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

SC 120/2023

BETWEEN	**DAMIN PETER COOK**
	Appellant
AND	**THE KING**
	Respondent

SUBMISSIONS ON BEHALF OF APPELLANT

Dated the 6th day of May 2024

Counsel for the Appellant certifies that this submission contains no suppressed information and is suitable for publication.

Junior Counsel for Appellant
A J McKenzie
Barrister
PO Box 13968
Armagh
Christchurch 8141
Telephone: (03) 377 7980
Email: mckenziebarrister@gmail.com

Senior Counsel for Appellant
RE Harrison KC
10th Floor, Southern Cross Building
61 High Street
AUCKLAND 1010
Telephone: (09) 303 4157
Mobile: 0274 925 945
Email: reh@rodneyharrisonkc.com

I INTRODUCTION

1 This is an appeal against convictions of the appellant on two charges of sexual violation[1] pursuant to leave of the Court granted on 19 February 2024. The approved question is "whether the Court of Appeal was correct to treat Mr Cook's defence as insane automatism".

2 The appeal is therefore brought against the decision of a Divisional Court of Appear2 rejecting the appellant's complaint of misdirection by the Trial Judge in relation to his "sexsomnia" defence to the sexual violation charges. The Trial Judge had ruled and directed the Jury that his sexsomnia defence was a defence of "insane automatism", with the consequence that it had to be dealt with under s 23 of the Crimes Act 1961.

3 The Trial Judge had so ruled and directed the Jury in accordance with the earlier judgment of the Court of Appeal in **Cameron v R[3] ("Cameron").** In **C v R[4]** this Court had granted leave to appeal the decision in **Cameron.** However, it appears that that appeal never proceeded.[5]

4 **Cameron** is analysed and critiqued in depth below. In summary, the Court there reasoned by first observing at [71] that this country "has adopted an orthodox approach to deciding whether a mental abnormality should be characterised as a disease of the mind":

> *The traditional yardstick is a medical condition that is "internal" to the accused and prone to recur, so posing an ongoing danger to others. The latter is a policy rationale [which} lies at the heart of the insanity defence.*

5 After addressing the vexed question of the "classification of parasomnias" more generally, the Court concluded at [83) - [84) that the appellant's sexsomnia should be "classified as one of insane automatism **on the evidence** in **this case"** (emphasis added), reasoning without further elaboration:

> *There is no external cause in the appellant's case. His reported condition is so long-standing and regular that absent treatment its recurrence must be considered near-inevitable.*

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1 One of sexual violation by unlawful sexual connection and the other of sexual violation by rape.
2 **Cook v The King** [2023] NZCA 342 {"the CA judgment").
3 Reported as **C (CA223/2020) v R** [2021] 3 NZLR 152, [2021] NZCA 80.
4 [2021] l NZLR 530, [2021] NZSC ll0.
5 CA judgment, footnote 11.

6 Whether it is correctly characterised as "an orthodox approach" or the "traditional yardstick" to defining a "disease of the mind", a crucial issue for the Court in this appeal is whether the "internal to the mind and prone to recur" test (or tests) can be justified as a principled approach to the "classification" of parasornnias, sexsomnia in particular. The appellant argues in detail below that it is not.

7 The trial Judge's brief ruling in this case that he was bound to follow **Cameron** is recorded in his 15 July 2022 Minute.[6] However, the trial itself- a re-trial - had already commenced on 5 July 2022, and the Trial Judge in his opening address to the Jury had already directed the Jury that the appellant's sexsomnia defence was "a defence of insane automatism".[7] At the conclusion of the trial the Judge directed the Jury that the appellant's sexsomnia defence was a defence of "insane automatism", in both his Summing Up[8] and the Q estion Trail.[9]

8 As both the Trial Judge's directions to the Jury and the Crown's opening and closing addresses repeatedly emphasised, the effect of treating the appellant's sexsomnia defence as one of insane automatism was that the burden of proof lay on him to establish that defence, on the balance of probabilities. The Crown's position at trial, supported by the calling of both lay and expert evidence, was that the alleged sexual violations were not due to sexsomnia. Thus these were plainly crucial rulings and directions, in all probability decisive of the ultimate trial outcome.

9 In support of his conviction appeal the appellant argued that **Cameron** was wrongly decided. The Court of Appeal chose to follow **Cameron,** seeing no reason to depart from it (at [8] - [11]). Consequently, the CA judgment contains no substantive reasoning. In practical terms, therefore, this appeal is an appeal against the reasoning and approach in **Cameron.**

10 As briefly observed by the CA judgment at [5] - [6], whether the appellant's sexsornnia is categorised as sane automatism or "insane automatism" radically affects the legal nature

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[6] Case Vol 2 p 176.

[7] See Case Vol 2 p 137, at p 144.

[8] The Summing Up starts at Case Vol 2 p 220. The relevant passages are at paras [12]- [14] (p 224- 225); [19] - [25] (p 227 - 229); and [54] (p 240). The relevant directions explaining the Question Trail are at [73] - [74] (p 245) for Charge I and [77] - [79] (p 246 - 248) for Charge 2.

[9] The Question Trail starts at Case Vol 2 p 251. There is a specific "Insane Automatism (Sexsomnia)" direction at p 256. Relevant parts of the Question Trail appear at p 260 - 262 for Charge I and at p 263 - 265 for Charge 2.

and burden of proof of his defence. If treated as insane automatism which is to say insanity, the defendant bears the burden of showing that he suffered from a disease of the mind to the extent that he did not understand the nature and quality of his act. If treated as sane automatism, "where there is an evidential foundation for the defence, it would be for the Crown to exclude the reasonable possibility that a defendant acted without conscious volition".[10]

11 Sexsomnia is a recognised "specific parasomnic behavior";[11] that is to say, one among a number of different fonns and manifestations of parasomnia as generally described by the highly-qualified defenc_eexpert, Dr Tony Fernando, in his 4 June 2021 report which formed part of his evidence:[12]

> *Parasomnias form a vast group of sleep disorders by which patients experience undesirable events and sleep-related behaviors before, during, or immediately after sleep. Parasomnic behaviors include sleepwalking, sleep talking, sleep terrors, nightmares, restless legs, sleep eating, teeth grinding and sleep sex. Some parasomnias may cause serious injuries in the case of sleepwalking through glass doors or unintentional violence towards a bed partner.*

12 The Trial Judge summarised sexsomnia for the Jury as" ... a specific form of parasomnia", described by the prosecution expert, Dr Peter Dean, as "a person attempting to have or having sex while in a sleeping state [and having] no recollection of their actions in that state".[13] The expert evidence of Dr Fernando, which included presenting his report, is at p 197 - 268 of the Notes of Evidence ("NOE"). The rebuttal evidence of Dr Dean is at p 270 - 308 NOE. [14] The Summing Up usefully summarises the evidence of and extent of disagreement between the two experts.[15]

13 Based on the expert evidence at trial, therefore, there can be no dispute that sexsomnia is properly to be regarded in medical terms as simply one form of parasomnia, and also that there are other forms of parasomnia with the potential to cause harm, either to the sufferer or to a third party (or to property). The particular significance of this point is addressed later.

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[10] See also **Cameron** at [3] and [5].
[11] American spelling in the original.
[12] The report itself is at Case Vol 2 p 276 - 288. The quoted passages are drawn from p 3 (p 278).
[13] Summing Up Case Vol 2 para [36) (p 233).
[14] Dr Dean's two reports, the first dated 28 June 2021 and the second 28 March 2022, are at Case Vol 2 p 289 - 298.
[15] Case Vol 2 paras [42] - [51] (p 235 - 239).

