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

SC 80/2023
[2024] NZSC Trans 6

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

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L

Appellant

v

THE KING

Respondent

Hearing:	19 March 2024
Coram:	Glazebrook J Ellen France J Williams J Kós J Miller J

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

CRIMINAL APPEAL

(MISSING AUDIO 10:00:00 TO 10:14:54)

MR MCKILLOP:

… persuaded to come to New Zealand if arrangements are made for the payment of their expenses, travelling costs, or they could appear by an alternative method, via AVL. If that sort of soft persuasion fails, there's certain steps the Crown can take, if it's a Crown witness, under the mutual assistance regime, which involve asking another state to help obtain evidence or to serve a summons or to arrange for someone's removal to New Zealand, if that person consents. So it's not a big improvement on persuasion but it likely has some sort of impact. But ultimately, if a person is unwilling and unpersuadable, we say that they're practically uncompellable.

So the Crown has submitted that mere unwillingness is not a sound basis for an exception to the hearsay rule and that mere unwillingness does not meet any of the tests in section 16(2), and we agree with that, we're not saying that it's enough to know that someone is unwilling and to do nothing more. That's not the test.

GLAZEBROOK J:

And you're going to tell us what the test is?

MR MCKILLOP:

Well I've addressed the test at a high level, which is that someone – which is that the parties seeking the evidence needs to engage in persuasion, they need to try and interrogate what the reason for the unwillingness is and try and meet those concerns, try and offer ways for the evidence to be given in a way that will flip someone from unwilling to willing, and that's what reasonable

practicability requires, I submit. That only can be taken so far though when someone is outside of New Zealand and can't be compelled into court. Obviously, even with New Zealand-based witnesses you don't start with compulsion but it's always there as a backup. The same can't be said for people outside of New Zealand, and we say this is intended to deal with that instance of practical non-compellability in a way which doesn't visit the consequences of that on the party, the consequences of something which is not in their control.

ELLEN FRANCE J:

So what does "unpersuadable" add then? Aren't you really just saying unwillingness is sufficient?

MR MCKILLOP:

No, I'm not, because uninterrogated unwillingness is going to mean that the party who's seeking to lead this evidence just hasn't made the efforts that are necessary to get someone into court.

WILLIAMS J:

So is it unwillingness combined with the party seeking call to the witness trying really, really hard. That's it?

MR MCKILLOP:

That's a fair way to put it, yes.

KÓS J:

That sounds like the sort of words that appear in section 16(2)(d), "cannot with reasonable diligence", but those words don't appear in subsection (b).

MR MCKILLOP:

"Reasonable practicability" appears in subsection (b) and I say that they're both focused, they're both capably of focusing on the conduct of the party to try and obtain the witness, the person as a witness in the hearing. They're both flexible tests that address all of the circumstances of the case, including the efforts that

the party has gone to ensure the, to obtain the attendance of the person as a witness.

WILLIAMS J:

The paradigm case will be the witness is on a boat in the Amazon, don't you think? That's what "practicable" – I suspect that's what PCO had in mind as your paradigm. I'm not saying it's the only kind of case, but practicability is factual practicability. Too hard, right?

1020

MR MCKILLOP:

Too hard, but the point, I submit, isn't to judge just the feasibility of the circumstance. The feasibility of a stable AVL link or something like that. It's not about this –

WILLIAMS J:

That might be enough if there's no satellite link and it's not practical to bring the person home.

MR MCKILLOP:

Yes, certainly, but what I'm saying is that if you could get a stable AVL link to a boat on the Amazon and the person simply said: "I'd rather not," that's a misfortune that gets visited on the party through no fault of their own, if the approach of the Crown is supporting and that the Court of Appeal adopted is endorsed, and what we say is the point of these provisions is to avoid unfairness to parties seeking to rely on evidence which is crucial to their cases.

GLAZEBROOK J:

What's the difference with a witness who I guess the expression might be "go bush in New Zealand", "goes bush in New Zealand"?

MR MCKILLOP:

Well, what I'm saying is that there isn't a difference because both potential witnesses, both people, are practically not compellable. If you can't find, say,

someone who's "gone bush", then you aren't going to be able to have them in person in the courtroom.

KÓS J:
That's section 16(2)(d) provided for.

MR MCKILLOP:
Yes, that's – yes. And I say that section 16(2)(b) addresses a similar situation where you can find someone, but you can't force someone.

I should go to the Court of Appeal case law that I say supports all of this, and the first – there's essentially – what I submit is that this has been the position for over 50 years. There's three leading Court of Appeal judgments that I want to address: *Union Steam Ship Co of New Zealand Ltd v Wenlock* [1959] NZLR 173, *R v M* [1996] 2 NZLR 659 (CA) and *Gao v Zespri Group Ltd* [2021] NZCA 442, [2022] 2 NZLR 219. And all three of them support this position, I submit, and the first of those is *Union Steam Ship* which was a civil case. It was concerned with negligence when a ship employee was injured and there was a witness who'd apparently gone to Australia and couldn't be found, and there was a statutory test where someone was – if someone was beyond the seas and it was not reasonably practicable to secure their attendance, then a hearsay statement could be admitted.

So if we – it's on page 1023 of the authorities bundle. This is the – maybe we can zoom in on the centre to around line 28. They were dealing with "reasonably practicable", so the same wording or similar enough wording was there in that statutory test at the time. You can see that from, starting at the sentence, starting on line 27, and the sentence starting on line 28: "If the witness refused to travel, although offered his expenses, clearly it would not be 'reasonably practicable to secure his attendance.'" So the Court of Appeal's approach there was refusal, despite reasonable matters, meant unavailable as a witness.

And if we go down to page 1026. So this is the –

WILLIAMS J:

You can see the – you can perhaps see the point in that in 1958 terms, because the burden on the witness to say, "Yes, I'm fine, I'll catch a boat back to New Zealand and take out two or three weeks of my life in order to give evidence," may be seen in that context to be disproportionate, but that doesn't really apply here. You think *Union Steam Ship* would be decided the same way if there were AVLs?

MR MCKILLOP:

I say it should be because –

WILLIAMS J:

Do you think it would've been?

MR MCKILLOP:

Sorry?

WILLIAMS J:

Do you think it would've been?

MR MCKILLOP:

It would've been then? Or what –

WILLIAMS J:

Yes. Not – well, if there were AVLs.

MR MCKILLOP:

Well, I think somewhere in the judgment they referred to the –

WILLIAMS J:

It was a rhetorical question. I doubt it.

MR MCKILLOP:

I'm saying that the – well, we'll come to a case in 2021 where I think that's – there were certainly AVLs that existed then, but I just want to note that this is –

the first judgment was judgment of Justice North, this is judgment of Justice Cleary, and the Judge makes clear from about line 24 here, and this is a point the Crown's picked up on and it's correct: "Moreover, I think that the phrase 'secure his attendance' is not to be read as meaning the compelling of his attendance as a witness at the trial by process of Court, because the mere fact that he is 'beyond the seas' would free him from compulsion," and that's absolutely right, that this isn't – it's not simply the mere fact of being outside of New Zealand and thus not being able to be reached by the Court's power, but – so the Crown's quoted that first sentence, but the follow-on sentence provides a lot of context for that: "There are circumstances in which it might well be thought 'reasonably practicable' to secure [his] attendance," and from line 32 there, the example given is "where he is willing to come to New Zealand if his expenses be met". So, again, there needs to be willingness in response to the reasonable steps taken by the party, says Justice Cleary.

I don't want to spend heaps of time on a 1959 case for obvious reasons, but if we move on to the Court of Appeal in *R v M*, we – as I've pointed out in the submissions, Justice North's statement I've just shown you is quoted with approval. The Court – and it's page 585. Yes, that's right. So they're referring to *Union Steam Ship*. They quote, there at about line 31, Justice North's approach, "refus[ing] to travel though offered his…expenses" as with apparent approval. They also note there from paragraph, from line 36 I should say, that that was a civil matter. It had a different test, and things had changed in the meantime and that this Court of Appeal was applying the Evidence Amendment Act (No 2) 1980, I think it was, which dealt with hearsay, on a general basis, not on a civil basis. But the Court said: "The underlying considerations remain the same. Whether it is 'not reasonably practicable'… 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."

Just while I'm here, I just want to go on to the following page if we could –

ELLEN FRANCE J:

Just before you do, do you accept what's then said, that it's an objective test?

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MR MCKILLOP:

Yes. I just want to note from line 14, this is how the Court deals with this particular matter. It's not dissimilar from the one that we're dealing with here. It's a witness who's – although it's the complainant in a sexual case who has gone overseas and refused to return. The Crown – the Court, sorry, notes that the Crown took no steps to respond to a letter where she's indicated to a friend she was frightened of returning and didn't want to. The Court noted it's a criminal matter, the allegations were serious, the evidence was "of crucial significance", and New Zealand Bill of Rights Act 1990 considerations of the right to cross-examination were "highly relevant in assessing whether reasonably practicable steps have been taken".

So that's the second case, the second Court of Appeal case, but I also want to go to *Gao v Zespri* which is –

GLAZEBROOK J:

What are you taking from that case?

MR MCKILLOP:

Well, I'm taking that the Court maintains – first, the Court maintains the same approach to unwillingness of an overseas witness not being able to be overcome that Justice North set out in the earlier *Union Steam Ship* case, that this test was regarded as being the same despite the expansion from being a civil hearsay rule, exception in the *Union Steam Ship* to being a general one by the time of *R v M*, and, in the last passage that we saw, that the considerations when it comes to reasonable practicability are wider than what the cases that I criticised have focused on. They include the seriousness of the charge, the centrality of the evidence and the importance of the right to cross-examination. All matters that if we were to pick up and run with the approach that the Court of Appeal has taken in this case and the other recent case, *Huritu v Police*

[2021] NZCA 15, which I criticise, which I say was wrong, I should say. That would not be – those things would not be factors.

ELLEN FRANCE J:

That's even though there the Court says it's not enough? There wasn't sufficient evidence.

MR MCKILLOP:

What's the – sorry, your Honour, what's the question?

ELLEN FRANCE J:

Well, when you look at how the Court actually applies the test in that case, they get to the opposite conclusion to the one you'd argue for in this case.

MR MCKILLOP:

Yes.

ELLEN FRANCE J:

Which suggests some evidence required.

MR MCKILLOP:

Yes.

ELLEN FRANCE J:

In other words, it's not sufficient just to say: "X or Y won't come and I can't persuade her to come."

MR MCKILLOP:

Well, the evidence required is evidence of what measures you've taken to try and persuade X or Y. It's – so that's what I mean when I say it's not mere unwillingness, it's actually about addressing what efforts, because that's a focus on the whims of a witness. It could be the whims of a witness, but if you have a reliable hearsay statement, then the more important thing is to focus on whether or not the parties have done what they can in the circumstances, have done what's reasonably open to them to overcome that. And if they haven't

been able to overcome that, then that unfairness shouldn't be visited on the party if the evidence is essential to their case as we say it is here.

WILLIAMS J:

The problem –

KÓS J:

Do you accept that one way of persuading a witness would be to say to them: "If you don't participate in this hearing, your evidence in support of the party who wants to call you will not be heard"?

MR MCKILLOP:

Well, I think you could say it certainly won't be heard. It might be – and there's a risk that it won't be read.

MILLER J:

Or be considered at all.

MR MCKILLOP:

Yes.

MILLER J:

But it seems to be your approach creates an opportunity for parties to say to people, look, if you're really not willing to go/come, we're just going to ask the judge to read it anyway.

MR MCKILLOP:

Well, I think if you'd said that –

MILLER J:

That opens a very large door, principally for the Crown, actually.

MR MCKILLOP:

Yes. I think if you'd said that to a witness, you'd be, I mean, and you didn't, then you would be real danger of not being able to prove that you'd taken every reasonably practicable step. So.

WILLIAMS J:

Our problem with your reasoning in respect of *M* is the fact that the Court said what the Crown had done there was not enough does not necessarily mean that they meant that if they had done it, it would've been enough. They're just pointing out the shortcomings on those facts.

MR MCKILLOP:

Well, these were –

WILLIAMS J:

They're not giving a positive test as to what would be enough.

MR MCKILLOP:

No.

WILLIAMS J:

They're just saying what wasn't enough.

MR MCKILLOP:

No. Yes. It's very hard to draw anything but principles from these cases because they're all so fact-specific, so I'm not trying to draw facts, necessarily.

WILLIAMS J:

Well, the difference between on the facts between this case and – I mean, *M* and your case is that in your case, counsel diligently chased the person involved, and in this case, the Crown only had a letter three months old. So, but the question –

MR MCKILLOP:

Which they didn't respond to at all. Yes.

WILLIAMS J:
Yes. So, but the – I just don't know whether that's going to help you.

MR MCKILLOP:
No, I'm not –

WILLIAMS J:
Because the Court doesn't accept constant badgering of the unwilling witness as the test.

MR MCKILLOP:
Well, I'm not –

WILLIAMS J:
I don't mean badgering in a bad way. I mean, you know, filling that three-month gap is not necessarily going to get you there either.

MR MCKILLOP:
Well, it's – I mean, I don't want to comment on the particulars of whether any particular one of these case was rightly decided because we don't have all the facts of them before us and –

WILLIAMS J:
Correct.

