cos me and [C], we were close, really close, but when I got there we just weren't as close as we were back then.

Miscarriage of justice

[178] By not admitting C's statement, the defence was deprived of evidence[171] that was capable of corroborating Mr L's defence that the complainant had made up the allegations because she hated him and was trying to get rid of him. It is true that several points covered in C's statement were able to be put to the complainant and other witnesses.[172] There is a difference in kind, however, between questions put to a witness and evidence, as the jury was told in this case by the trial Judge:

> [17] I turn now to the issue of assessing evidence. So the starting point is what is and is not evidence. Evidence does not include counsel's opening or closing addresses. The opening addresses were there to inform you about the case while the closing addresses were submissions made to persuade you one way or the other. What I say to you is not evidence. The questions asked of witnesses are not evidence unless they accept the proposition that is being put by the party.

[179] It is also true that the complainant admitted in cross-examination that she hated Mr L and that she had not disclosed the offending to C while she was in Australia.[173]

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171 This evidence would not have been subject to cross-examination, which I accept could have affected the weight the jury put on it. But see above at [164].

172 See above at [112]–[114].

173 Above at [173] and [177].

C's statement, however, outlined an occasion in New Zealand in October 2016 where the complainant had told her that she "wanted to find a way to get rid of [Mr L]" and then, in answer to a direct question as to whether Mr L had hit her or done anything to her to make her want to get rid of him, the complainant said no. C's statement also says that, when she visited the complainant "almost every day" when the complainant was staying with F and D in Australia, the complainant would tell her that "she wanted to come up with something to get rid of [Mr L]". Again, in answer to C's direct questions, C says that the complainant denied that anything had happened between Mr L and her.

[180] There is a significant difference in kind between the evidence in C's statement and the complainant's admission in cross-examination that she had not disclosed the alleged offending to C when she was in Australia. To reiterate, C's evidence alleged that the complainant wanted to "come up with something to get rid of [Mr L]" but denied on more than one occasion that Mr L had done anything to her to make her want to get rid of him. A mere omission to tell C of the offending is starkly different to a positive denial to C that Mr L had done anything to her, coupled with a stated desire to find something to "get rid of" Mr L. If the jury accepted as a reasonable possibility that the complainant had made those admissions to C, this would have provided a solid evidentiary foundation for the inference to be drawn that the complainant had made up the allegations to "get rid of" Mr L, which was the basis of his defence.

[181] I accept that a submission could still be made that the offending did not occur, based on the complainant's admissions that she hated Mr L, that she had not told C about the allegations, that she had not disclosed the offending to the school counsellor and that she had failed to make full disclosure to F. But it would be much more difficult for this submission to give rise to a sound inference that the complainant had made up the allegations, without the corroborating evidence of an actual admission made by the complainant to C that the complainant wanted to find something to "get rid of" Mr L and evidence of multiple denials that he had done anything to her.

[182] There were also other aspects of C's statement that may have been helpful in cross-examination of the complainant and possibly other witnesses, such as C's

perception of the complainant's feelings towards F. We also do not know whether the complainant would have accepted in cross-examination that the conversations with C had taken place or what she would have said when asked about her answer to the question posed about whether anything had occurred between Mr L and her.

[183] In light of the above, I consider that the failure to admit the evidence created a real risk that the outcome of the trial was affected.[174] There was therefore a miscarriage of justice.

Fair trial

[184] The right to a fair trial is an absolute right that cannot be compromised.[175] Central to that right is the right to present an effective defence.[176] This must be the defence that the accused wishes to put forward, based on the evidence they wish to proffer.

[185] The dismissal of the application for an adjournment of the July trial is not before us. I do, however, comment that the refusal is understandable in the circumstances where there was such uncertainty as to when C might again be well enough to be willing to appear as a witness. However, in his minute of 19 April granting the adjournment, Judge Bergseng recognised the importance of C's statement to the defence, going so far as to say that, without it, the trial would likely be unfair.[177] I agree with this assessment. This means that the application to admit C's statement should have been granted in order to ensure a fair trial.[178] The failure to admit it therefore is a miscarriage of justice.[179]

[186] C had originally been ready to testify in February. But for the delay due to COVID-19, Mr L would have had the benefit of her testimony. To find her statement inadmissible was to let contingent events, totally outside Mr L's control, deprive him

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174 Criminal Procedure Act, ss 232(2)(c), 232(4)(a) and 240(2).

175 Bill of Rights, s 25(a); *R v Howse* [2005] UKPC 30, [2006] 1 NZLR 433 at [49]; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [23.14.2(3)]. See also Evidence Act, s 6(b) and (c).

176 Bill of Rights, s 25(a) and (e).

177 DC adjournment minute, above n 151, at [156].

178 C's statement could have been admitted by agreement under Evidence Act, s 9(1) in order to ensure a fair trial.

179 Criminal Procedure Act, s 232(4)(b).

of a fair trial. The capriciousness of this outcome for Mr L increases the weight of the breach of his fair trial rights.

[187] Further, as noted above, C's evidence related to statements allegedly made by the complainant, who was a witness and would have had the opportunity to answer the allegations.[180]

[188] Two of the purposes of the Evidence Act are to provide for "rules of evidence that recognise the importance of the rights affirmed" by the New Zealand Bill of Rights Act 1990, and to promote "fairness to parties".[181] Even if the majority were right as to the appropriate test for the admission of hearsay evidence under s 16(2)(b), in this case, and in line with its purpose, the Evidence Act should have been interpreted to ensure a fair trial, not to compromise it.[182]

Result

[189] For the reasons set out above I would have allowed the appeal, quashed the convictions and ordered a retrial.[183]

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180 See above at [164].
181 Evidence Act, s 6(b) and (c).
182 Of course, I do not accept that the majority does articulate the correct test.
183 Criminal Procedure Act, ss 232(2)(c), 233(2), 233(3)(b) and 240(2).