14 The argument for the appellant will proceed under the following headings:

- An argument from first principles, statutory and common law
- Analysis and critique of the **Cameron** "traditional yardstick"
- The absence in this case of expert evidence directed to the "disease of the mind" classification issue
- Overview and conclusions.

II AN ARGUMENT FROM FIRST PRINCIPLES, STATUTORY AND COMMON LAW

Automatism and insanity

15 The classic definition of automatism is that offered by Gresson P in **The Queen v Cottle:** [16]

> *Automatism, which strictly means action without conscious volition, has been adopted in the criminal law as a term to denote conduct of which the doer is not conscious - in short, doing something without knowledge of it, and without memory afterwards of having done it - a temporary eclipse of consciousness that nevertheless leaves the person so affected able to exercise bodily movements.*

16 His Honour later observed: [17]

> *Automatism, that is action without conscious volition, may or may not be due to or associated with "disease of the mind" - a term which defies precise definition and which can comprehend mental derangement in the wider sense whether due to some condition of the brain itself and so to have its origin within the brain, or whether due to the effect upon the brain of something outside the brain, e.g. arteriosclerosis.*

17 The perceived need to identify or rule out a specific "disease of the mind" arises of course from the wording of s 23(2) of the Crimes Act, which establishes the insanity defence.

18 Section 23 appears in Part 3 of the Crimes Act, dealing with "Matters of justification or excuse". The s 23 insanity and other specified Part 3 defences are governed overall by s 20, "General rule as to justifications". Section 20(1) provides:

> *All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any offence, whether under this*

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[16] [1958] NZLR 999, 1007 **("Cottle").**
[17] Above, at p 1011.

> *Act or under any other enactment, except so far as they are altered by or are inconsistent with this Act or any other enactment.*

19 In light of s 20(1)), s 23 should therefore be seen as replacing - and effectively, codifying - the pre-existing common law insanity defence, commonly known as the M'Naghten Rules.[18]

20 However, while s 23 definitively prescribes the insanity defence, it cannot be said that s 20(1) contemplates or far less requires curtailment of the scope of any other common law defence which may in principle be available to and relied on by a criminal defendant. Thus whether "action without conscious volition" is seen as negativing *mens rea* or *actus reus* (or both), it plainly qualifies as a common law "justification or excuse" or defence, in particular to the charges the appellant faced.

21 A person engaging in parasomnic behaviour, whether or of a sexual nature or not, is literally and inarguably acting "without conscious volition"; that is, subject to "a temporary eclipse of consciousness that nevertheless leaves the person so affected able to exercise bodily movements", within the classic **Cottle** definition of automatism. Choosing to label such behaviours "insane automatism" so as to ensure that they can be dealt with only by means of the Procrustean bed of the s 23 insanity defence is therefore a matter of judicial policy choice; not based on conceptual or common law "first principles", nor on statute.

22 An important practical constraint on the too-ready availability of the automatism defence lies in the well-established requirement that a defendant cannot advance a plea of automatism unless a proper foundation is laid, and the Trial Judge so rules.[19] While this involves a "persuasive" rather than a "legal" burden of proof, it is a crucial one. As Lord Morris memorably put it in **Bratty v Attorney-General:**[20]

> *... It is a province of the judge to rule whether a theory or a submission has the support of evidence so that it can properly be passed to the Jury for their*

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[18] There is a helpful discussion of the scope and purpose of the original M'Naghten Rules when contrasted with the "statutory form of the Rule in New Zealand... by virtue of' the predecessor to s 23 in the judgment of Gresson P in **Cottle** atp 1008 -1011.

[19] See for example **Cottle** at p 1025 - 6 per North J; **The Queen v Burr** (1969] NZLR 736, 744, 748; **Cameron** at (45].

[20] (1963] AC 386,416 - 417. In **Police v Bannin** (1991] 2 NZLR 237, 242, Fisher J went further, requiring "independently verified evidence which would call into question the accused's capacity to satisfy [requisite] mental elements", observing also that "a feigned blackout or amnesia is the first refuge of the guilty".

> *consideration.... it is not every facile mouthing of some easy phrase of excuse that can amount to an explanation.*

23 The M'Naghten Rules on which ours 23 is based were formulated by way of answers to hypothetical questions, in 1843. Nowadays it is axiomatic that the test is hopelessly outdated, and thus completely unable to take into account the vast increase and indeed shifts in contemporary knowledge about the state of the human mind and its workings.[21] Even in 1958, Gresson P in **Cottle** was moved to observe (at p 1008) that "It is commonplace that the M'Naghten Rules have never provided an adequate or a satisfactory test in cases where the mentality of the accused shows some departure from the normal".

24 The twin express10ns "disease of the mind" and "natural imbecility" in particular are wholly divorced from modem ways of thinking and speaking about mental illness/mental incapacity, either on the part of experts in the field or on the part of laypersons such as Jury members.

25 Where the behaviour in issue is due to sexsomnia or some other parasomnia, the defendant has quite literally and in actual fact "acted without conscious volition". However, if the law is as laid down in **Cameron,** the applicable s 23(2) hurdles which the defendant must overcome are to satisfy the Jury that he or she had a "disease of the mind", and that it rendered him at the time "incapable... of understanding the nature and quality of the act" with which he or she is charged.,.

26 The logical and practical difficulty which the defendant then faces is that a "mind" which lacks "consciousness" is wholly incapable of **any** "understanding" or knowledge at all, whether in relation to the "nature and quality of the act", or indeed as to its being "morally wrong".

27 As Gresson P (in **Cottle)** perceptively observed (emphasis added):[22]

> *The law [governing the insanity defence} has imposed positive tests which are difficult to apply where the mind of the doer of the act did not function in control of*

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[21] As indeed was repeatedly remarked on in the December 2010 Law Commission Report (No 120), "Mental Impairment Decision-making and the Insanity Defence" ("Law Commission Report"). See for example paras 2.7 - 2.12,2.16.

[22] Above, at p l009/20 - 49. On the one hand, in the same passage, Gresson P accepts that this "unsatisfactory" position must be accepted "having regard to the authorities": "The clock cannot be put back now". On the other hand, in a later passage at p l022/30 - 49, Gresson P appears to treat the question of classification of "an absence of consciousness or volition at the crucial time" as one which "in the present state of the law, cannot be said to have been answered".

> *the action.* ***It is almost impossible, and certainly highly unsatisfactory, to apply the principles which were formulated to cases to where there has been no consciousness of the act*** *at all as in "blackout", which is usually of short duration, or* ***in cases in which there is some behaviour of which the doer is not conscious, commonly called "automatism",*** *which may extend over hours .... We must accept the position as it is, but we cannot escape the difficulty that the M'Naghten Rules were never intended to apply to a case where the act was done without volition or consciousness of doing it.* ***The M'Naghten formula takes account only of the cognitive faculty and presupposes that the doer was conscious of his actions*** *It is unfortunate that there should have been this too liberal application of the M'Naghten Rules. It is a forced and unreal application and has led to much confi1sion. There was never any need to invoke them where the act was committed without conscious knowledge, since absence of knowledge of doing an act is itself sufficient to negative intent; a person is responsible criminally only for his conscious acts.*

Interpreting section 23: the text

28 The appellant contends that it is open to this Court to address these issues on the basis of first principles, starting with the (re)interpretation of s 23 itself. That necessarily involves interpreting s 23, by "ascertaining its meaning from its text and in the light of its purpose and its context" - including related statutes prescribing the consequences of a verdict of not guilty by reason of insanity - and by recognising that it must speak to contemporary circumstances and knowledge.[23] The interpretation exercise needs also to have regard to the "right to a defence" interests of a criminal defendant, as developed below.