MR MCKILLOP:
All we can really do is extract principles from them. So I do want to move on though because this is taking some time and there's quite a lot of other things to say. I want to go to *Gao*, which is page 320, and paragraph 53 of this case – this is from 2021. If we could scroll up just to the start of the paragraph. It's a civil case. It's about a witness who's in China. This passage is about a witness who's in China. They're unwilling to give evidence. They're beyond being compelled to give evidence and the issue is, are they unavailable as a witness under section 16(2)(b). The Court recognises there in paragraph 53 that they

were "compellable" in a legal sense, so that's a given, but he was unavailable in that "he was outside New Zealand and it was not reasonably practicable for him to give evidence", because he basically set conditions on giving evidence that were: "Zespri, I want you to enter into a commercial arrangement with me to be your man in China. I want to be – I want to get something out of this," and that wasn't, plainly, reasonable.

If we could scroll down. The Court – sorry, yes, that's covered in the sentence starting "moreover". So what the Court says there is: "In this context the possibility that remote hearing technology might be used is beside the point; the evidence…[was] sufficient, on the balance of probabilities, that [this person] was unwilling to give evidence and, being beyond compulsion, [was] thereby unavailable." So there was unwillingness evidently and there was evidence of the interactions that the party had had with him trying to convince him and his response to that being this sort of commercial arrangement proposal, which was clearly inappropriate, and the Court says it was really beside the point whether or not an AVL could've been used. He was unavailable to the party.
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So, in my submission, the Court of Appeal couldn't have been clearer in *Gao* that witness unwillingness and a lack of persuadability established, if they're outside of New Zealand, unavailability.

WILLIAMS J:
So this is a case where Mr Gao was, hadn't – made, recorded some statement that was contrary both to his, sorry, not Mr Gao, the witness, recorded some –

GLAZEBROOK J:
Mr Shu.

MR MCKILLOP:
Shu.

WILLIAMS J:

Mr Shu had recorded some statement that was contrary to both his interest and Mr Gao's interest.

MR MCKILLOP:

Well, yes, and it certainly –

WILLIAMS J:

And he wanted to corruptly seek advantage for the benefit of giving evidence.

MR MCKILLOP:

It seemed that he was a co-conspirator in Gao's scheme and, yes, and so he wasn't –

KÓS J:

It dealt with a very simple point which was whether Mr Shu was growing a particular variety of kiwifruit, there being evidence that he had obtained it from Mr Gao. So it was on that short point.

MR MCKILLOP:

Well I won't tell your Honour what the facts of that case were, but the, yes, so the witness wasn't an angel it seemed, but, well the potential witness, but the focus wasn't on his characteristics, it was the fact that he had become unavailable to the party because he was unwilling and unpersuadable.

Now I just want to note that the same approach exists in England and Wales. If we go to page 1209. I want to just refer to the leading text on hearsay in the UK, Spencer, and at paragraph 6.16, if we could just scroll down a little, he really makes similar point to what I've been saying, there's no legal mechanism to force a witness to travel to the UK. So the question isn't physical possibility, it's whether the witness can be persuaded to come voluntarily and the word "practicable" is not equivalent to "physically possible", and that holds true for AVL links as well in my submission.

There's a further, just an example of a UK case from a different UK jurisdiction that I've put in the additional authorities, and I'm not going to go to it but I just wanted to mention it. There's a case called *R v Crilly* [2011] NICC 4, which is the Northern Ireland Crown Court, so it's not exactly a high authority but the point that I'm making is it just shows how universal this approach has been. It was a case about three witnesses who were Republic police officers who the Northern Ireland Crown wanted to call on as witnesses and they refused to travel to Northern Ireland. The Crown had not, though, tried serving a summons under Northern Ireland's mutual assistance law, and nor had they offered AVL as an option to these witnesses to see what they would say, if that would shift their unwillingness, so they were treated as being available.

So that's, I mean, my overall point there is that there's been a consistency of case law until this case under appeal and *Huritu* which is a, which takes a similar philosophical approach and I wanted to come to talking a little bit about *Huritu* because we say that that case demonstrates a wrong approach in the Court of Appeal. Although it's concerned with a different part of section 16(2), it raises very similar issues. So *Huritu* and the case, the judgment under appeal are something of a sort together. So if we could go to – it's page 427 of the bundle. The case concerned a domestic violence complainant who failed to appear as a witness despite a summons and that led to a police application to have her statement admitted as hearsay under section 16(2)(d). So it wasn't about her being outside of New Zealand, it was about taking reasonably diligent steps to find her.

So a different subparagraph, but like section 16(2)(b) it incorporates a test of reasonableness of the measures taken to secure the attendance of a witness, and if we just go to the top of paragraph 37. Paragraphs 37 to 39 are the key passages in this judgment. The Court's rejecting the idea that there are, that it should refer to any broader principles. They say it's "straightforward statutory language" and the question of whether a witness is to be found or not "is a simple question of fact", and going down into paragraph 38, that: "The question of whether reasonable diligence has been applied…is [*sic*] an assessment of what has been done in the overall circumstances." They say: "There is no

difficulty in the statutory language," and it's quite a narrow, although they say "overall circumstances", they apply that quite narrowly, the Court in the last sentence saying: "We consider Ms Hoskin was correct to submit that issue is to be determined by looking at the steps taken to find the witness and ought not to be influenced by a consideration of what role the witness will play in the trial if he or she is located and gives evidence."

Then paragraph 39, we have the other factors that the Court says are obviously important. It stops on the free admission of hearsay, the reasonable assurance of reliability and whether or not the section 8 test applies, but the Court ends by saying: "… none of those matters has an impact on the factual enquiry as to whether due diligence has been applied in attempting to find the witness."

So, I'm sorry there's a lot there in those paragraphs, but I want to just address quickly why I say each of those paragraphs contains some sort of wrong approach and what we say the proper approach ought to be, and I'm not trying to quibble with the particular, again, the particular factual outcome of *Huritu*, it's not open to me, without the facts of the case, to make that sort of submission and I don't want to, but the point is that the reasoning, I say, is wrong. It's similar reasoning that's found in the judgment under appeal in our case and it would be of concern if these, given that long history of a more contextual approach to section 16 to that that the Court of Appeal cases I've shown you so far have taken, it would be a shame if that wasn't looked at closely by this Court.

So the idea that, firstly, just addressing the idea that the test is a simple question of fact not to be influenced by consideration of the role of the witness at trial. We say this is a wrong and a narrow approach because it leaves no space for the rights of criminal defendants, which are especially affirmed by section 25 of BORA, and we're not saying at all there that there's a problem with having a unitary test of hearsay admission in both civil and criminal trials, so long as there's sufficient flexibility to take account of defendant rights, either the right to cross-examine or the right to bring a defence which would arise in relation to Crown applications to admit hearsay or defendant applications respectively.

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ELLEN FRANCE J:

Isn't all the Court's saying that when you're talking about the factual question of the steps that had been taken, at that point, you're not looking at those broader issues, because they, on the Court's analysis, come in at the next stage because that's when you look at reliability, probative value outweighed by the risk it would have unfairly prejudicial effect, et cetera. It's not saying you don't consider those questions at all.

MR MCKILLOP:

It's certainly what the Court – yes. It's certainly what the Court's saying, and what I'm saying is that that's not right, and that those are factors that go into what is reasonable to expect of a party. The reason that I say that is that it has to be a test, it has to be a test that works for both Crown and defence hearsay applications, and so when the Court goes on to rely on the general ability to exclude unduly prejudicial evidence in paragraph 39, obviously that is to be exercised by taking into account the right to bring an effective defence as section 8(2) says, but that's an exclusionary rule only, and that can only help defendants to respond to a Crown hearsay application. Whereas what we're actually concerned with here is an inclusionary rule which is – which is what section 16(2) is about when it's seeking one of the thresholds for when hearsay evidence will be admitted and that can be relied on by a criminal defendant as it was or as this defendant tried to. So it's just not sufficient to say that those don't form part of the relevant circumstances that go into what is reasonable to expect of a Crown applicant.

MILLER J:

I'm not following that. I thought the right to offer an effective defence included the right to offer evidence.

MR MCKILLOP:

Yes?

MILLER J:

In other words, we're not talking about an exclusionary principle here. That's not what the Court is saying. It happens to be that in this particular case, we're looking at a statement that the prosecution want to offer. Why can't you invoke that principle to say: "I want to offer evidence of my own"?

MR MCKILLOP:

That's exactly what I'm saying is a shortcoming of not taking into account broader circumstances.

MILLER J:

All right, well perhaps I've misunderstood you.

MR MCKILLOP:

That being able to bring defence evidence would be hampered by such a narrow focus. Obviously, we also say in our written submissions that treating section 18(1)(a) threshold reliability as a separate and later enquiry is not right, that we say that whether – if the evidence passes the threshold, that – sorry, that the Court should first turn their mind to threshold reliability and that that sort of, that analysis is going to be relevant to the test of what can reasonably be expected of a party to get their witness there, and obviously, a statement that passes the threshold reliability analysis with flying colours and looks like it's very reliable is going to be more prejudicial to a defendant who can't cross-examine on it, which, in my submission, would mean more diligence being required of the Crown before it's introduced without that ability to cross-examine.

All of this is really to say that it's wrong to wall off certain things from the consideration of the overall circumstances of the case when assessing what's reasonable under both section 16(2)(b) and (d). It's wrong to limit those circumstances artificially, it risks being – it risks a legalistic focus on the words of the Act rather than achieving the underlying policy of not visiting the unavailability, or the whims even, of potential witnesses on a party that seeks to rely on their evidence.

Now I'm very conscious of time. I want to talk about the Mutual Assistance in Criminal Matters Act 1992, and part of why I need to address this is that both parties have referred in their submissions, and I think this – probably taking the lead from the appellant's submissions. We've referred to the special regime for Australia for evidence, the special regime inserted by the Trans-Tasman Proceedings Act 2010 into the Evidence Act 2006. In preparing for this hearing, it's become quite apparent that that was a mistake and that the procedure inserting with the Evidence Act was intended to be for civil proceedings only. So that's actually written in the purpose of the Trans-Tasman Proceedings Act which inserted those provisions into the Evidence Act. It's also apparent from the text of the Trans-Tasman Agreement, which is annexed to that Act, and I would also submit it's why the only procedure for finding those subpoenas, for having those subpoenas issued is found in the High Court Rules 2016 and the District Court Rules 2014, rather than in any criminal process statute. So all that's to say that our reference to the issue of subpoena to be issued in Australia and requiring attendance in an Australian court, it's very doubtful that that actually has any relevance to this case and so it was a bit of a misdirection or red herring for us to talk about that, so my apologies.

KÓS J:

Which paragraph is that?

MR MCKILLOP:

Of?

KÓS J:

Your submissions.

MR MCKILLOP:

I'll tell you that shortly, Sir.

KÓS J:

Thank you.

MR MCKILLOP:

But the procedure that does have application to criminal proceedings is the Mutual Assistance in Criminal Matters Act. I just want to talk about that a little because I say that it influences the reading of section 16(2)(b).

So the key section is section 11 and under, and there it is, and under section 11(1) the Attorney-General can make a request to a foreign government for information to be, sorry, for evidence to be taken by that foreign government and transmitted back to New Zealand. These requests get received by the central authority of the foreign state and, all going well, they'll get the person to court to ask them the questions raised in the letter of request. Now obviously a really good process would mean there'd be the opportunity for the parties in the New Zealand case to effectively do the questioning in the overseas court, but equally obviously not all countries have the same system of justice that ours does.

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Sections 11(2) and 11(3) deal with what you do with those things when they're received, a deposition or other document, the sections are almost identical. The point I want to make is that they deal with the admission of evidence in criminal proceedings and they note, each section notes they're "subject to the rules of law relating to the admission of evidence". So what you're left with from this mutual assistance process is a deposition or similar document. Depositions are themselves hearsay and their admission is, this Act says, subject to the usual rules of evidence, including the hearsay rules in the Evidence Act.

So in my submission, bearing in mind how the mutual assistance regime works here, it would be unusual to read section 16(2)(b) of the Evidence Act as meaning that an unwilling overseas person is available as a witness if there was a feasible plan for bringing them to New Zealand or to appear via AVL because this regime is at its most useful when you can't get someone participating voluntarily for whatever reason, it's effectively a replacement for compulsion. It can allow a foreign state to do the compelling where you can't. So if you go through this process but the person overseas was merely unwilling to come

here or to comply with an AVL set-up, on the Crown approach and the Court of Appeal's approach, they would often still be regarded as unavailable as a witness. You'd need to have this admitted as evidence to rely on the test of undue expense or delay, but it'll be, in my submission, unusual to rely on that for evidence of any real consequence to a conviction and dangerous to dilute that test.

So that's a submission essentially that section 11 of the Mutual Assistance Act and section 16(2)(b) of the Evidence Act must be read in a complementary way. They both relate the admission of hearsay statements of overseas witnesses and there's a risk that the approach that the Court's taken below of rendering section 11 essentially inoperable, and I say that that can't be the intention.