29 Section 23 begins with the subsection (I) presumption of sanity at the time of the alleged defence "until the contrary is proved". This is a presumption that the alleged offender was not **legally** insane at the time of the alleged offence. It is not a presumption that the act or omission was voluntary; under New Zealand law there is no su h presumption.[24] The effect of the presumption of sanity in terms of s 23 overall is that the various express elements of s 23(2), in particular any potential "disease of the mind", are to be treated as absent "until the contrary is proved".

30 It is important to note that the s 23(1) presumption of sanity and associated reverse onus of proof of insanity - including proof of a "disease of the mind" where in issue - are not imposed on the defendant alone. Thus if the Prosecution asserts the existence of a "disease

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[23] Legislation Act 2019, ss 10 and 11.
[24] **Cameron** at [51] - [58].

of the mind' in response to a "sane automatism" defence, the onus in that respect lies on the Prosecution, not the defendant.

31 When imposed on a defendant, the s 23(1) reverse onus of proof raises obvious Bill of Rights considerations. These are addressed below. This reversal of the onus of proof is understandable, and indeed may be justifiable, where the defendant opts to rely on insanity as his or her defence to the charge faced. In such a case, the defendant will be actively seeking to demonstrate the existence of a "disease of the mind" or (less likely in practice) "natural imbecility".

32 It is quite a different matter, however, where the defendant advances and succeeds in laying the necessary evidential foundation for a "lack of consciousness" automatism defence. The defendant's purpose and trial strategy will necessarily be to advance that defence, and disavow an insanity defence. He or she may well have led evidence attempting to negate the existence of a "disease of the mind" as such.

33 A ruling by the Trial Judge[25] that the defence advanced by the defendant is an insanity defence, by reason of the presence of a "disease of the mind", effectively imposes on the defendant an unfair and unjustifiable reverse @nus burden of proof. The defendant will be faced with the burden of establishing he had a "disease of the mind" and the other elements of the insanity defence, when the central focus of his defence is to contrary effect.

34 The prosecution evidence, for its part, is likely to be directed to establishing that the defendant did not suffer from a "disease of the mind" at all, and/or that in any event the elements of the s 23(2) defence have not been established by the defendant to the necessary standard.

35 Turning to the wording and interpretation of s 23(2) itself, the characterisation of the key concept of a "disease of the mind" as being something which one "labours under" strongly suggests a necessary requirement of **serious** mental illness. So also do the qualifying words, "to such an extent as to render him or her incapable... ".

36 Fors 23(2) to apply, the contemplated "disease of the mind" must therefore be a species of mental illness that is **incapacitating,** either as to the subject's relevant "understanding" of

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[25] As to the role of the Trial Judge, see for example **Cameron** at [38] and [59] - [63].

both the "**nature**" and the "**quality**" of the act in question, or alternatively his or her knowledge of its moral wrongness.

37 Thus the contemplated benefit (or in the appellant's case, burden) of the insanity defence is being conferred by s 23(2) on a defendant, about whom it is in principle possible to reach an informed conclusion as to the "extent" and "nature and quality" of the requisite "understanding" (or "knowledge") at the time in question. By contrast, a person who is acting without conscious volition while in a state of sexsomnia or some other parasomnia is wholly incapable of the relevant "understanding" or "knowledge" contemplated by the s 23(l)(a) and (b) tests. The requisite question of the "**extent**" of his or her capacity to understand or know simply cannot arise.

38 **Cameron** briefly addresses these aspects of s 23(2) at [48] - [49]. Incapacity is there described as "not an objective standard; the question is simply whether the defendant understood the nature and quality of their acts or knew the acts were wrong". Section 23(2)(a) was said to focus on the physical act or omission and require that the defendant "not know what he was doing".[26]

39 The starting point for analysis of the two insanity defence gateways under s 23(2) is that they are disjunctive. Section 23 therefore necessarily contemplates that a defendant found to have been "labouring under" a qualifying "disease of the mind" should be able in principle to attempt to satisfy at least one or other of them. Otherwise, it would simply operate as an unacceptable dead end.

40 Addressing the s 23(2)(b) second gateway first, a defendant who has, due to sexsomnia, acted without conscious volition, lacks all knowledge of the events in question. It is therefore both logically and practically impossible for him or her to address or be assessed by reference to a question whether or not he or she knew the act in question "was morally wrong". The s 23(2)(b) gateway is therefore a complete non-starter for the sexsomnia sufferer.

41 Turning to the first, s 23(2)(a) gateway, it is also impossible for a person who has acted without conscious volition due to sexsomnia to pass through that gateway, given its wording as explained in paras 26 - 27 above. The only way around that logical and

[26] See also **Cameron** at [50].

practical difficulty would be to interpret the s 23(2)(a) test, which is expressly concerned with the "extent" of the defendant's capacity to understand the nature and quality of the act in question, as satisfied by a **total** lack of "understanding". However, that is to strain the archaic statutory language beyond breaking point.

Interpreting section 23: statutory context and purpose

42 In addition, the proper scope and modem day purpose of the s 23 insanity defence must also be derived from a consideration of its legal consequences, if established. As a matter oflaw, and despite the invitation by means of the Question Trail to the Jury in this case, to enter a verdict of "not guilty by reason of insanity" in the event that a defence of "insane automatism" was upheld,[27] there is no "special plea" of insanity or verdict of "not guilty by reason of insanity".[28]

43 Acquittals on account of "insanity" are dealt with under Part 2, Subpart 2 of the Criminal Procedure (Mentally Impaired Persons) Act 2003. Section 20(1) of that Act provides that if at a trial **the defendant gives evidence** as to the defendant's insanity and the Judge or Jury as the case may be makes a finding of "act proven but not criminally responsible on account of insanity",[29] the Trial Judge must take various prescribed steps, including to "acquit" the defendant on account of the defendant's "insanity".

44 Section 20(3) of that Act further provides that if at a trial before a Jury, "the defendant gives evidence as to the defendant's insanity" and the Jury finds the defendant not guilty, the Judge must ask the Jury whether it had acquitted the defendant on account of the defendant's insanity. Equally, under s 20(5), if "it appears from the evidence that the defendant may have been insane at the time" of the offence, "the Judge may ask the Jury to find whether the defendant was insane within the meaning of section 23 of the Crimes Act 1961, even though the defendant has not given evidence as to the defendant's insanity or put the question of the defendant's sanity in issue".

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[27] Refer to footnote 9 above.
[28] See Criminal Procedure Act, s 45(I).
[29] Section 4(I) defines "act proven but not criminally responsible on account of insanity". The Act contains no definition of "insane" or "insanity".

45 In turn, where a person is acquitted on account of his or her insanity,[30] under s 23(1) Criminal Procedure (Mentally Impaired Persons) Act the Court must order that enquiries be made to determine the most suitable method of dealing with the person under either s 24 or s 25 of the Act.

46 Section 24 empowers the Court following stipulated enquiries to order the defendant to be detained either in a hospital as a special payment under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or in a secure facility as a special care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. Section 25 empowers the Court, if not satisfied that an order for detention under s 24 is necessary, to make "alternative decisions" of respect of a defendant found not guilty by reason of insanity.

47 Relevantly in the case of a defendant such as the present appellant, these include ordering (under s 25(l)(a)) that the defendant be treated as a patient under the Mental Health (Compulsory Assessment and Treatment) Act, or (under s 25(1)(d)) "ordering the immediate release of the defendant". Under s 25(2), to make a treatment order under s 25(l)(a), the Court must be satisfied on the evidence of one or more health assessors, at least one of whom must be a psychiatrist, "that the defendant is mentally disordered".[31]

48 Even assuming that a defendant found not guilty by reason of "insane automatism" could in principle qualify as "mentally disordered", the likelihood of a defendant in the position of the present appellant being subject to a treatment order under s 25(l)(a) would seem to be extremely low. Effectively therefore, the ultimate consequence of a verdict of not guilty by reason of insanity in such a case is likely to be an order for the defendant's immediate release, made under s 25(l)(d) of the Act.[32]

49 Thus considered in terms of the overall statutory regime for dealing with those found not guilty by reason of insanity, the contemplated statutory outcomes, having regard to the public interest and the interests of the subject person, are detention (if necessary) and treatment (if required); and outright release if not.

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[30] Or found unfit to stand trial.

[31] The Act does not define "mentally disordered". It is defined ins 2(1) of the Mental Health (Compulsory Assessment and Treatment) Act.

50 For the Court to interpret s 23 Crimes Act so as to require a defendant who has offended due to sexsomnia or indeed some other form of parasomnia to pass through the s 23 gateways with a view to their being dealt with under the Criminal Procedure (Mentally Impaired Persons) Act cannot be regarded as in any way consistent with the overall purpose and effect of the statutory regime, just outlined. It necessarily follows that any contemporary interpretation of the key expression "disease of the mind" should not be so broad as to "catch" those whose behaviour or condition renders it inappropriate that they face the downstream statutory consequences of the prescribed finding of not guilty by reason of insanity.

The right to present a full defence

51 Whether automatism strictly speaking negates voluntariness (responsibility for the *actus reus)* or negates *mens rea,* a defendant's legal entitlement[33] to raise the issue is a potentially crucial matter of justification or excuse. As observed in **Cameron** at [43], "voluntariness is an elemental requirement of the criminal law". In a sexual violation case, the prosecution must show that the acts charged were deliberate and intentional.[34]

52 Among the minimum standards of criminal procedure and "minimum rights" prescribed by s 25 of the New Zealand Bill of Rights Act 1990 ("BORA') are (c) - the right to be presumed innocent until proved guilty according to law - and (e) - the right to be present at the trial and to "present a defence". [35] The Court of Appeal has described the s 25 "protected rights" as conferring on the criminal defendant "a power of decision over central rights: how to plead, what defence to present, how to challenge the prosecution witnesses and what evidence to call".[36]

53 As already discussed, the longstanding interpretation of the s 23 insanity defence, based on the s 23(1) presumption of sanity, is that it requires the defendant seeking to advance the defence to prove its s 23(2) elements to a balance of probability standard. This reversal of the burden of proof is arguably inconsistent with the presumption of innocence enjoyed

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[33] Based on a sufficient evidential foundation, as discussed in para 22 above.
[34] See for example **Kumar v R** [2017] NZCA 189, (2017) 28 CRNZ 310 at [22]. See also **F (SC 129/2016) v R** [2017] NZSC 34 at [22].
[35] Each of these important rights is directly derived from Article 14(3) of the International Covenant on Civil and Political Rights.
[36] **Fahey v R** [2018] 2 NZLR 292, [2017] NZCA 596 at [4l](b).

under s 25(c) of the Bill of Rights.[37] That is especially and (the appellant submits) definitely the case, where the defendant's chosen defence is an established lack of voluntariness/intent through absence of conscious volition, as discussed in paras 31 - 33 above.

54 Consequently, even if a "reverse onus" interpretation of s 23 (where it applies) cannot be avoided, the fact that s 23 will, in those cases where it is held to apply, impose a reverse onus contrary to the s 25(c) BORA right in turn mandates[38] a narrow rather than broad interpretation of "disease of the mind". That is, an interpretation which in turn does not preclude a defendant from advancing an otherwise available defence of lack of voluntariness or intent.

55 Furthermore, an interpretation of"disease of the mind" ins 23 which broadens the scope of the insanity defence so as to preclude the defendant from advancing an otherwise available defence of lack of voluntariness or intent plainly impinges on the s 25(e) right to present a defence. Thus assessed in BORA terms, an upholding of the right to present an available automatism defence in reliance on something as fundamental to criminal responsibility as a lack of voluntariness or intent is sufficiently "justified" in terms of "reasonable limits", by taking into account the existing, well-established requirement (para 22 above) that a defendant cannot advance a plea of automatism unless a proper foundation is laid, and the Trial Judge so rules.

56 For completeness, the discussion (in a law reform context) of the extent of international human rights compliance of s 23 in the Law Commission Report at paras 2.14 - 2.19 may be noted.

III ANALYSIS AND CRITIQUE OF THE CAMERON "TRADITIONAL YARDSTICK"

The Cameron decision itself

57 As noted in para 4 above, **Cameron** proceeds (at [71]) by first citing a New Zealand "orthodox approach" to deciding whether a **"mental abnormality"** may be characterised

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[36] **Fahey v R** [2018] 2 NZLR 292, [2017] NZCA 596 at [4l](b).
[37] By analogy with the reasoning and approach of the majority in **R v Hansen** [2007] 3 NZLR 1, [2007] NZSC 7.
[38] By operation of BORA s 6.

as a disease of the mind.[39] However, it is not accepted that the three High Court decisions cited in support reveal the adoption of any particular "orthodox approach".

58 In **Ericsson v Police,**[40] Blanchard J was "content to accept for present purposes the internal/external division of causes",[41] but suspected "that it may not survive closer scrntiny", asking "How, for example, can automatism in the form of sleepwalking be attributed to an external cause, yet it usually is clearly not insane behaviour?" In **R v Yesler,**[42] Lang J commented on **Police v Bannin** (above), noting that Fisher J had there "rejected the 'recurring danger' test in determining whether there was a disease of the mind, also noting also Blanchard J's comments in **Ericsson.** Ultimately, Lang J was content "to adopt the holistic approach adopted by the Supreme Court of Canada in its more recent decision in **Stone".**[43]

59 Likewise, having postulated an "orthodox approach", **Cameron** at [71] then identifies as the "traditional yardstick" the existence of "a **mental condition** 'internal' to the accused and prone to recur, so posing an ongoing danger to others".[44] The cases cited in support variously espouse (i) the "ongoing danger test" test (Lord Denning in **Bratty);** (ii) the internal/external test **(Rabey);** and (iii) an "external physical factor" test **(Sullivan).** It cannot therefore be said that the cases relied on establish a combination test, in particular by way of any "traditional yardstick".

60 Having thus formulated a combined "internal" mental condition" and "prone to recur posing ongoing danger to others" test, **Cameron** at [72] - [82] considers the "classification of parasomnias" generally. Having discussed that general topic, the Court of Appeal opted (at [83]) to proceed on the assumption that sexsornnia is a "recognised species of parasornnia". Having done so, it had "no hesitation in agreeing with [the Trial Judge] that the appellant's condition should be classified as insane automatism **on the evidence in this case"** (at [84].

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[39] Para [71] and footnote 77.
[40] (1983) 10 CRNZ 110, 116-117.
[41] As adopted in the Supreme Court of Canada decision in **R v Rabey**
[42] [2001] 1 NZLR 240, [32] - [33].
[43] At [34] and [41].
[44] Para [71] and footnote 78.

61 Having earlier emphasised (at [82]) that the classification of the particular defendant's condition "must be decided on a case by case basis, with the assistance of expert evidence", the Court supported its "insane automatism" classification by noting that there was "no external cause in the appellant's case", and that his "reported condition is so long-standing and regular that **absent treatment** its recurrence must be considered near-inevitable".