I do not – in terms of outline, I – we're up to 1.5 now. I think I've kind of made the point already and it's in our submissions that – so it's probably not worth the time. The essential point is that the appellant's approach to section 16(2)(b) deals with human rights guarantees through its more flexible approach to admission based off of what's reasonable to expect a party to do in criminal proceedings, being a varying test where reasonableness, where that word arises, is assessed in light of the human rights guarantee in section 25 of BORA.

GLAZEBROOK J:
You're coming dangerously out of time.

MR MCKILLOP:
I'm sorry?

GLAZEBROOK J:
I mean we're at 11 o'clock now.

MR MCKILLOP:
Oh, yes, I'm –

GLAZEBROOK J:

And if you're to finish by, both of you are to finish by morning tea, you're really running into some real issues.

MR MCKILLOP:

Yes, I appreciate that, your Honour. So I'm not going to respond, I was going to respond to Crown objections but I don't really see too much of a need. The –

GLAZEBROOK J:

Well if they're not on your – you're better covering matters that aren't in your written submissions rather than the matters that are.

MR MCKILLOP:

Okay, well –

GLAZEBROOK J:

Apart from drawing our attention to any specific matters you want to stress.

MR MCKILLOP:

Yes. Well I'll very quickly then say that the Crown says that a mischief could arise if sending a reluctant overseas was sufficient to ensure that they were unavailable and their written statement therefore became admissible as hearsay, and I say that that's a speculative and very unlikely scenario, and it's also a mischief that the law already addresses in section 16(3) of the Evidence Act which provides that a person who prevented someone's attendance can't rely on their unavailability, and further the statement would need to pass threshold reliability which also needs to be established before it can be admitted and if a suspiciously exculpatory note was made just before a witness fled the jurisdiction, I mean it would surely raise eyebrows in the, or raise the eyebrows of the trial judge. So I think it's an overblown concern. So that's the really important Crown point I wanted to respond to.

I just want to lastly say that the, I mean we've submitted in the written submissions that there would be potentially alternative routes to admission if

this argument wasn't accepted. There's very little I need to say about it because I obviously submit that the primary submission is that the interpretation that's been advanced is the same one that the courts have been affirming for the last 50 years in these various Court of Appeal judgments I've referred your Honours to. But even if you were to give a narrower reading, then this is a principled exception that comparable jurisdictions have no problem whatsoever in recognising and this Court ought not to either, in my submission. So that's everything in section 1, unless there was any more questions on that. That – probably we're out of time for them anyway.

GLAZEBROOK J:
Thank you.

MR DE GROOT:
Your Honours, I'll deal with admissibility and then deal with the miscarriage of justice issues.

The fundamental submission on admissibility is that because she was outside New Zealand and counsel had, as Justice Williams said at the beginning, been diligent in their efforts to secure attendance but she nevertheless remained unwilling, she was therefore unavailable. In our submission, admitting her evidence as hearsay would've given effect to the underlying purpose of the hearsay rules, which as Mr McKillop said, is to protect parties from arbitrary disadvantage in proceedings.

I had planned to go through admission in quite a systematic way. There probably isn't time to do it –

KÓS J:
Do you meet your own test here in terms of counsel's diligence to procure the witness? You had a witness who clearly at the time the second trial fixture was wobbling, but no steps were taken then to procure any kind of, I'm not sure now after Mr McKillop's suggestion whether a subpoena in fact would've been available or not, but I mean that step was not taken.

MR DE GROOT:

No, I'll deal with those in turn. The fundamental submission is that there is nothing else realistically that counsel could've done, and I will come to the subpoena issue.

KÓS J:

Right.

MR DE GROOTH:

But these lawyers did exactly what we would expect of responsible people in this situation. They'd briefed the witness, they worked through her statement, ask her to make alterations, they were constantly in contact with her prior to the February trial and would have the impression, at least at that stage, that there was no reason to think that she wasn't going to co-operate, and then they remained in contact with her family in the lead-up to the next dates, but the problem was that the witness had just withdrawn, and not only had she withdrawn from contact with counsel, but she had withdrawn from communicating with her family. She'd withdrawn from seeking medical care that she clearly needed at the time. So if a witness is uncontactable, it's almost definitionally the case that they become unpersuadable because there is no channel by which to persuade them.

1110

On the subpoena point, I think the position we arrived at is that nothing could be done under the Trans-Tasman Proceedings legislation. Could a summons have been issued in New Zealand and the witness had the thought in their mind: "Well, if we go back to New Zealand one day, I might be arrested at the airport"? Yes, that's possible, but I think our learned friends have accepted in their submissions that it's very unlikely that this would have had any effect on a person in this situation psychologically. This is a person who's not even speaking to her family. So her lawyer's saying: "Well, I'm going to serve a summons on you and if you don't answer – you know, you could be arrested when you come back to New Zealand." It's my submission that it would've had had no effect on her mind.

So I was going to preface this discussion with a discussion of relevance, but that's more related to the miscarriage issues. That probably isn't going to surprise the Court to learn that the fundamental submission would be that evidence could hardly have been more relevant. It went directly to what was the only trial issue which was whether the complainant was telling the truth and the extent to which she was motivated to lie.

So the first major question to address is that of reliability, and as Mr McKillop said, we submit that the Court should not only interrogate threshold reliability, but should interrogate actual reliability in order to make an informed decision about what is reasonable in the circumstances. I won't go through the principles of reliability for purposes of sections 16 and 18. They'll be well-known to the Court. But it's probably sufficient to say that it takes into account almost everything relating to the statement.

Now, the Act. Because the Act only puts threshold reliability in issue, it follows that evidence of reliability that may not be perfect is nevertheless capable of admission, but there's going to be a category of evidence or there are going to be forms of evidence which far eclipse the threshold, and we say that the evidence in this case is that type of evidence. I don't want to go through the indicia of reliability, but the way I'd want to characterise it is to say it's essentially gold standard for reliable evidence. And I see Justice Kós –

KÓS J:

Well, it's an interesting test. I'm not sure we've ever approved that test based on precious metals.

MR DE GROOT:

No.

KÓS J:

But isn't the point more here that this evidence was confirmed by the complainant herself in cross-examination which of course had already occurred

at the point where you were going to call this witness, or your predecessor was going to call this witness.

MR DE GROOT:

I'm going to make the –

KÓS J:

But that also goes into the question whether there's a miscarriage in the absence of the evidence.

MR DE GROOT:

The submission I'm going to make later is that it certainly was not cross-examined into the trial and that there was all sorts of other matters in the brief that formed no part of the trial whatsoever. But I'll certainly come to that issue in the miscarriage section.

KÓS J:

But we're dealing here with three critical points that you've identified in your submissions.

MR DE GROOT:

Yes.

KÓS J:

And two of them had been elicited in cross-examination of the complainant. There's one thing missing which was that she wanted to get rid of the defendant and that was clearly capable of being the subject of submission, closing submission anyway, given the narrative that had been established.

MR DE GROOT:

Just on that point, she was cross-examined to the effect that you wanted to get rid of this person –

KÓS J:

Mmm, and denied it.

MR DE GROOT:

– only in general terms, but denied it, so there was nothing to back that up. The cross-examination, the height of the cross-examination in terms of this brief was that the complainant had not made disclosures to C. So therefore she had been silent. That of course was not the evidence. The evidence was that repeatedly, in Australia and New Zealand on a number of occasions, the witness had said to the hearsay witness – the complainant, sorry, had said to the hearsay witness: "I want to find a way to get rid of this person." That didn't come in through the cross-examination. And when pressed by the cousin: "Has he done anything to you?" "No, he hasn't done anything to me," is her answer. So it's not a simple silence on whether this man has done anything wrong to her. It's saying: "I want to find a way to get rid of him," and then being asked if she has a good reason for doing that, she says: "I hate him. He's lazy, I don't like the way he treats my mother, and that's the reason I'm motivated to find some way to get rid of him."

So, circling back to the reliability issue, I won't go through the indicia of reliability. I think they will be apparent to the Court. It's a signed statement. Her mother witnessed it. The list goes on and on. And we just say that the inherent reliability of this brief went to what was reasonable in the circumstances. I'm about to say that there was nothing more that could realistically have been done by –

GLAZEBROOK J:

I just really can't understand how these other matters actually relate to "reasonably practicable". I'm just having an incredible amount of difficulty with that. I understand the submission that says you do everything you possibly can to persuade the witness. I understand that statement, but I just can't understand the statement that it depends how reliable it is or whether it's gold standard reliable or threshold reliable. It seems a different question altogether.

MR DE GROOT:

I don't quarrel with the idea that they're different questions, but just as a judge needs to know, and just as it's relevant who is making the application, and what

rights guarantees are on the table when considering a piece of evidence, the judge has to know how good the evidence is and what the content of the evidence is and deciding what is reasonable in terms of the conduct of a party wanting to lead the brief.

GLAZEBROOK J:
So is it the better the evidence, the less you have to do? Or the worse the evidence, the more you have to do?

MR DE GROOT:
It would –

GLAZEBROOK J:
Well, it doesn't make any sense to me.

MR DE GROOT:
It would depend on the party, on which party was calling the witness. If for example the Crown wanted to call a piece of evidence that had a lot of reliability about it, then you would have to take into account the fact that the defendant lost the ability to cross-examine on it and there would be rights implications in terms of section 25(f). It's not a critical part of our argument, but we're just saying that the Court shouldn't shut its eyes to the inherent reliability of a statement when deciding what is reasonable in terms of securing attendance.

So I'll move on to reasonable practicability. Was it reasonably practicable for C to be a witness? Our answer is no. Clearly it was technologically possible. I take my learned friend's submissions to accept that technologically possible certainly isn't the test. If it were the test, most people in the developed world would be available because we all have supercomputers in our pockets that can beam a sensor into courtrooms at any given time, and the policy of the hearsay rules would be undermined.

The real issue here is that C was initially willing at the call of the trial in February and as evidence show that she was setting up a computer and ready to beam

into a courtroom before Auckland went into a lockdown, but she became unwilling at the point of the April fixture and then beyond. I don't want to dwell on the evidence too much about why that was the case, but I think it's sufficient to note that the Judge, hearing directly from the witness' mother, accepted that she had become very unwell, and that unwellness arose against the backdrop of some struggles. Again, we don't need to get into them, but they are understandable. It is understandable that this witness had fallen on – had fallen into a difficult mental state. We're not saying that we could demonstrate necessarily that her mental condition made her unfit to be a witness in terms of section 16(2)(c), but nevertheless, it is context, when dealing with the question of what counsel could've done to get her there.

1120

WILLIAMS J:

My thing that's been niggling me in the back of my mind is if the witness had pneumonia, for example, and the mum says: "Well, actually she's too sick," I would expect counsel to get a doctor's certificate that said the witness had pneumonia and is unavailable, is too unwell to hook up to this supercomputer. I just don't see why mental unwellness is any different. I'd want something objective to tell me, to confirm that she's too unwell, it's just a form of illness, right, that she's too unwell to give evidence. Not unfit to give evidence, just too unwell. It's not there. It was surprising that it wasn't there, frankly.

MR DE GROOT:

Well it wasn't surprising at the level that the witness was unwilling to seek treatment. So it would –

WILLIAMS J:

But that's a different point, you could still get an opinion from an expert to indicate.

MR DE GROOT:

Well it be very difficult to get that type of evidence and to get evidence which had any value about it if –

WILLIAMS J:

Well so you say, but there's not even any indication that we tried and an expert has said I can't, she won't talk to me, and we know that she's had these issues before and had dealt with clinicians, so we know there was a clinician who could've spoken to this issue. Because the danger here is that it's not as serious as it appears. Who knows without that, because if you're going to abrogate the hearsay rule, you shouldn't be doing that too lightly. Independent evidence might well have been enough.

MR DE GROOT:

That would've been much better, I'll accept that, but the point we made in the Court of Appeal is that the party who wants to call the evidence was prejudiced in a really significant way because if this person is not going to seek treatment and you can't force them to speak to anybody, and they're not even going to speak to their family, how are you going to marshal evidence that would be a better form of evidence about her condition.

GLAZEBROOK J:

I'm just – do you want to take us to the submission that she's not even talking to her family? I mean if that's the case in the bold way you're putting it, I can't understand why they haven't sought medical advice.

MR DE GROOT:

Well the –

GLAZEBROOK J:

I mean if you have a child that's locked in a room and won't say anything, you must be actually very worried, mustn't you?

MR DE GROOT:

They were very worried about her, and they were worried about her to the extent that she was taken to the hospital in April, but because of the COVID settings in Queensland at that time, hospital however said you can come in but your father can't come in with you, and she would not go into the hospital by herself.

WILLIAMS J:

You're still stuck with the witness having a clinician that's clearly been treating her, I won't speak to that person anymore, you could have had an independent expert indicate what the problem was and why this person could not give evidence. Not was not unfit – not was not fit to give evidence, but could not.

MR DE GROOT:

I don't quarrel with the idea that it would've been better, but we have to work with what we have.

WILLIAMS J:

Sure.

MR DE GROOT:

And we have to notice as well that the test, the test for establishing unavailability is the balance of probabilities, right, so –

GLAZEBROOK J:

Well your main point really is if with all efforts they remain unwilling, that means they're unavailable.

MR DE GROOT:

That's really – yes.