62 Despite the Court's reference to "absent treatment", there is no discussion - and appears to be no evidence in either **Cameron** or the present case - to support the assumption that "treatment" as such of sexsomnia is an available option, in particular by means of the statutory procedures following a finding of not guilty by reason of insanity discussed above.[45]

63 Despite the references in **Cameron** to deciding on a case by case basis and classification of the appellant's sexsomnia based "on the evidence in this case", it is difficult to view **Cameron** as anything other than a ruling that a defence based on sexsomnia is and can only be an insanity defence. Both the Trial Judge and the Court of Appeal in the present case effectively recognised and treated it as such.[46] What **Cameron** importantly fails to address is how parasornnias other than sexsornnia should be treated as insane automatism.

64 There are innumerable, generally *obiter*, statements in the reported cases to the effect that acts done while sleepwalking are to be regarded as a form of (sane) automatism. Many of these cases are cited in **Cameron** footnote 12 and paras [72] - [82]. The Court of Appeal's "brief survey of the authorities" was seen (at [82]) as showing that overall "they are far from establishing that sleepwalking or sexsomnia, or parasomnias generally should be treated as sane automatism".[47] Equally, however, the converse is also true; namely that the cases do not establish that any of these conditions should be treated as **insane** automatism.

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[45] Presumably, sexsomnia is capable of being risk-managed, for example by the sufferer abstaining from drugs or alcohol if these are known triggers, or avoiding sleeping arrangements where there is a risk of unwanted sexual intimacy occurring.

[46] See paras 7 and 9 above.

[47] For an alternative source of an overview or survey of the authorities addressing sleepwalking, see the New South Wales Court of Criminal Appeal "sexsomnia" decision of R **v DB** [2022) NSWCCA 87 at [11]- [43]. Refer in particular to the conclusions of Brereton CJ (with whom Ierace J agreed) as to the effect of the common law in relation to sleepwalking at [33] and [43]. (The ultimate decision in that case, on which the Court was divided, turned on the wording of the New South Wales statute.)

65 Given the appellant's "argument from first principles" approach, little benefit is seen in conducting a headcount of the numerous previous cases where sleepwalking was cited as a paradigm example of (sane) automatism. It is, however, noteworthy that so many Judges over the years have instinctually categorised sleepwalking - the most well-known and common parasornnia - as such.

66 Indeed, given that it is plain from the expert evidence in this case that sexsornnia is a "recognised species of parasomnia", it is difficult to see how other forms of parasornnia producing behaviour alleged to constitute criminal offending could be classified any differently.

67 Thus the sleepwalker while naked may face an indecency charge. The sleep eater who eats a flatmate's food may be accused of theft. The sleepwalker who causes harm to another person (or thing) encountered while sleepwalking could be called upon to answer a range of criminal charges, from common assault to criminal damage to murder. It is difficult to see how any of these scenarios could fairly and properly be addressed only by means of an "insanity" defence, as the **Cameron** approach to classification of parasornnias appears to reqmre.

68 Turning directly to the internal/external cause test or criterion for the existence of a disease of the mind, upon reflection that can only be seen as depending on judicial exercises in characterisation of mental conditions - effectively, labelling - without regard to and indeed even while disregarding how medical science may view the condition in question.

69 The adoption of an approach which characterises an "externally" caused a mental state and its associated behaviour as not involving a "disease of the mind", but all other mental states and associated behaviours as "internal" and therefore "disease of the mind", is both artificial and illogical. Thus even if some "external causes" of a mental state should plainly not be treated as giving rise to a disease of the mind, it does not logically follow that all non-external (or internal) causes should be.

70 As **Cameron** at [81] notes, Toohey J in **R v Falconer** [48] criticised what he called the "external factor test" as artificial and indeed confused, and paying "insufficient regard to the subtleties surrounding the notion of mental disease". Toohey J adopted Glanville

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[48] (1990) 171 CLR 30, 61 and 72.

Williams' succinct and undeniable comment, that "To say that the presence of an external cause of mental trouble saves a man from the imputation of madness... does not imply that an absence of an external cause necessarily means that he is mad".[49]

71 The second test or factor, on which **Cameron** at [84] can be seen to have placed particular emphasis in its conclusion that a defence of sexsornnia is an insanity defence, is that of a "mental condition that is... prone to recur, so posing an ongoing danger to others". As further addressed below, that, too, should be seen as an unacceptably blunt instrument, when applied to the field of parasornnias.

72 Having noted the divergence of views m different common law jurisdictions on the question whether somnambulism is a "disease of the mind", the Law Commission Report relevantly comments at paras 4.4 and 4.7:[50]

> *However, the fact that the case law leaves open the possibility of including conditions such as sleep-walking or diabetes may also tend to suggest that its scope is simply too wide....*
>
> *It may well be that the "recurring danger" and "external/external factor" tests, which presently attempt to manage the scope of "disease of the mind", are too broad. However, while the cases that they inadvertently capture are notorious, their incidence is rare. ...*

73 As we have seen, as a matter of statutory interpretation there is nothing in the wording of s 23 which supports the importation into the undefined expression "disease of the mind" of a "recurring danger" test. That imported gloss on the wording is necessarily advanced, and often expressly justified, by reliance on that "unruly horse",[51] public policy.[52]

74 The public policy justification was forcefully articulated by Fisher J in **Bannin** in the following terms (emphasis added):[53]

> *The principal consideration is that if a person is so predisposed to disassociation that he **may lose control of his conduct** in circumstances which other members of the community would be able to cope with, he is **likely to be** a continuing danger to the community. There is **assumed to be a high risk** that history will be repeated*

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[49] For similar judicial expressions of scepticism about the internal/external factor test, see the discussions in **Parks** and the dissenting minority in **Stone,** referenced in paras 89 and 95 below.

[50] See also paras 2.23 - 2.24.

[51] **Richardson v Melish** (1824) 2 Bing 229, 252 per Burrough J:

> *[Public policy] is a very unruly horse, and when once you get astride it you never know where it will cany you ..... it is never argued at all but when other points/ail.*

[52] In **Cameron** itself, see at [17], arguably approved by the Court of Appeal (at [84]) and [71]), referring to the prone to recur/ongoing danger yardstick as "a policy rationale".

[53] **Police v Bannin,** above, 248 - 249.

> *when he is presented with the same circumstances in the future.* ***As the problem is essentially "internal" to the accused, some form of treatment or oversight is then warranted*** *to protect the community notwithstanding the absence of fault.*

75 With respect, that reasoning bristles with unsupported assumptions. However, the precise issue here is not how a serious and manifestly potentially dangerous mental condition (such as paranoid schizophrenia) should be classified for s 23 purposes. It is how sexsomnia, a behavioural condition which is undoubtedly recognised by psychiatry, but neither an interference with day-to-day individual functioning nor open to treatment as such, should be classified, for both criminal liability and criminal disposition purposes.

76 The point has already been made that the "need for treatment" concern or justification would appear to be misplaced in the case of a parasomnia such as sexsomnia, there apparently being no available "treatment" as such. Furthermore, as analysed in paras 42 - 50 above, neither treatment nor "oversight" is a likely outcome of the statutory regime that would apply in the case of a "successful" sexsomnia insanity defence.

77 When the asserted public policy justification for treating sexsomnia as insane rather than sane automatism is boiled down, it reduces to a concern that a sexsomnia sufferer who has while completely unconscious committed what would otherwise be a rape or other sexual violation should not get off scot free, because of the hypothetical risk of (again involuntary) repetition of the conduct in question.

78 However, without in any way devaluing or discounting the trauma and ordeal of the victim of a sexual violation, the law in other respects recognises that it is not sufficient to establish criminal offending that the particular violation at issue was not in fact consented to.

79 Thus the law recognises not only a defence of absence of intent; it also recognises a defence of belief on reasonable grounds that the victim was consenting, even when consent was in fact not present. The important countervailing public policy, which can be seen as forming the basis for the latter defence, effectively places the interest in a just outcome of the "subjectively innocent" sexual violator over the interests of the victim, for criminal liability purposes. This countervailing public interest is overlooked or disregarded in **Cameron.**

80 By contrast, the Law Commission Report recognises both of the twin public purposes which the s 23 insanity defence is supposed to, but in some respects fails to, serve:[54]

> *The insanity defence serves two purposes. Section 23(2)(b) has the effect of partly protecting some defendants, by shielding them.from a criminal conviction. Section 23(2)(a) protects the community, by ensuring that the defendant who would otherwise be entitled under normal principles of criminal liability to an acquittal can be detailed.*
>
> *The defence therefore tends to mix up the defendantjocused question of criminal responsibility with a second and different question: who needs to be detailed for the protection of the public (because of the likelihood that their disorder, which in turn produces criminal behaviour, will recur).*
>
> *This has been regarded as unprincipled and, in practice, the defence does not serve either of its purposes particularly well.*

81 To sum up, the "internal/external factor" test is both simplistic and completely unscientific: "internal because not external" necessarily encompasses both the mind and the body, without differentiation. Thus as a test for s 23(2) purposes, it does not even locate the origin or cause of the conduct in question within "the mind"; let alone as one attributable to "disease". The "internal/external factor" test lacks both logic and utility, and should be entirely discarded.

82 The "recurring danger" test is a gloss on the statutory language, based on questionable "public policy" assumptions. It can only take the classification task so far, and then only if supported by expert evidence (as argued below) and utilised alongside the other legal and policy considerations canvassed in these submissions.

Some contrasting overseas decisions

83 Finally under this heading, reference can usefully be made to three contrasting overseas decisions. The English Court of Appeal decision of **Regina v Burgess**[55] is described in **Cameron** at [75] as still the leading authority on somnambulism in that jurisdiction. **Burgess** involved application of the original **M'Naghten Rules,** with their reference to "a defect of reason, from disease of the mind".

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[54] Law Commission Report, Introduction, p 4 - 5. See also paras 1.17 - 1.19, 2.1- 2.6.
[55] [1991] 2 QB 92.

84 It was treated as a given in that case that the accused "plainly suffered from a defect of reason from **some sort of failure** (for lack of better term) of the mind causing him to act as he did without conscious motivation".[56] The Court then essentially applied the internal/external factor distinction, reciting the expert evidence which (predictably and understandably) ruled out any "external factor".[57] While the defence experts were prepared to accept that the accused had been sleepwalking, the court responded to this aspect simplistically (at p l00G):

> *We accept of course that sleep is a normal condition, but the evidence in the instance case indicates that sleepwalking, and particularly violence in sleep is not normal.*

85 Plainly, "not normal" cannot possibly operate as a test. Ultimately, the Court of Appeal in **Burgess** regarded itself as at liberty to disregard previous characterisations of sleepwalking as non-insane automatism, because (with one exception) no previous cases "had the advantage of the sort of expert medical evidence" available in that case (at p 100/G).

86 The reasoning and approach in the Supreme Court of Canada decision in **R v Parks[58]** is in direct contrast to **Burgess.** As in **Burgess,** the defence in that case was that the accused, charged with murder and attempted murder, had been sleepwalking, giving rise to a defence of (non-insane) automatism.

87 The joint judgment of Lamer CJ and Cory **J** accepted that the evidence showed that the respondent was not suffering at the time from any mental illness and that "medically speaking, sleepwalking is not regarded as an illness, whether physical, mental or neurological".[59] It was also pertinently observed that "there is no medical treatment as such, apart from good health practices, especially as regards sleep". **Burgess** was distinguished by noting that "while the facts are similar the medical evidence was very different".[60]

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[56] At p 98C (emphasis added).
[57] See in particular at p 101 A - C and H, also seizing upon a description of the accused's "condition" as one to be "regarded as pathological" (at p 102 A).
[58] [1992) 2 R.C.S. 871.
[59] At p 885 e - f and p 889 h.
[60] At p 890e-89lj.

88 The other Supreme Court Judges in **Parks** agreed with that conclusion.[61] The joint judgment of La Forest, L'Heureux-Dube and Gonthier JJ emphasises in addition that distinguishing between automatism and insanity requires consideration of "more than the evidence; there are overarching policy conditions as well [although] the evidence in each case will be highly relevant to this policy inquiry".[62] Their Honours also observed that if the accused pleads automatism, the Crown is then entitled to raise the issue of insanity, but that (despite the statutory presumption of sanity) "the prosecution then bears the burden of proving that the condition in question stems from a disease of the mind".[63]

89 The latter joint judgment also contains a useful, by no means unquestioning discussion "of the two distinct approaches to the policy component of the disease of the mind inquiry", namely "the 'continuing danger' and 'internal cause' theories".[64] It observes in particular that somnambulism "is not well suited to analysis under the internal cause theory";[65] that "the dichotomy between internal and external causes ... is not helpful in resolving the inquiry";[66] that "Recurrence [of the involuntary acts in question] is but one of number of factors to be considered in the policy phase of the disease of the mind inquiry";[67] and ultimately that "In this case... neither of the two leading approaches determines an obvious result".[68]

90 The consequent need to "to look further afield" led their Honours back, in the absence of any compelling social policy factors that preclude a finding that the accused's condition was one of non-insane automatism, to the "fundamental precept" of the criminal law, that "only those act voluntarily with the requisite intent to commit an offence should be punished by criminal sanction".[69]

91 The later Supreme Comi of Canada decision ofR **v Stone**[70] contains a much more difficult and controversial discussion of automatism principles. The accused, who admitted stabbing his wife 47 times, claimed to have done so while in an automatic state brought on

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[61] See per La Forest, L'Heureux-Dube and Gonthier JJ at p 895 - 896; Sopinka J at p 910; and McLachlin and Iacobucci JJ at p 913.
[62] Atp 896c.
[63] At p 898d.
[64] At p 900 - 908.
[65] At p 902j.
[66] At p 903e.
[67] At p 907a.
[68] At p 907 c.
[69] At p 907 e and p 908 f- j.

by her insulting treatment of him. He advanced defences of both sane and non-insane automatism, and provocation. **Stone** therefore did not involve "sleepwalking" automatism, but (at its highest) "psychological blow" automatism. The majority Judges, who dismissed his appeal, were understandably focused on that aspect, and keen to limit the scope and availability of any such automatism defence.

92 The Supreme Court in **Stone** divided five to four, into two quite diametrically opposed camps. The majorit/[1] relied on the presumption (under Canadian law) that people act voluntarily, to formulate a two-step approach applicable to all cases involving claims of automatism. The first stage was that the defence needed to establish a proper foundation for automatism, in particular by calling confirming psychiatric evidence. The second stage, if a proper foundation was established, involved the Trial Judge determining whether the condition alleged by the defence was "mental disorder[72] automatism" or "non-mental disorder automatism".