GLAZEBROOK J:

And whether they get a medical certificate or not doesn't actually go to that question, however it might bolster the best efforts I suppose, or at least give some more context around unwilling, not unwilling because of being ill rather than because of repenting of the statement.

MR DE GROOT:

That's as good a way as putting the submission as I can. Just because your Honour raised the reticence point earlier in the hearing, perhaps should say something about it briefly.

One important factor to keep in mind is that although she wouldn't participate and she wouldn't speak to counsel, she would initial her brief just prior to the hearing. Is that a perfect indication of someone standing by it? No, but it's a pretty good one, and it also needs to be taken into the context of she was present at one call of the trial and the information we have was that she was about to give evidence at that trial and then things fell apart for her. So I would submit that there's – reticence is something the Court has to be mindful of, but there's just no evidence for it in this case.

Are your Honours content if I move off admissibility? I'll move to miscarriage of justice, and I'll try and be as brief as I can.

The critical points of this brief were that N had said that she hated the appellant for specified reasons, she wanted to come up with something to get rid of him, and she repeatedly and positively denied that he'd done any wrong to her. Despite this, the Crown says that no miscarriage of justice was occasioned, and that seems to fall principally on a contention that the brief would've just duplicated other evidence in the trial. I'm going to submit that that's just wrong on the face of the record, but the primary submission that's been made for L is that the absence of the brief rendered the trial unfair.

The first reason for that submission is that the absence of the evidence has just brought about an arbitrariness to the determination of the charges. It was just a random feature of the case that this witness happened to be based in Australia, and it was also a random feature of the case that by the time the appellant needed to make the hearsay application that she had, for want of any better explanation, become very unwell such that she was willing to co-operate.

By the time that the appellant was required to make the hearsay application, he'd actually already lost something that was very precious, and that was a live witness whose evidence could not be subjected to unreliability directions or depreciated by the Crown on the basis that the witness was not there to answer questions. Where the witness refused to participate, hearsay was the next best

option. It was poorer evidence than should have been available, but it was powerful even as hearsay and it was certainly better than having nothing from C.

The uncomfortable fact of this appeal is that we'd not likely be having this discussion if there had not been a public health crisis putting Auckland in Level 3 lockdown and if this particular witness did not have these mental health difficulties. We just say simply that determination of serious criminal charges needs to be based on rational processes and not outrageous fortune, and the public would reasonably expect the Court to remedy a trial defect that was entirely outside of the defendant's control without necessarily interrogating the full effect of the evidence.

The next point about unfairness is that we say it led to an unfair Crown closing. The Crown closed its case on the basis that essentially the complainant had no logical or credible motive to lie. Now, I accept entirely that even if the brief was read, a prosecutor could make some version of this submission, but I'm going to suggest that a good deal more restraint would've been exercised if the brief was going to be read. The reason for that essentially is that where there was going to be evidence that N said she wanted to find a way to get rid of her mother's husband, the reasons that she offered for wanting to do that were the exact reasons that the prosecutor said were not credible or logical motives. I accept that that as a motive may not be objectively credible or logical, but there was reliable evidence that it was subjectively logical to N.

The Crown closing also obscured the fact that disclosures to the aunt in January were not the first discussions that N had had with another person about L where the topic of accusing him was raised. The jury would've been entitled to infer that N was in a preparatory phase when speaking with C and that the allegations to the aunt immediately afterwards were the answer that she arrived at as to the question of how to get rid of L.

The final point on the unfairness ground is that the exclusion simply trespassed the right to offer a defence. I don't need to be drawing too far on this, but what

I want to say is that even if the evidence from C wholly duplicated other evidence, and it certainly doesn't, there may be a range of reasons that a party wants to call a witness. They may just add colour or texture to other evidence that's going to be addressed in the trial, they may just be useful because they lay the foundation for a consistency appeal, or they may just be more persuasive on a certain point. Defendant has no obligation to do prove anything but it is powerful to do so in the eyes of a jury and criminal charges, the determination of criminal charges comes down to inches and not miles, and the defendant must be permitted to fight over that ground. So those are the submissions that I wanted to make about unfairness.

1130

Real risk that the outcome of the trial was affected. Again, my learned friend's submissions are really that this evidence just duplicated what was already there. Certainly, I accept that it duplicated some areas of the evidence and that would be no more than what would be expected. The evidence about N's general hatred of L is perhaps the obvious example and there are some other details that featured both in the Crown evidence and would have come out through the hearsay brief. But again, none of this was unexpected and it would actually be suspect if the brief just addressed totally different matters than had been addressed by the other witnesses or if it was violently inconsistent with the rest of the evidence that was adduced in the case.

Secondly, the jury was deprived of the context of the making of the brief. Nothing in the trial alerted them to the fact that this prospective witness had been so disturbed learning about the allegations that her cousin had made that she had gone away, contacted counsel and co-operated to prepare a detailed brief which tended to contradict her cousin. Now, the Crown's submission on this issue is that this was a divided family and that this wouldn't have assumed any relevance. I say respectfully to my learned friends I very much doubt a prosecutor would submit that to a jury at trial. There was little to no evidence that C was caught up in the family division or had any reason to come to L's aid, and the implication that she had gone well out of her way to perjure herself because of squabbles between aunts and uncles was implausible.

Lastly, and most importantly, the Crown's suggestion that the contents of the hearsay statement was essentially confirmed by the complainant in cross-examination is just incorrect. Nothing in the cross-examination really conveyed the probative substance of the brief. This next submission was going to take the form of a list which is quite an unhappy type of submission to make and may not be particularly useful to the Court, but –

GLAZEBROOK J:

Well, I'm not sure it is, because what we – because if it was significant it had to be put the complainant if she was going to give evidence, if it wasn't significant, then it really has nothing to do with this, does it?

MR DE GROOT:

Well, I'll content myself to say that if you compare the notes of evidence for the complainant and this – or any of the other witnesses, frankly, and the brief of evidence for trial, your Honours will notice that there is a whole range of highly probative matters and I discussed some of them with Justice Kós earlier, the central matters. But there's a whole range of matters that were not touched in cross-examination. I need to be clear here that I'm not criticising counsel for that. Some lawyers would say, you know, to heck with it, I'm just going to try and cross-examine the whole contents of this brief, but great many lawyers would not do that. It's simply too dangerous. You don't know what the witness is going to say. She could give evidence that's damaging to you, and to the extent that you put propositions that she just denies and seen to just come out of left field, you run the risk of damaging defence credibility.

KÓS J:

But you've got to put the core points for the defence to the complainant giving evidence.

MR DE GROOT:

Yes. I'm simply making the point that to the extent that the Crown's suggesting that this comes out in the wash because the substance of the brief was put to

the witness, that's not actually what happened at trial. If counsel had been given permission and said – and the Judge had said: "Yes, you can read that," or "I will read that" at the – when you open the defence case, then all of those propositions would have needed to be put. But I can't criticise counsel for not doing so where she was erroneously, in our submission, refused permission to lead the brief.

A more minor point I was going to make is I think it's very telling that nothing in the cross-examination troubled the Crown. None of the evidence that my friends want to lean on was referred to, in fact, by either party in closing. So really, this just comes down to a submission that the probative value of the brief was obvious. It could hardly have been more valuable for defence purposes.

KÓS J:

Sorry, I'm looking at Ms Hoskin's submissions. Are you saying the point made at paragraph 65.1 that: "N hated the appellant and had told C that – which N accepted in her evidence," you're saying that wasn't put in closing to the jury? It's an incredibly important point.

MR DE GROOT:

The –

GLAZEBROOK J:

We are actually at morning tea. How much longer do you think you'll be?

MR DE GROOT:

There's – I was going to answer that question. There's literally one more point which is not a long point.

GLAZEBROOK J:

Well, I think we'll take the adjournment and then we'll come back to afterwards and we're not rushing you.

MR DE GROOT:

Okay, thank you.

COURT ADJOURNS: 11.36 AM

COURT RESUMES: 11.53 AM

MR DE GROOT:

Just to return very briefly to your Honour, Justice Kós' question, certainly the hatred evidence was referred to but what I –

GLAZEBROOK J:

You don't seem to be coming through the microphone for some reason. Thank you.

MR DE GROOT:

The hatred evidence was referred to. The non-disclosures, as the Crown put it, I don't understand to even take a glancing reference in the closings. It was clearly just written off as a simple non-disclosure. But again, I would have gone through this in a lot more detail but I really have to commend the brief and the notes of evidence to the Court. They are day and night on one reading. There are violent differences between saying you want to do something to get rid of someone and being pressed about whether this person is hitting you or wronging you in some way and saying: "No," and simply being silent on the subject, and also the point that the brief conveys is that these conversations were repeated. They happened in Auckland, they happened in Brisbane. The implication of the brief is that the Brisbane conversations were repeated conversations. So really those were the submissions about the brief.

On the miscarriage of justice issues in the sense of a defect in the trial that could have affected the outcome, I would just say simply that this was far from a slam-dunk Crown case. On the first conviction appeal, on which Justice Kós and Justice Miller sat, there was a finding that convictions were not inevitable and that was in respect of an even weaker defence case where the defence

had wrongly been refused to cross-examine about non-disclosures to a sexual abuse support service and the school counsellor.

It really appears that the complainant was a particularly compelling witness in the sense of her demeanour and that she was persuasive, but really interrogated her evidence was very inconsistent, if I can put it that way, and conversely there was nothing in the cross-examination of L which really allows us to understand why the jury was able to put him aside entirely. He stood up in cross-examination. So this wasn't a strong Crown case. Convictions were by no means inevitable and we have to think that admission of this evidence could very well have an impact on the verdicts.

The very last point I make, just because it sometimes comes up, I just note that this offending has remained consistently denied. It was denied in the PAC report. It's been denied through this man's time in prison. He appeared before the Parole Board in February of this year. He's a minimum security prisoner and his file notes are all very good but he refuses to participate in any programmes because he maintains his innocence.

Unless I can help your Honours any further that was all I had to –

WILLIAMS J:

I thought the difficulty – sorry, I won't drag this out – but I thought the difficulty in cross-examination was, one, his acceptance that he encouraged the children to massage him, two, that he agreed with Crown counsel that the complainant, he invited the complainant in alone but in respect of all the other kids there was always more than one and he accepted that, and that was pretty inculpatory in the context of this particular case where this was all about the massages.

MR DE GROOT:

The opportunity aspect was always a part of the defence case. That wasn't quarrelled with at all. Perhaps the Crown could invite the inference that your Honour is referring to in terms of isolating her, but he gave – I don't pretend to be able to recall them perfectly right now, but he gave some answers explaining

why he would ask some children to come in at some times and other children to come in at other times, and on the massaging point, that was covered in the section 9, it was well accepted by everyone that this was a cultural practice. It was –

WILLIAMS J:

Sure, no question about that.

MR DE GROOT:

So I would not be particularly troubled by his evidence as trial counsel. The real question for the jury is on tripartite principles, can you put this completely aside, and my submission is there was nothing in the questioning which really seemed to create a basis for the jury to reject him outright.

WILLIAMS J:

You're done.

MR DE GROOT:

Thank you, your Honour.

GLAZEBROOK J:

Thank you.

MS HOSKIN:

May it please, the Court, I will be speaking to you about the proper application of section 16(2)(b) in light of its text, its history and the hearsay regime, and my learned friend, Ms Thomson, will be speaking to the Bill of Rights Act and why that doesn't alter the interpretation of this section nor provide any alternate pathway to admissibility for hearsay evidence and she will also be speaking to the facts of this particular case and the miscarriage.

We will not be in danger of going over time, if I can say that from the outset, and I say that because I'm going to ask you your indulgence to start with a broader view before I zoom in to section 16(2)(b) because I think it's really

important in the context of this appeal that we remind ourselves briefly about the hearsay regime, and what I want to do is I just want to remind everyone, and, of course, I'm saying what you all know, but the starting premise is the exclusion of hearsay evidence and we all know of the reasons for that, of the inherent risks that are seen to be associated with hearsay evidence.

We've quoted in our submissions somewhere the UK case of *R v Riat* [2023] EWCA Crim 1509 and the fact that second-hand hearsay is necessarily second-hand evidence and for that reason it is very often second best. We know a lot of the dangers that come from the admission of hearsay come from the severance of the link between the witness' testimony and the evidence that the factfinder is being asked to accept.

1200

There is a discussion by the Supreme Court in one of the Law Commission papers, and I'm not proposing to take you to it, I'm just going to speak to it briefly because it talks about five inherent risks when a witness describes a past event, and these are all the risks that are very live when evidence is admitted without the witness there to be cross-examined and challenged.

Those five risks are, firstly, a lack of personal knowledge, secondly, inaccurate perception of the events that the person is describing, thirdly, inaccurate recall of their perception of events, fourth, the use of ambiguous or misleading language when describing those events, and of course the final one is the risk of insincerity in the description given. It is those five things that an adversary in proceedings has a chance to cross-examine the witness about and seek to explore and highlight those imperfections, and it is that that is lost when hearsay evidence is admitted and that, I say, is why we started with this fundamental premise that hearsay evidence is excluded.

But of course that's not where it ends and we all know that. In this jurisdiction, as in most jurisdictions, if not all jurisdictions, for a very long time there have been exceptions to that rule. But the exceptions to that rule are necessarily closely confined and they are protected by certain safeguards, and that's

designed specifically to mitigate the inherent risks of admitting hearsay evidence. We have more general safeguards of course which apply to the admission of all evidence, things like relevance and the section 8 exclusionary rule, but we also have specific safeguards which apply directly to the admission of hearsay evidence, and those developed in common law, and here I'm speaking specifically to two of them, one being threshold reliability and the second being necessity, and they are described and referred to as those two fundamental principles, they're referred to in all academic papers discussing the introduction of hearsay evidence, they're discussed repeatedly in cases and they were discussed in the common law, and now we see them encoded in the Evidence Act. We see reliability there at section 18(1)(a) and we see necessity which appears as the unavailability provision both in section 18(1)(b)(i) and through the description of the definition of unavailability in section 16. Of course, what we are talking about here today is necessity or unavailability.

I just make one point in response to my learned friend's submissions about threshold reliability perhaps informing the way the Court deals with unavailability, and that's simply not the case. They stand alone as two distinct safeguards, and I can say that with total confidence because in the 1991 Law Commission paper, which appears in our documents, there was a proposal put forward where the Court, where the Law Commission suggested that perhaps we could move to a system where reliability largely dictated whether hearsay evidence was admitted, leaving – so that the admission of hearsay evidence wasn't precluded if a witness was available, it was simply for a party who might want to challenge the statement maker to decide whether or not that statement maker was required to be called, but that did not find favour and that is not what we ended up with. Instead, even by 1999, and that Law Commission paper is also in our materials, you will see that by then that has been done away with and we are back to a system where we are considering necessity and reliability, and there is but one exception to the necessity principle and that is where a witness is unavailable but it would be, cause undue delay or expense to require the witness to attend, and that of course is the provision that becomes section 18(2)(b)(ii) I think, no, (1)(b)(ii), and that is the only way that unavailability is not a required safeguard.

There was also a very interesting discussion about the need for both necessity and reliability in one of the older cases, the 2001 case of *R v Manase* [2001] 2 NZLR 197 (CA) where the Court of Appeal specifically discussed the Canadian approach and they noted that the Canadian approach had relaxed the necessity requirement and the Court of Appeal specifically said, and this is at page 597 of the appellant's bundle of authorities: "The Canadian concept of necessity now reaches well beyond the idea of the primary witness being unavailable. It encompasses 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," and then the Court of Appeal went on to say: "The common law of New Zealand should not be developed in this way," and went on to say: "We prefer an analysis which separately considers the distinct elements," and it talks of the two requirements, one of which was necessity, so essentially the unavailability of the primary witness to give evidence and be cross-examined, and it later talks about "necessity" which it terms "inability, meaning that in the particular circumstances the primary witness cannot be called to give the evidence in issue".

I think it's really useful to start from looking at why we have the primary exclusion rule for hearsay and why and when we consider that hearsay evidence can nevertheless be admitted. In looking at the development of it, I think it is quite clear that unavailability is a high bar, and I say that not only as a matter of principle because it is permitting a departure from the status quo, being that witnesses give evidence orally and their evidence is able to be tested by the other side, but I suggest it is quite clearly a high bar and that is made plain in the legislation.

We can see that the word used to describe necessity is "unavailability" and, of course, "unavailability", we know what the synonyms for "unavailability" are. They are unobtainable, inaccessible, unattainable, and that is the question that the legislation is seeking to answer: is the proposed witness unavailable, unobtainable, inaccessible?

We can see in section 16 the five scenarios, the five times that Parliament has decided yes, a witness is unavailable, and in fact when you consider them all we are considering in fact eight situations because some of them have more than one. We have got where a witness is dead, where they are unfit because of age, unfit because of mental condition, unfit because of physical condition, cannot with reasonable diligence be found, cannot with reasonable diligence be identified, not compellable to give evidence and this subsection with which we are concerned today. When you consider each of those provisions in section 16(2) of the Act, you can rationalise the inability of the affected person to give their evidence orally and the corresponding need to admit their evidence in hearsay form. So a witness is dead so they cannot give their evidence orally, they are unfit so they cannot give their evidence, they are unlocatable so they cannot give their evidence, they are unidentifiable so they cannot give their evidence, and they are not compellable in law so they cannot give their evidence.

So I say that we can quite clearly see "unavailability" is a high threshold. This section, section 16(2)(b), is no exception. It should be read in context of the entire section in the scheme of the Act. The Court, when it is considering whether that ground is met, is considering whether there is an established inability of that witness to give their evidence in oral form.

KÓS J:

"Not compellable" is not a – not able.

MS HOSKIN:

"Not compellable" and –

KÓS J:

That's not an ability question. That's a compulsion question.

MS HOSKIN:

Absolutely. The "compellable" that's recognised as an unavailability, so through section 16(2)(e), is uncompellable in law, so we say that's sections 72 to 75 of

the Evidence Act. It's not considering factual compellability. They're two different concepts, and I will take you in a moment to how we can see that section 16(2)(b) is not intended to be factual compellability.

I think we always need to start by considering that section 16(2)(b) is designed at solving the problem and the problem is that the witness is outside of New Zealand, so that is what it's directed at looking at. Notwithstanding the distance of that witness, can they give their evidence in these proceedings.

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We can see the cases that my learned friend has talked about where the standard has been discussed, so that's the standard that has remained unchanged throughout each iteration of this legislation from when it was a hearsay provision only in civil proceedings to where we are now. The standard has always been not reasonably practicable and the sort of authoritative discussion of that is the one that took place in 1959 in the *Union Steam Ship v Wenlock* case. That's where President Gresson said that the ordinary meaning of practicable was feasible, able to be accomplished, and he talked about it being satisfied if a witness refused to travel, they were offered expenses, and that practicability would depend on the nature of the suit, the importance of the evidence contained in the statement, financial and other relevant considerations. Then of course we've got the *Hearsay Evidence Report* in 1970 when they consider putting this provision to criminal proceedings as well and they talk about the *Union Steam Ship v Wenlock* having authoritatively canvassed the meaning of reasonable practicability, and then we have *R v M* saying that the underlying considerations remain the same.

What that means is that the applicant for a hearsay – the hearsay applicant is endeavouring to satisfy the Judge that it is not reasonably practicable for a person who is abroad to give their evidence in the particular circumstances of the case. They don't have to show it would be impossible, just that it is not feasible within reasonable parameters, not able to be reasonably accomplished.

What the Crown says about that test is that it is clearly a logistics-centric question. It is addressing the issue of the witness being outside the jurisdiction. It is considering what logical, sorry, what logistical options are there which are available to enable the prospective witness to nevertheless give their evidence in these New Zealand proceedings.

We can see that the appellant's bundle of authorities at page 1150, and that's the 1999 Law Commission report, they talk about it very much in terms of a logistical exercise. They say: "The combined effect of the definitions of 'witness' and 'give evidence' is that a person is only unavailable as a witness if he or she cannot give evidence in any of the ways provided for in the Code, or cannot be cross-examined in a proceeding even in an alternative way, such as by close-circuit television or videolink… Paragraph (b)…" so that's the subsection that we're concerned with today, "…assumes that persons within New Zealand would not be prevented by practicalities from being witnesses. Advancing technology may mean that this will increasingly be the case for overseas residents as well," and that is indeed true. It is now very much a question that considers and addresses the technological advancements. It's no longer looking, as your Honour Justice Williams said, like we were back in the *Union Steam Ship v Wenlock* about whether somebody might want to take two weeks out of their life to go on a boat back to New Zealand, often now we are looking at practical, feasible, technological solutions to enable somebody in another jurisdiction to give evidence here in New Zealand.

MILLER J:

So how do you explain the *Zespri* case against the standard that you're putting to us?

MS HOSKIN:

I like the approach that the Court of Appeal in this case took saying that the context of that case is so far removed that it's not of any practical use here, because I accept that there are difficulties with the *Gao v Zespri* case. I do want to come to that if I may, your Honour, a little later in my submissions because I want to take you through the principles that I say that apply when you're

considering whether it is reasonably practicable and then to explain why I think that case should not be taken to suggest that an unwilling witness can, as a result of that unwillingness, be regarded as unavailable in law.

KÓS J:

Although it probably would meet your not feasible within reasonable parameters test given –

MS HOSKIN:

Yes, it may well, your Honour. I think the difficulty with it is the way the – we're probably going to end up discussing it now anyway, but I think the difficulty with that decision is the way the unavailability argument was framed in the High Court and it was that the question was posed, is Mr Shu unwilling and therefore unavailable. And then of course, it's taken on appeal but no one has ever challenged unwillingness as equating with unavailability. Much of the appeal and the Court of Appeal focused on whether Mr Shu's comments about not being willing to participate had in fact been made, had appropriately been understood, and the argument was not heard before the Court that just because a witness expresses themself to be unwilling doesn't answer the question of whether they're unavailable.

Now, it may well have been in that case and the factual circumstances the applicant may have been able to show the various ways in which a witness in China could not have been able to give evidence in the proceedings, but on the face of the judgment itself, I accept it's problematic to the Crown approach because it can be relied on from its wording, as indeed, the appellant has, to suggest that it is authority for the broader proposition that an unwilling witness is an unavailable witness, and the Crown simply does not accept that that is the case.

When we are considering what is reasonably practicable for the purposes of section 16(2)(b), we're asking – that reasonable practicability is tied to the logistical solutions. So it's, what might it be reasonable to expect of the witness? So we've got various cases in the Crown bundle at tab 1, the case of

Clout v New Zealand Police [2013] NZHC 1364 there provides quite a useful demonstration of that because there's video link available for a witness in I believe Germany to give evidence, but it would require that witness to travel quite some distance to stay overnight and incur the costs, and then to give evidence by video link in the middle of their night. And that was considered not to be reasonably practicable in terms of the evidence that he was to give and the Crown suggests that that shows a perfectly good example of a court assessing the logistical, feasible option that has been put forward to enable the witness who's overseas to meaningfully participating in the proceedings as a witness, but what is being asked of that witness is not reasonably practicable in the circumstances.

That takes into account all sorts of factors particular to the witness, so another useful case which is at tab 4 of the Crown bundle, is the *R v Bath* 2010 BCSC 307 decision, and what's interesting about that decision is the witness was a schoolteacher and he didn't want to give evidence during school time, and that was a perfectly reasonable request and the Court suggested that the applicant hadn't done enough to investigate whether or not that witness could indeed give evidence during school holidays or outside of school time. But the Court is clearly showing that they're taking into account that witness' circumstances and what it might be reasonably practicable to ask of them.

The fact that it is a logistical, focused exercise can be seen in cases such as *R v C* [2006] EWCA Crim 197 which is at tab 9 of the Crown bundle where the Court says, and this is the UK Court of Appeal, says: "We accept the submission…that the expression 'reasonably practicable' of the [Criminal Justice Act 2003 (UK)] must in this case be judged on the basis of the steps taken, or not taken, by the party seeking to secure the attendance of the witness." And that's very similar to in our decision, the New Zealand decision of *R v M*, where the Court sort of uses the shorthand of what measures were taken and could have been taken to obtain the evidence.

So the Court considers that – there, it's when the Court is asking what feasible options could have been put in place to enable this witness to give evidence, it

is there that there might be some difference in the application of the same test where an applicant is the defence rather than the Crown. And that is purely a recognition of the pretty uncontroversial position, I suggest, that there are different measures that might be available to the Crown that might not be available to the defence. So there are different things that in some instances, the Crown might be able to avail itself of in trying to make arrangements for a foreign witness to give evidence.

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An obvious example of that is the Mutual Assistance in Criminal Matters Act which sets up state-to-state assistance. It's obvious that in New Zealand it would be easier for the Crown to employ assistance perhaps from foreign law enforcement to perhaps go and speak to a witness and try and encourage their participation, to make arrangements at places like a police station to enable evidence to be given, all those sorts of things.

But what that doesn't do is make it a different test for the Crown as against the defence and I just want to make that very, very clear. The Crown position – I think my learned friend in the opening of his submissions accepted that it was one test for both parties but then latterly in his submissions seemed to suggest that if it was a defence the Court might approach it differently, so I just want to be very clear that it is – that the statutory language is party neutral, and that is pretty significant in the Evidence Act where there are other provisions which clearly set out where a different standard might be expected of the prosecution and the defence. Not only that but it was explicitly the legislation's intention to have one standard for both the prosecution and the defence and we can see that as far back as 1970 in the *Hearsay Evidence Report* (revised) [1970] NZTGLR Com 2 which is at the Crown bundle at page 228 where the Law Commission referred to their observance of certain principles and that included at paragraph 7(ii): "In general it is undesirable in criminal cases to have one evidentiary rule for the prosecution and a different rule for the defence," and the only caveat that they added to that was recognition that there was a vital provision that should be contained which is the equivalent of section 8 which is recognition of all, every – it basically takes the form as section 8 of our

Evidence Act, but other than that, as far back as 1970 when discussing hearsay, what was being proposed was one rule for both parties. We can see that, having looked at the rationale for the hearsay regime, there's really no reason why it should be different because the hearsay regime is designed to protect against those inherent dangers in admitting evidence without a statement maker being able to be challenged.

WILLIAMS J:

Well, there was no BORA in 1970.