93 According to the majority in **Stone,** in the event that the Trial Judge rules that the asserted condition qualifies as "mental disorder automatism", it is then to be treated and decided by the trier of fact as an insanity defence. If on the other hand the Trial Judge concludes that the asserted condition is "non-mental disorder automatism", the question for the trier of fact will then be whether **the defence has proven** on the balance of probabilities, that the accused acted involuntarily.[73]

94 The majority in **Stone** therefore departed radically from previous Canadian authority (and that of other common law jurisdictions), by imposing in respect of a non-insane automatism defence, the same reverse onus burden of proof as applied (by force of statute) to the insanity defence. They did so despite the presence in the Canadian Charter of Rights and Freedoms of provision in the same terms as ss 25(c) and (e) BORA (para 52 above). This innovation is tellingly criticised in the minority judgment.[74]

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[70] [1999] 2 SCR 290.
[71] L'Heureux-Dube, Gonthier, Cory, McLachlin and Bastarache JJ.
[72] "Mental disorder" being the Canadian statutory equivalent of a "disease of the mind".
[73] See at p 374 - 379.
[74] See at p 321 - 327.

95 The minority Judges[75] in **Stone** strongly dissented, holding that as the necessary evidentiary foundation had been laid (by expert evidence) and the Trial Judge had ruled that there was evidence that the accused was unconscious throughout the commission of the offence, the non-insane automatism defence should not have been taken away from the Jury.

96 The minority's discussion[76] of the concept of "disease of the mind" lends support to the arguments from first principle advanced in paras 15 - 55 above. In particular as regards to any policy-based classification, adopting the words of Binnie J, "... the mental element of voluntariness is a fundamental aspect of the crime which cannot be taken away by a judicially developed policy".[77]

IV THE ABSENCE IN TIDS CASE OF EXPERT EVIDENCE DIRECTED TO THE "DISEASE OF THE MIND" CLASSIFICATION ISSUE

97 A point strongly emphasised in all the above Canadian decisions is that while the definition of "disease of the mind" is necessarily a matter of law, as Binnie J for the minority in **Stone** put it, "Medical input, of course, is nevertheless an essential component" of the classification exercise.[78] Proceeding accordingly, those decisions analyse the available medical evidence in depth.

98 In marked contrast, **Cameron,** while affirming that the classification of the particular defendant's condition must be decided on a case by case basis with the assistance of expert evidence,[79] fails to identify let alone discuss that evidence. Its conclusory reasoning at [84] simply affirms the Trial Judge's ruling, which appears (at [15] - [17]) to have been based on not on the medical evidence as such, but simply on application of the intemaVextemal and "recurring danger" tests.[80]

99 The issue for this appeal, however, is whether the Trial Judge and in tum the Court of Appeal in fact adopted the approach, seen by **Cameron** as mandatory, of determining the

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[75] Lamer CJ, Iacobucci, Major and Binnie JJ.
[76] At p 330 - 346. See also the helpful summary at p 346 - 348.
[77] At p 338.
[78] At p 330.
[79] At [82] and [84].
[80] **Cameron** summarises the evidence at trial about sexsomnia at (18] - (23]. The evidence of the defence expert Dr Veale is summarized at [22] - (23].

classification exercise by reference to the appellant's particular condition, having regard to the expert evidence (if any).

100 As already noted (para 7 above), the Trial Judge's brief ruling during the course of the trial was that he considered he was bound by the decision in **Cameron,** and that "on the basis of the proposed evidence, the present case was indistinguishable from ***Cameron",*** there being "no evidence of an external cause". [81] The "proposed evidence" was the two sets of competing expert reports.[82] Their content is discussed below. (Given that the Trial Judge had already ruled that the appellant's sexsomnia was a "disease of the mind", no expert evidence directed to this issue inconsistent with the Judge's ruling was nor could have been led at trial.)

101 In tum, the CA judgment, while accepting that in accordance with **Cameron,** the "classification depends on the evidence in the particular case" (at [5]), undertook no analysis of the evidence (in particular the expert evidence) relevant to the classification issue. Instead, the Court "saw no reason to depart from *Cameron",* treating "the issue of whether sexsomnia can be a form of sane automatism or insanity" as "central to the Court's decision" (at [8]).

102 The Trial Judge's and in tum the Court of Appeal's failure in this case to determine the classification issue based on e pert evidence constitutes error(s) of law in and of itself. In short, **Cameron** could not be treated as a **legal** precedent to be followed, in effect ignoring the expert and other evidence led by the appellant and/or pre-detennining the classification issue in simple reliance on **Cameron.**

103 The role of the expert witness where a defence based on sexsomnia is at issue can be said to comprise three interrelated aspects, namely (i) a description of the condition itself expressed in medical and in particular psychiatric tenns, including offering an opinion on whether it should from that perspective be treated as a "disease of the mind"; (ii) an opinion whether the defendant suffers from sexsomnia; and (iii) if so, an opinion whether the defendant's alleged actions were due to his sexsomnia.[83]

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[81] 15 July 2022 Minute, Case Vol 2 p 176 at [2].
[82] Case Vol 2 p 276 - 288 for that of Dr Fernando; Case Vol 2 p 289 -298 for those of Dr Dean.
[83] All three topics qualify as admissible expert opinion evidence in terms of s 25(1) and (2) of the Evidence Act 2006.

104 Dr Fernando's report notes that "parasomnias form a vast group of sleep disorders", sexsomnia being "a specific parasomnic behavior recognized in the most recent edition of the *Diagnostic and Statistical Manual"* ("DSM-5"). He summarises the DSM-5 criteria for sexsomnia.[84] His evidence at trial confirmed and reflected the content of his report in the above respects.[85]

105 Dr Dean's reports are focused on the question whether the appellant's conduct the subject of the charges was due to sexsomnia. His conclusion was that "the diagnosis of sexsomnia at the material time (even if present at other times, in the past) is excluded using sleep disorder diagnostic criteria because of the level of intoxication", such that "intoxication remains the most likely diagnosis and sexsornnia should be excluded".[86] He therefore does not dispute Dr Fernando's description of the condition, nor indeed his diagnosis of the appellant's sexsomnia condition.

106 Significantly for present purposes, in his report Dr Dean observes that there are "few, if any, case reports of repeated defences of sexsomnia in the same individual". Under the heading "automatism", he saw fit to characterise sexsomnia as "a non-insane condition", leading if upheld to an outright "not guilty" decision.[87] Dr Dean's evidence at trial likewise confirmed his two reports.[88]

107 Overall, therefore, Dr Fernando does not directly address the question whether sexsomnia should be regarded as a "disease of the mind". Dr Dean initially offered his psychiatrist's opinion that it is not. Neither expert's evidence in any way suggests that there is any available psychiatric or other treatment for the sexsomnia condition.[89]

108 The expert evidence before the Trial Judge therefore very largely did not address the first topic identified in para 103 above, namely whether in medical or psychiatric terms sexsornnia qualifies as a "disease of the mind". The Trial Judge and in tum the Court of Appeal were therefore dealing with the classification issue, without expert evidence to

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[84] Report p 3 - 4, Case Vol 2 p 278 - 279.
[85] Case Vol 3 p 201.
[86] Case Vol 2 p 296.
[87] First Report p 6 - 7, Case Vol 2 p 294 - 295. At trial, be encountered a prosecuting Counsel-imposed correction of bis characterisation of sexsomnia as being non-insane automatism: see Case Vol 3 p 290 and also p 306.
[88] Case Vol 3 p 275 - 290.
[89] Contrast Dr Fernando's comment on practical management of the condition at Case Vol 3 p 224 - 225 (a common treatment recommendation is to "cut back on alcohol").

assist. The contrast with the leading English and Canadian sleepwalking cases discussed above is therefore marked.

109 Furthermore, as argued above, the s 23(1) reverse onus of proof lay on the Prosecution to adduce expert evidence that the appellant's sexsomnia qualified as a "disease of the mind".[90] It was therefore not for the defendant to lead expert evidence, or indeed otherwise to establish, that the behaviour due to sexsomnia which he advanced as a defence was brought about by a "disease of the mind".