MS HOSKIN:

No, there was no BORA, your Honour, indeed.

WILLIAMS J:

What difference does that make?

MS HOSKIN:

In terms of the direct application of BORA to section 16(2)(b). I don't want to cross onto Ms Thomson's part. She's going to be dealing directly with that, so that's my easy get-out, your Honour. But I would also say that it's a bit of a dangerous argument to suggest that if we approach legislation in the way that it's drafted and read into it a different test for the Crown and the defence in respect of this subsection, where does that stop, in the sense there's no wording that permits it in section 16(2)(b), so then why don't we do it for mentally unfit, for physically unfit, for unfit by virtue of age, and if we're doing that why don't we do it for reliability as well and before you know it we have two different hearsay regimes. We have –

WILLIAMS J:

Well, there may or may not be two different tests or it may be simply that the mix of ingredients vary although the recipe is the same, and that's probably a contradiction in terms but you get the vibe, because, of course, BORA does say you read of all of these statutes so as to be consistent with the rights protected, and the Evidence Act is a core statute in that regard, so we can't dodge BORA.

MS HOSKIN:

No, we certainly don't need to dodge BORA, your Honour.

WILLIAMS J:

Right, so how do we deal with the defendant-centred rights in BORA when assessing sections 16 and 18?

MS HOSKIN:

And this is where –

WILLIAMS J:

Right, okay. Ms Thomson, you're pre-warned.

MS HOSKIN:

At the risk of looking like I'm playing dodgeball, your Honour –

WILLIAMS J:

Fair enough.

MS HOKSIN:

– this is very squarely within my learned friend's remit.

WILLIAMS J:

Yes.

KÓS J:

But presumably, for instance, reasonable feasibility, which is your touchstone, might be different as between defence and prosecution. The prosecution has very large coffers to fly people into New Zealand, defence does not.

MS HOKSIN:

Absolutely, your Honour. That's one of the factors where you do take into account, and as I was saying before, there are – it doesn't change the test but it changes the way the test might bite because the Crown, we would accept, have different resources and so on occasions that would permit the Crown to

suggest a different mechanism by which the witness gives evidence, but it doesn't, BORA doesn't, well, enable a defendant to approach the test. You don't look at the test of whether a witness is unavailable and say, well, because it's a defence application, kind of available/kind of unavailable, but this test permits us to regard him as unavailable because it's a defence witness and –

WILLIAMS J:

You do have the difference of getting beyond reasonable doubt and raising a reasonable doubt, and I might've thought that that might affect how far one party ought to go given the burden on each of them in terms of the evidence that they might want to call or not be able to call and whether they should be allowed to not call, don't you think?

MS HOSKIN:

Well, yes, your Honour, but we're still dealing with a standard that you're still having to prove that it is not reasonably feasible, not able to be accomplished within reasonable parameters. Now, those parameters might be different in terms of what a defendant can offer or can arrange to get a defence witness to give evidence, but the test itself doesn't change. I'm not sure if that – I think perhaps, if we can, I will pause this and allow my friend to pick it up so that I'm not seeking to cut across what she has spent far more time preparing for than I.

GLAZEBROOK J:

I don't think your friends are arguing there's a different test anyway, they said that explicitly, and I know, I understand what you say about there was possibly a sliding on that at the end, but that's their official position. What you do need to do is to deal more clearly with unwilling –

MS HOKSIN:

Absolutely, and –

GLAZEBROOK J:

– and willing in terms of best endeavours to get them to give evidence in a context where they are not practically compellable.

MS HOSKIN:

Absolutely.

GLAZEBROOK J:

They might be legally – well, they're not really even legally compellable. In fact, if they are not, if they can't be made to give evidence because they're overseas.

MS HOKSIN:

Well I wouldn't accept that, your Honour. I would accept that whilst they're not factually compellable because they're overseas, that doesn't make them not legally compellable.

GLAZEBROOK J:

No, I understand that, but –

MS HOKSIN:

Yes, okay. Yes, so the two factors I want to come to consider now and to address in some detail are the dual propositions that you can't answer the unavailability question by considering first of all can you make a witness give evidence, so are they factually compellable? That is not the way you answer the test, and the second one is you don't answer it by asking is the witness willing to give evidence?

So dealing with the first of those, which is factual compellability, and that – I take your Honour Justice Glazebrook's point that you, I think, agree that just when someone is not factually compellable, it doesn't make them legally non-compellable, and that's –

GLAZEBROOK J:

Well, yes, to a degree, although because there is no legal means to compel them when they're offshore, it's different from saying it's just factual non-compellability, isn't it?

MS HOKSIN:

No. No, it's not your Honour, because the legal –

GLAZEBROOK J:

All right, that's terminology, so just tell me why that's not a factor?

MS HOSKIN:

Okay. Well I'm going to start with legal non-compellability is dealt with under section 16(2)(e), and the Crown position is that relates to those categories in section 72 through section 76 when a witness is not legally compellable in New Zealand. The Evidence Act itself clearly contemplates that witnesses can give evidence from overseas. We can see that in, I think it's section 105 which provides for different ways that in evidence that a witness can give evidence and it talks about it including places from outside of New Zealand, and we can see from the actual wording of section 16(2)(b) that it is not answered, unavailability is not answered by questioning whether a witness is factually compellable, because if it was then we don't need the second part of the sentence. A witness would be unavailable if they're outside New Zealand because a witness outside of New Zealand is not factually compellable in proceedings here. We can't make a witness outside of New Zealand give evidence.

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But the section isn't drafted that way. It says "is outside New Zealand and it is not reasonably practicable for him or her to be a witness". So it is a dual requirement.

GLAZEBROOK J:

Well, it would never be the fact that there you can have a hearsay statement because they're outside of New Zealand and not factually compellable. If the witness is willing to give evidence, they give evidence, and you would not admit the hearsay. So I don't see that it follows just because you have a second part of the sentence that it means that the argument that factual non-compellability is at least a factor to be considered.

MS HOSKIN:

Okay, so moving to consider unwilling witness and then perhaps that will assist me in making the point. It is not enough, in the Crown's submission, to ask whether the witness wants to co-operate. That would be – we would effectively be accepting that the test is, it's not reasonably practicable for a witness who is abroad to give evidence if they don't want to. That's effectively what that argument is. That if a witness is –

GLAZEBROOK J:

Well, I don't think that's what your friend is saying. What they're actually saying is that if you have made every effort that you possibly can, in a context of not being able to compel the witness, then that should be enough.

MS HOSKIN:

And I say, the Crown says it's not enough. Now, the reasons it's not enough are first and foremost, because if that was the intention, then that's what the statute would say. Now, I appreciate that's not a terribly helpful answer, but I'm going to try and back that up by showing why the legislation is drafted the way it is, and that specific consideration has been given to whether an unwilling witness should be an unavailable witness for the purposes of the Evidence Act and the decision has been made that it's not. And that doesn't change, in my submission, whether a witness is in New Zealand or is abroad.

So in 1991, when we were initially – when the Law Commission were initially considering categories of unavailability, and I'm referring here to the Crown bundle at page 324, they proposed an expanded definition of unavailability, and a specific provision that they put in there which did not find its way into the Evidence Act, is the provision that a witness "cannot, after all reasonable steps to compel have been taken, be compelled to attend". So that is the kind of scenario we're talking about. We're not talking about legal compulsion, we're talking about factual compulsion. So that's at page 324.

KÓS J:

It's subsection (e), is it?

MS HOSKIN:

Yes, it is. So where reasonable effort, all reasonable efforts have been taken to compel attendance but they've been unsuccessful. That did not find favour, and by 1999, we have at page 340 of the Crown bundle, the conscious decision being made not to extend the concept of unavailability to a witness who "simply refuses to testify and be subjected to cross-examination. The Commission accepts that such an extension to the grounds of unavailability would tend to encourage witnesses to opt out of testifying for any reason at all" –

KÓS J:

Just tie your hand for a second. We're just waiting for that to come up. What page?

MS HOSKIN:

That's paragraph 59 page 340. Perhaps I have the wrong citation written down which is…

KÓS J:

That looked like the right citation.

WILLIAMS J:

Except for the "physical present in court".

GLAZEBROOK J:

Well, paragraph 59 is talking about people who are present in court.

MS HOSKIN:

Paragraph 59. That's it, yes. It is there. "The practitioners who attended the consultative seminar series were uneasy about admitting the hearsay statements of someone physically present in court who simply refuses to testify and be subjected to cross-examination. The Commission accepts that such an extension to the grounds of unavailability would tend to encourage witnesses to opt out of testifying for any reason at all, which is clearly undesirable."

Then we have the Courts taking a similar approach that an unwilling witness is not enough. We have that in *R v Manase*, tab 30 of the appellant's bundle at paragraph 30 which is at page 601 and it says there: "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."

So a consistent theme that both the Law Commission and then the Courts are considering, whether "unavailability" should be expanded to consider an unwilling witness.

KÓS J:

That's interesting it uses the word "accused" which makes the point we were making earlier to Mr McKillop that it's the Crown that would reap the primary benefit of the argument the defence is making in this case.

MS HOSKIN:

Absolutely, your Honour. I mean there is some not inconsiderable irony about me as the Crown witness making the submissions to you that I am that we should be very cautious to expand the concept of unavailability when it is the Crown who routinely has unco-operative, unwilling witnesses, and we wear that on a daily basis in trials. It's – I think the submission was made by my learned friend the appellant advocates for an approach whereby the whims of a prospective witness should not be visited on the applicant. Well, that is something that is visited on the Crown routinely, but nevertheless…

GLAZEBROOK J:

But only in their submission in the context of witnesses who are overseas and are non-compellable so you can't get them along to court.

MS HOSKIN:

Yes, absolutely, your Honour, and I'm coming to that if you will just bear with me. What I'm seeking to do here is to show you that the Law Commission and the Courts have considered whether unwilling witnesses should conceptually be regarded as unavailable witnesses and have considered it unsatisfactory, and then I want to talk to you about whether there's any basis for a distinction because a witness is in New Zealand or is abroad. So just before I leave the situation, we have *R v MT* CA269/02, 4 November 2002 which is the Crown bundle tab 8 and –

GLAZEBROOK J:

I suppose the other point is the case you just took us to didn't say they would never be considered unavailable, seldom if ever, but "seldom" suggests there is a window there in relation to an unco-operative witness.

MS HOSKIN:

I suppose, your Honour, you could read it that way but I would say all of the policy reason behind not seeking to discourage a witness to opt out for no reason at all would point against us reading into the provision that some unwilling witnesses would be unavailable.

WILLIAMS J:

It's just a never-say-never, isn't it, because these assessments are so factually –

MS HOSKIN:

Never-say-never. They are so factual, yes.

I just want to quote quickly from *R v MT* –

GLAZEBROOK J:

I suppose my problem is that you're putting an absolute position with no never-say-never and the cases that we were referred to by your friend suggest that it is a factual query.

MS HOSKIN:

It is a factual query, I absolutely accept that these queries –

GLAZEBROOK J:

Well, you say a factual query that can only go to actual physical, if that's the right word, feasibility.

MS HOSKIN:

If you have established feasibility, so you have failed to establish it's not reasonably practicable for a witness not to give evidence, you cannot trump that by saying, look, we've got the – which is exactly what this case provides a really good example of. You've got the logistical arrangements in place which are accessible, they're convenient, they're easy to be accessed, they're causing no logistical inconvenience to anyone. You cannot trump that by saying: "But I don't want to be a witness." That does not render an otherwise available, demonstrably available witness, unavailable.

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The *R v MT* quote, which I will just press on with, says at page 143 of the Crown bundle: "… a principled approach to a residual category of exception to the hearsay rule requires a qualifying criterion of need to resort to hearsay evidence rather than one of mere convenience. We note…that the Law Commission is concerned that to extend the concept of unavailability to cover those who refuse to give evidence would tend to encourage witnesses to opt out of testifying… Without such a limiting criterion as that of inability there is a risk of what Lord Steyn has recently termed 'an excessive inroad into the right of a fair trial.'"

I then also just want to, before I move to the matter of principle why it should be no different for an overseas witness than for a New Zealand witness, I just want to briefly point that the two cases my learned friend relied on, *R v M* and *Crilly*, I think this is a point that your Honour Justice France made in any event, both act to show that the fact that a witness is unwilling does not end the enquiry, that both those witnesses, or those witnesses in those cases made it very clear

that they didn't want to co-operate and that the Courts in both cases did not accept that that answered the question about whether or not it was reasonably practicable for them to attend.

As a matter of principle, the Crown submission is that there's no reason why it should be sufficient for a witness who is abroad being unwilling, why that should qualify for unavailability when it doesn't in New Zealand, because the equivalent really of the situation we're discussing is a witness who's overseas and has a mechanism by which they can give evidence and yet refuses to avail themselves of it. That is the practical equivalent in New Zealand of a witness who can be brought to court and yet who refuses to be sworn and be a witness. There is no route, in the Crown submission, by which that witness' evidence can be admitted as hearsay evidence.