110 In the absence of expert evidence directed to that issue, it was quite plainly unsafe for the Trial Judge to reach his or own conclusion as to the medical and psychiatric categorisation of sexsomnia, an acknowledged "specific parasomnic behaviour", by evaluating that condition as such.

111 Alternatively, even if it was not unsafe to proceed in that way and it was open to the Trial Judge (and in tum the Court of Appeal) to reach a conclusion and rule on the "disease of the mind" issue without the benefit of expert evidence, the Trial Judge (and in tum the Court of Appeal) failed to undertake his (or its) own evaluation of the nature of the appellant's sexsomnia condition and behaviour, as such.

112 In particular, the Trial Judge was not permitted to make that assessment simply by recourse to some mechanistic internal/external distinction between presumed causes or origins of the condition. Likewise, it was not open to the Trial Judge to decide the issue by reference to a wholly policy-based inquiry (there being no supporting expert evidence) as to the likelihood of a recurrence posing danger to others - particularly, one based on the unfounded assumption that a "not guilty by reason of insanity" finding would enable "treatment' of the sexsomnia condition.[91] The successive failures of the Trial Judge and the Court of Appeal constituted legal error leading to a miscarriage of justice.

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[90] See para 30 above and **Parks** (para 88 above).

[91] An intellectually rigorous approach to that issue in any event would focus on the likelihood ofrecurrence of actual behaviour with which the appellant was charged, namely unconsented sexual behaviour towards a non-partner, by contrast with his potential future conduct towards consenting or at least acquiescent present and future sexual partners.

V OVERVIEW AND CONCLUSIONS

113 The appellant's argument from first principles contends that the answer to the "classification" question posed by the appeal is to be found in New Zealand statutory and common law, with s 23 in particular being subject to interpretation in its broader statutory (including BORA) context. Cases and judicial reasoning drawn from other jurisdictions may at times provide insight, but - particularly given their conflicting state - cannot possibly be determinative.

114 Approached in that way, how then should the s 23 insanity defence be regarded as intended to operate in the modem-day context, having regard to the necessarily competing interests of the general public and the criminal defendant?

115 As argued in paras 81 - 82 above, the "internal/external factor" test is simplistic and completely unscientific, lacks both logic and utility, and should be entirely discarded; while the "recurring danger" test can only take the classification task so far, and then only if supported by expert evidence (as addressed above) and utilised alongside the other legal and policy considerations canvassed in these submissions.

116 Whens 23 is read alongside s 20(1) (para 18 above), it is obvious thats 23 has effectively codified the common law insanity defence. However, that codification does not in itself give rise to any alteration of or inconsistency with other "rules and principles of the common law" as to justification, excuse and defence to a charge. It is those rules and principles which s 20(1) expressly preserves.

117 While the received view of s 23 is that if its operation is triggered in respect of a particular state of mind of a defendant, that state of mind can then only be considered under the insanity defence, that approach has to be seen as open to question - particularly if subject to a BORA analysis.

118 From the perspective of a defendant facing a serious charge, being required to proceed by way of an insanity defence by reason of a "disease of the mind" classification is a benefit only if he or she would otherwise be found guilty of the offence charged. It is a burden, and indeed an unwanted burden, if he or she has an otherwise available and viable automatism/acting without conscious volition defence.

119 Thus in the borderline case where automatism is raised, the defendant can and should be afforded the benefit of the prime and most fundamental principle of criminal liability available to him or her, namely that a defendant who acts without the necessary conscious volition is to that extent absolved of all criminal responsibility. Any attempt to define the boundaries of "disease of the mind" for s 23 purposes needs to be undertaken in that broader legal context.

120 In terms of s 23(2) itself, the characterisation of the key concept of a "disease of the mind" as being something which one "labours under" strongly suggests a necessary requirement of **serious** mental illness. So also do the qualifying words, "to such an extent as to render him or her incapable ... ".

121 Furthermore, approaching s 23 purposively, it cannot be said that the prescribed statutory disposition consequences of a "successful" defence match what we do know about the appropriate management of parasomnias, sexsomnia in particular. [92] Thus s 23 should not be interpreted, purportedly on "public interest" grounds, to "catch" a defendant whose condition will effectively not be able to be managed in terms of the applicable statutory responses, in any event.

122 In any event, an interpretation of "disease of the mind" which encompasses transitory, wholly unconscious behaviours such as those involved in parasomnia and in particular sexsomnia is wrong in principle. The classification of a particular behaviour or its underlying causality - in the case of sexsomnia, incompletely understood - as a "disease of the mind" effectively obliges the defendant to bring himself (or herself) within one or other of two entirely unsuited - and most likely disavowed - gateways to a "successful" insanity defence.[93]

123 The classification of sexsomnia as only giving rise to an insanity defence also flies in the face of trial realities. Addressing what it ultimately saw as the "futility in attempting to reform the [insanity] defence", the Law Commission Report observes[94] that "because it is fundamentally a moral question, ... juries approach [the defence] intuitively, regardless of the precise wording of the statutory defence".

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[92] See paras 42 - 50 above.
[93] See paras 32 - 41 above.
[94] Para 6.9.

124 Thus it seems highly likely that any such intuitive Jury approach simply asks of the defendant who advances a sexsomnia defence, "is he really insane?" Or, as the Law Commission Report surmises, is not the reality that, "regardless of what the rules may say, in the end, the question jurors will put to themselves when they retire is simply: 'Is this man mad or not?'".[95] Whatever the niceties of any underlying legal classification of sexsomnia as a "disease of the mind", it seems highly probable that in practice, juries will be unlikely to answer that question in the affirmative.

125 The reasons why the appellant submits that the Trial Judge and in tum the Court of Appeal wrongly ruled that his automatism defence was a defence of insane automatism/insanity can be summarised as follows:

125.1 Sexsomnia together with other parasomnias does not qualify and should not be classified as a "disease of the mind" within the meaning of that expression, properly interpreted (paras 35 - 41 above);

125.2 The appellant's defence that he acted without conscious volition due to sexsomnia, for which he had laid the necessary evidential foundation, should have been put to the jury, given (i) his presumed sanity (and thus absence of "disease of the mind") by virtue of s 23(1) and (ii) his fair trial rights under s 25 BORA (paras 51 - 55 above);

125.3 The Trial Judge and in tum the Court of Appeal erred in following and applying **Cameron,** that case having been wrongly decided for the reasons advanced in paras 57 - 82 above;

125.4 Alternatively, the Trial Judge and in tum the Court of Appeal erred in determining the issue of classification of the appellant's sexsornnia behaviour as a "disease of the mind" without expert evidence addressing and supporting that classification (paras 97 - 112 above);

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[95] Introduction p 7.

125.5 Alternatively, the Trial Judge and in tum the Court of Appeal erred in treating **Cameron** as determining as a matter of binding legal precedent what should in law have been the evidential issue of classification of the appellant's sexsomnia behaviour as a "disease of the mind" (paras 7, 9 and 63 above).

126 The appellant submits that for the foregoing reasons, his appeal should be allowed. By the time this appeal is heard, the appellant will have served two years of his seven year sentence of imprisonment. In the event that his appeal succeeds, it must surely be accepted on the evidence adduced at trial that a reasonable doubt (at least) exists, that his alleged offending was due to his sexsomnia. If a retrial were to be ordered, it would not occur before 2025, some six years after the events in question. The Court is therefore invited not to direct a retrial, in the event that the appeal succeeds.

Dated the 6th day of May 2024

R E Harrison KC
AJ McKenzie
Counsel for the Appellant