There have been suggestions made in the past that if a witness came and was brought to court under warrant and refused to give evidence, perhaps that could make them legally non-compellable so that they come within that subsection (e) of section 16. The Crown does not support that argument. We say that compellability in terms of section 16(2)(e) is clearly referring to compellability as set out in the Evidence Act, and section 165 which is the route, that's section 165 of the Criminal Procedure Act 2011, which is the route that has been suggested in some cases, *Awatere v R* [2018] NZHC 883 which appears in the appellant's bundle is one of them, that where a witness refuses to give evidence and suggests that they have just cause for not giving evidence, that that may make them non-compellable in law. But in fact the Crown says that section 165 speaks only to whether it is appropriate for sanctions to be placed upon that witness. It doesn't speak to whether their evidence is then non-compellable, and it would be sort of perverse if it was anything other because you have a witness intentionally refusing to co-operate with the court processes and that enabling their evidence to be admitted before the fact finder without any sort of challenge.

KÓS J:

I mean that's often because they're under duress though.

MS HOSKIN:

Yes, your Honour, but that still – unless they enter the witness box and become a witness, and then their statement can be cross-examined in, the fact that they're under duress and they turn up and refuse to give evidence doesn't give them a route to have their statement admitted as hearsay evidence, and the Crown cannot see any reason why it should be different for a witness who's abroad than it is in New Zealand. Being unwilling in New Zealand, refusing to co-operate in New Zealand, does not enable your evidence to be admitted as hearsay.

MILLER J:

When we, when I asked your opponent about this earlier I was puzzled about the incentives that this would create and if you said to a witness, such as the witness here, I'm taking a statement from you, if you're unwilling to give evidence orally, you won't have to.

MS HOSKIN:

Absolutely.

MILLER J:

And I got the answer, well, you wouldn't have made all practicable efforts then, but it seems to me that's directed to a different question really, whether you've actually offered them the technology to do it.

MS HOSKIN:

Absolutely, I would accept that. The efforts are speaking to what mechanisms you have sought to avail of the witness to enable them to give evidence but it just cannot be right that you can give a witness who, for whatever reason, wishes to avoid giving their evidence in person, and there can be all sorts of reasons – I mean we see it on a daily basis, witnesses not wanting to give evidence because it's an interfamilial context, people who are simply afraid of coming and giving evidence, people who don't feel that they want to be judged giving evidence, who don't feel sufficiently eloquent, who feel – who have work commitments and don't want to come, all sorts of reasons that witnesses are

reluctant to come and give evidence. To enable that reluctance when expressed as: “Oh, well, I’m not going to co-operate, I’m not willing,” to make them unavailable in law, I mean it’s pushing the door wide open for hearsay and it is expressly what the legislation has considered. We haven’t ended up with section 16(2) by accident, nor section 18. We can see, following it through, that hearsay evidence has been much debated, it’s been the subject of loads of Law Commission reports, of academic studies. All of the Commission reports talk about the number of hours they’ve spent considering the proposals, the various input they’ve had from external, from overseas, from academics, and this is where we’ve ended up, and along the way we can see that proper consideration has been given to whether an unwilling witness should be considered an unavailable witness and the decision has been that it’s not.

Also, I think, as I stand here, what I think is quite interesting about that 1991 additional definition of “unavailability” that didn’t actually make it into the Act, that the whether all reasonable efforts to compel a witness have been made but have been unsuccessful, the fact that that was even drafted as a possibility clearly acknowledges that that’s a situation that was not considered as falling under any of the other already existing provisions. So in my submission it makes it quite clear that what we’re dealing with, the other scenarios all stand alone. We’re dealing here with reasonable practicability in terms of whether it is feasibly, logistically, demonstrably available for that witness to give evidence and that is not answered by saying: “Well, do you want to?” which is effectively what we end up with if we accept the appellant’s argument.

GLAZEBROOK J:

The 1991 is almost like (d), isn’t it, ie, you haven’t found them?

MS HOSKIN:

No, I think (d) –

GLAZEBROOK J:

So it has made its way in in a slightly different form. I don’t have it up so…

MS HOSKIN:

I've just asked my learned friend to bring it up. It's not – the efforts are about compelling the witness, not locating the witness. So it's page 324 of the Crown bundle.

GLAZEBROOK J:

Well, I don't know how – I mean one assumes you would be able to compel them if you knew where they were.

MS HOSKIN:

Well, I see we can see (d) exists in its form above it: "Cannot with reasonable diligence be identified or found." (e) is contemplated to cover other scenarios where you know where the witness is, you know who the witness is, they're fit and yet nevertheless you can't make them give evidence, so they are to all intents and purposes factually not compellable, and it's specifically this, that in the 1999 report they reference back and say the 1992 report was considering broadening the concept of unavailability, so that can only be referring to this section, this proposal, and broadening it to include witnesses who were unwilling. We think that goes too far.

MILLER J:

I understand that in its current review of the Evidence Act the Commission is proposing to allow the admission of out-of-court statements from witnesses who are too fearful to give evidence in Court.

MS HOSKIN:

So in terms of the UK similar provision?

MILLER J:

Mmm.

MS HOSKIN:

So even that's interesting, your Honour, because that does extend a concept but done by Parliament, so we have a statutory provision which arguably is

extending it to "unwillingness" but it's being very careful about what that unwillingness – it's not blanket unwillingness.

MILLER J:

No.

1250

MS HOSKIN:

It's unwillingness where it is motivated by fear. So even those sort of additional legislative steps which our country has not yet taken would still not push it as open and as wide as my learned friend suggests it should be pushed.

What is also interesting about that *R v MT* case which I referred to before, it specifically says that if there is to be further inroad, and it talks about there being the real problem prosecuting domestic violence, so acknowledging the fact that it's normally the Crown who stands in my learned friend's shoes seeking to have this evidence admitted, then that is a matter for legislative intervention rather than common law development, and, of course, that case was three years before the enactment of the Evidence Act and what we don't see in section 16 is any provision for an unavailable witness because they are unco-operative or unwilling.

R v MT is also I think directly on point for what we were talking about before about a New Zealand – sorry, *R v M*, I think – the New Zealand witness there who was the domestic violence complainant who decided that she would be too emotionally fraught to give evidence against her partner, she actually was given just excuse. The Court found that she had just excuse for not giving evidence and the Court, after doing that, then considered whether her depositions evidence could be read in and admitted as hearsay and said it could and that's what was overturned on appeal. So we can quite clearly see that even then where a witness had just excuse not to give evidence didn't guarantee that the evidence then comes in as an exception to the hearsay rule.

The Crown says that unwillingness is really only relevant to this exercise where the unwillingness relates to the logistical measures in place, so it's like the example given of that *Clout* decision that yes, there is a German witness who could travel some distance and give evidence at night but is not really that thrilled by that option and that's considered a justifiable reason.

WILLIAMS J:
Partly by reference to the –

MS HOSKIN:
So it's not unwillingness per se. It's not I don't want to be a witness. It's the logistical options that are proposed for me to give evidence are inconvenient for this good reason.

WILLIAMS J:
Also in the context of non-serious charges.

MS HOSKIN:
Yes, absolutely, your Honour.

WILLIAMS J:
You agree there's a broad contextual analysis?

MS HOSKIN:
We do agree there's a contextual analysis and it takes account of those factors, yes.

I think the only case, and I've probably already addressed this as far as I'm able to do so, the only authority that my learned friend could point to to say that it's judicial authority for the concept of an unwilling witness being as of right an unavailable witness is *Gao v Zespri* and in my submission it's the way the case was argued, principally in the lower Court and then the points that were taken on appeal, that led to the question of unavailability being framed as whether Mr Shu was not willing to voluntarily give evidence, and in the Crown's

submission that case simply shouldn't be taken to be proposition or authority for the fact that an unwilling witness is unavailable in terms of section 16(2)(b), and again we can explain all of the criterion for unavailability in terms of that need to give evidence and it simply doesn't work when you substitute "unwilling". You know if someone's dead they cannot give evidence. They're unfit so they cannot give evidence. They're unable to be found, unidentifiable, cannot give evidence. Unwilling can give evidence but would prefer not to and that's simply not enough.

I think this is just stating the obvious but just before I pass on to my learned friend there's a real risk of a floodgates-type argument here because if we do read in to this provision and either permit a lesser threshold for one side than the other, reading down the necessity requirement depending on who is doing the asking or suggesting that being unwilling is sufficient, then we really are kicking open the door to this hearsay exception and I suggest that we will end up admitting an awful lot of evidence as hearsay because we will have a lot more unavailable witnesses, and I make that submission in full knowledge that it is a submission that cuts against the Crown far more often than it will cut against the defence but it is the only way to read that provision of the Evidence Act as informed by its text, its history and the rationale of the hearsay regime, in my submission.

Now unless the Court have questions for me I will hand over to Ms Thomson.

MILLER J:

I do. We were taken earlier to a passage from I think it was Spencer saying the question in English law is not whether it's physically possible to transport the witness to England but whether he can be persuaded to come voluntarily, and I wondered is there something in the English legislation that explains that approach or are we only talking about physical compulsion to attend?

MS HOSKIN:

No, I think that's rather akin to the *Union Steam Ship v Wenlock* decision. So what we're dealing with there is the way that had been proposed for that

witness to give evidence and whether a witness is willing to avail themself of the obvious inconvenience and other consequences when they're required to travel to another country and that's all I would say it is. I wouldn't suggest that that can be read as anything more or suggesting that in the UK being unwilling is sufficient and indeed I think we can see that, your Honour, because of the provision that we were earlier discussing that you've got –

MILLER J:

All right, yes, I see the authorities cited for it go back to 1994.

MS HOSKIN:

I will now stand to one side. Thank you.

GLAZEBROOK J:

Can we just pause a moment? How long do you think you're going to be?

MS THOMSON:

Less and less time, your Honour. I shan't take you to any materials. I think I have five, six points that I want to make about the Bill of Rights Act and perhaps we can leave –

GLAZEBROOK J:

The question was how long?

MS THOMSON:

Well, I would love to have a discussion about how the Bill of Rights Act applies here. I can probably take it down – I mean, we have four minutes exactly.

GLAZEBROOK J:

What I really can't understand is why – this has always been set down as half a day. When it is set down as half a day counsel are supposed to trim their submissions to fit within that.

MS THOMSON:

I shall speak for three minutes, your Honour.

GLAZEBROOK J:
We'll perhaps adjourn for five minutes and discuss it.

COURT ADJOURNS: 12.58 PM

COURT RESUMES: 2.03 PM

GLAZEBROOK J:
Ms Thomson.

MS THOMSON:
May it please the Court.

GLAZEBROOK J:
And you can have more than three minutes, obviously.

MS THOMSON:
Much obliged, your Honour, but I shan't be the full 45 by any means, I hope.

My learned senior has explained that the test under sections 16 and 17 of the Evidence Act does not currently admit any difference in threshold depending on whether the Crown or defence is making the application and as we've discussed, although my learned friends began making that same statement, there was some discussion further on in their submissions that perhaps the importance of the evidence to the defence could be taken into account in some manner, and if that is the submission, that the Bill of Rights Act requires that interpretation, then the Crown rejects it. To use this recipe analogy, it's the same recipe with the same ingredients for the Crown and defence. We just recognise that the Crown can go to Moore Wilson's and get the good olive oil.

I have three main points to make in support of that. The first is that there's absolutely no inconsistency between section 25 of the Bill of Rights Act and the hearsay regime or indeed any of the evidence rules provided in the Evidence Act. The second is there's no pressing need to address some

mischief that's been done here because we have no case law suggesting there is in New Zealand, and, third, if we get down to it the interpretation of the statute which is being suggested is not one which is reasonably available on the text of the statute in light of its intention in context.

Turning then to the first, I thought I might bring up section 25 of the Bill of Rights Act since that's what we're talking about and it provides the right for anyone charged with an offence to a fair hearing, to be presumed innocent until proved guilty according to law, to be present at trial and present a defence, and the right to examine witnesses for the prosecution and obtain attendance and examination of witnesses for the defence under the same conditions as the prosecution.

So it does not create an extra right of defence to admit evidence which might advantage them. It provides for the defence to have the same rights under the rules of evidence that the Crown does, and that makes sense because the five dangers of hearsay evidence which my learned senior began with apply equally whether it's defence or Crown evidence hearsay statements being sought to be admitted. The policy of the hearsay regime applies no matter which party is seeking to adduce hearsay evidence.

KÓS J:

It does but the dangers are greater when the evidence is admitted without cross-examination against the defence.

MS THOMSON:

The dangers of an unfair – of evidence which might mislead the fact-finder.

KÓS J:

Yes.

MS THOMSON:

Yes.

KÓS J:

Yes, consequences are graver.

MS THOMSON:

Because it's worse to convict an innocent person than –

KÓS J:

Correct.

GLAZEBROOK J:

Although that would be taken into account in terms of whether you do admit it or not.

MS THOMSON:

Yes.

GLAZEBROOK J:

So it can be admissible, but not admitted, because it will still be relevant whether you can cross-examine on it and whether it would be unfair if you can't cross-examine on it.

MS THOMSON:

Under section 8 to exclude it, under section 16 through 18 perhaps on its reliability but not in terms of the availability of the witness.

My learned friends have distanced themselves from the section 17 direct route to admissibility and this Court in *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 obviously held that the admissibility rules which limit proposed defence evidence are not inconsistent with the right to a fair trial. The Bill of Rights Act does not in itself provide an extra power to admit evidence, and when thinking about the way in which procedural rules affect different parties to a criminal proceeding the Canadian Supreme Court in *Martin* – this is not *Martin*, this is marked *R v Rose* [1998] 3 SCR 262 – when thinking about the Crown's right to address the jury last, which to us in New Zealand seems a very strange right to

grant, end of that paragraph on the left-hand side, the Supreme Court held that if they were granting the accused an additional advantage, which is how they saw the right to address the jury last, that would "not equate to remedying an unfairness in the legislation". The existing provisions are fair; they may just not be the most desirable, and the accused is not entitled to the most favourable procedures that could possibly be imagined. So because we can imagine a situation where the hearsay rules do apply differently doesn't mean that it's unfair not to apply them differently. There's obviously a distant end to that. We're not in a situation of the early rape shield legislation in Canada and the UK which in *R v Seaboyer* [1991] 2 SCR 577 and *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 record legislative overkill and provided no discretion to admit obviously relevant and otherwise admissible defence evidence. That's not the extreme case that we hear now. We're still in the flexible term of the right to a fair trial. It is true that it's a limitable and a special right and one which cannot be limited with any justified limitation but it's a very flexible term. The threshold is very high before a trial will be held to be unfair.

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The appellant's bundle at page 547 has the case of *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 which explains how the departure from good practice must be so gross, so persistent, so prejudicial, so irremediable, that a trial outcome must be quashed.

But what will count as reaching that high standard differs from country to country. The lines of a fair trial are not themselves set by the term "right to a fair trial". For example, in the UK there are obvious inroads against the right to silence which we would not adhere to. The Canadian example of giving the Crown the right to address the jury last for them does not infringe the right to a fair trial but for us perhaps could, and in *Al-Khawaja and Tahery v United Kingdom* [2011] ECHR 2127 the European Court of Human Rights looked at its task as being that the concern when thinking about fair trial rights for it is to evaluate the overall fairness of the criminal proceedings, having regard to the rights of defence and the interests of the public, and the admissibility of evidence is a matter for regulation by national and the national courts. So in

Europe it is well recognised that the rules of evidence might be different from country to country and a fair trial can encompass them all.

So in the Crown's submission there's no obvious inconsistency between a party-neutral test for the admission of hearsay or any other part of the Evidence Act which provides a party-neutral test and the right to a fair trial.

My second point is that there is no pressing need to make that change in interpretation which this would represent. We've had the Bill of Rights Act in place for 15 years before the Evidence Act came into force, another 20 years almost since it came into force, and there's no flood of cases before the Court which suggests there's a pressing need for this defence evidence exception to ordinary rule and this case is certainly not one which calls for that exception to be created as I'll go on to discuss when applying the facts to this case.

I also note that the overseas case law and textbooks referred to by the appellants concern statements which would be admissible under our Evidence Act. For example, in *Chambers v Mississippi* 410 US 284 (1973) a third party had made a written confession to the killing and then repudiated it both in writing and in – but then they'd also made oral confessions to other third parties. The defendant actually called that third party. He was a witness at the trial. In New Zealand his out-of-court statements would have been admissible in themselves but because of the very strict rules that they had in Mississippi they were out-of-court testimony and the defendant was not even able to cross-examine the witness, the third party who had confessed, on the basis of the confessions that he had made to other people.

Similarly, in the textbooks provided, Winkelried, in 1990, seems to be page –

KÓS J:

Where are you in your submissions?

MS THOMSON:

Well, I've departed from my submissions quite substantially, your Honour.

KÓS J:

Yes, so it would be useful therefore to have citations for these authorities.

MS THOMSON:

Reasonably fair.

KÓS J:

Yes.

MS THOMSON:

Chambers v Mississippi is in my learned friend's bundle. I've briefly missed it but it is in there. Then the Winkelried article at this page here, 110, talking about the exception in American law for crucial hearsay, talks about *Chambers* and this New York case where again the cousin and alleged victim had given evidence and so his confession to a third party would not have been hearsay in New Zealand rules but an exception was required in America for this crucial defence evidence.

So that's page 1100, and 1194 is the Canadian text that my learned friends provided citing *R v Finta* [1992] O.J. No. 823, 14 C.R. (4th) 1 (Ont. C.A.) and *R v Folland* [1999] O.J. No. 143, 132 C.C.C. (3d) 14 (Ont. C.A.) for an exclusionary discretion which would attach differently to a defence or Crown application.

Finta was a case about a person who had given depositions in a Hungarian Court and then died. His evidence would likely have been admitted in New Zealand because he was deceased and it was in, reliable in the circumstances. In *Folland* a confession had again been made by another man but there was no rule that the defence could require the Crown to call that man and so admitting his out-of-court statement through hearsay was necessary because he refused to come, it seems.

So again, there's no need for a change of New Zealand's practice to account for the intricacies of overseas evidence law which doesn't result in the same common sense outcomes that our Evidence Act does.

My third point was that if a differential test is to be seriously entertained it's not meaning that is tenable or reasonably capable of being given to or viable or reasonably available on the text of section 16(2)(b) and section 18.

GLAZEBROOK J:
Why can't "practicable" just mean "in practice"?

MS THOMSON:
In effect that is almost what the Crown says it means, your Honour, yes.

GLAZEBROOK J:
Well, or you do but you say that only means feasibility, it doesn't mean actual availability or willingness?

MS THOMSON:
For the same reasons that actual availability, sorry, actual willingness doesn't result in a –

GLAZEBROOK J:
But that is contrary to what the cases have said, like *Union Steam Ship*, isn't it, because they say you look at it in the round?

MS THOMSON:
You look at the willingness of the witness to come to New Zealand, to put themselves out to give evidence in the hearing. You don't look at the willingness of the witness to give evidence per se.

GLAZEBROOK J:
Well, what's the difference?

MS THOMSON:

Whether something is reasonably practicable. You start by saying what is practicable, what logistical solution could there be to allow the witness to give evidence. You then look at the personal characteristics of the witness, for example, their age, infirmity, are they able to get on a steam ship and come to New Zealand, do they have a stable internet connection, would they be required to travel in the middle of the night across the country, do they have a visa to leave their country if they need to travel, does the country that they are currently in accept that witnesses can give evidence overseas by video link because some countries say that would be a violation of their sovereignty unless they give permission in advance, in –

GLAZEBROOK J:

And you say that's the only thing those other cases were talking about, because it doesn't seem to me when you read them that is the case?

MS THOMSON:

That's because the cases which, the New Zealand cases which have been cited, weren't dealing in the world where the technological solution reduces –

GLAZEBROOK J:

So you're suggesting there should be change in test then?

MS THOMSON:

No, your Honour, because it's a change that was anticipated by the Law Commission when it drafted what became section 16. They anticipated that the expanding use of video links would reduce the burden on a witness to such, most witnesses, to such a degree that any refusal to participate would be an unreasonable one. It would be reasonably practicable for the witness to give evidence and they would have no reasonable reason not to, the only reason not to being unwillingness which domestically in New Zealand would not be a reason to admit a hearsay statement and so ought not to be overseas either.

Previously the barriers to entry to give evidence in New Zealand, a very distant country, were high, and so someone's willingness to expend the inconvenience and effort or the party's willingness to expend the resources to get them here was a significant barrier. In some cases that will still bite.

We may still have the Amazon jungle example and if Elon Musk's Starlink goes down then it may no longer be reasonably practicable for someone in the jungle to give evidence. But their willingness to participate in the proceeding in the sense of their willingness to stand by the statement that they have made and given to another party, that can't come into it.

1420

WILLIAMS J:

Their willingness to do what, sorry?

MS THOMSON:

Their willingness to – the question is what is it reasonable to expect or demand of a person in these circumstances. If they refuse to give evidence it must be a reasonable refusal because it's not reasonably practicable for them to give evidence, so the logistical solution that you're proposing is not one it's reasonable to expect them to take. Perhaps they have cancer, they're in chemotherapy, they can't join the video link and make any sensible –

WILLIAMS J:

Yes, it's a balancing exercise, is it not?

MS THOMSON:

Yes. But –

WILLIAMS J:

Depending in part on the seriousness of the charges and the significance of the evidence. Has to.

MS THOMSON:

It has to come into it, yes, because if they're giving evidence as a third eye witness to someone standing outside yelling about their cats, as was the case in the disorderly behaviour *Thompson v New Zealand Police* [2012] NZHC 2234, [2013] 1 NZLR 848, it's probably not worth the effort to put them out, but if they are the complainant in a sexual violation case it will almost always, likely always, in fact the Crown has found always been required of them and any refusal to engage will be taken to mean you're not unavailable.

WILLIAMS J:

Right. So I thought you were drawing a distinction between a willingness to assist and I just wondered how practical your distinction was. Perhaps I misheard you.

MS THOMSON:

It's very difficult to – my learned friend and I have agonised for some time about how best to express the difference between being willing to participate in the hearing in the sense of give the evidence according to the statement which you have provided at some point versus the willingness to inconvenience yourself for the sake of giving evidence. Once there's a reasonably practicable solution or a solution logistically that the party is proposing it could then be reasonable or not reasonable for you to take that up, and the willingness in that sense of whether you will engage in the logistics is one question but your willingness to be a witness, your willingness to take the oath and give the evidence which everyone has asked you to give is separate. That can't be taken into account.

WILLIAMS J:

Okay, I can see the point in theory.

MS THOMSON:

I don't think it would greatly assist the Court to go through why the hearsay regime is party neutral and provides a comprehensive rule of evidence in relation to the hearsay provisions, so perhaps I could talk about the application

of section 16 to these facts and extremely briefly about miscarriage and whether this trial was unfair.

So the appellant has agreed that there was nothing else trial counsel could reasonably have done here which is what the Crown says as well. Trial counsel had made it reasonably practicable for this witness to give evidence. That's the end of the question. The witness C had the VMR link. She confirmed that she'd tested it successfully. That's in the appellant's chronology at the end of their submissions. She signed and scanned her witness statement again on the 4th and 6th of July. That's in the additional materials, volume, I believe it's 6, at page 9 through 12. C's mother emailed that signed statement to trial counsel, so the internet in their household was definitely working, and C's mother confirmed that she was at home from where the mother was emailing.

KÓS J:

What were the facts in relation to the first fixture? Was she actually on the video at some point?

MS THOMSON:

No, your Honour. There was one fixture which was adjourned for COVID. There was then one where C's mother rang the Court, gave oral evidence over the telephone, I believe, as to C's mental state which had come to crisis only days previously, so the Judge then adjourned on the basis that medical evidence would be found if that was the ground of unavailability that was being relied upon. The only evidence that was ever provided was the email from C's mother, which is in the additional materials volume at 6, which actually says there was no treating clinician, C was refusing any treatment –

WILLIAMS J:

Yes, but she'd had a treating clinician, had she not?

MS THOMSON:

I don't believe so, your Honour.

WILLIAMS J:

Had I misunderstood?

MS THOMSON:

They had attended the emergency department at her mental health crisis point.

WILLIAMS J:

And was that the first time she had presented?

MS THOMSON:

As I understand it.

WILLIAMS J:

Okay, then I've misunderstood the facts.

MS THOMSON:

So what we have is a second-hand description of her mental health in layperson's terms, nothing on which an objective decision could be made about her ability and fitness to give evidence.

WILLIAMS J:

What do you say, if this is the first mental health episode this woman had had and she refused to see a clinician, what do you say they should've done?

MS THOMSON:

Well if they were seeking to rely upon mental unfitness as a reason that she was not available, the Court does require evidence, as was the main argument in the Court of Appeal but has not been in this case. The problem is it was reasonably practicable for her to give evidence. She was at a location with internet connectivity, she was able to access the court's virtual meeting room link, she was able to comprehend her statement, she had just signed it again, showing that she wasn't in a fugue state or anything like that. She was simply unwilling, for whatever reason, to come out of her room and give the evidence that L was asking her to give.

WILLIAMS J:

If there was a clinical opinion that had said those very same circumstances, this woman is too unwell to give evidence –

MS THOMSON:

Then we'd be having an argument under a different limb, your Honour.

WILLIAMS J:

And what would you say? What would you have said?

MS THOMSON:

It would depend upon the quality of the medical report, your Honour, but certainly witnesses whose mental infirmity have prevented them from giving evidence, that's been accepted as an unavailability ground.

My learned friend also touched on the reliability of the statement, which wasn't discussed I think in either court below and isn't something that we would concede here either. This was a statement made some four and a half years after a conversation with C's cousin, the victim. There was no evidence about how the statement came into being. It wasn't that C reached out to counsel, it appears from Ms Freyer's affidavit, which is in the Supreme Court case on appeal at page 43, that in August in 2019 after the first Court of Appeal decision came out, counsel heard through L's wife, the victim's mother, who had heard through C's mother that C had other information to provide and there was no statement in fact taken until January of 2021. But on the other hand, the statement is signed, it's written in the first person, appears on its face to contain truthful evidence and would meet the section 82 formal statement requirements. So I wouldn't argue too hard against it, but we wouldn't concede it if it were a point.

So the Crown's overall submission then is that section 16(2)(d) was properly applied, the hearsay evidence was inadmissible. Should that not be the case, the Crown says no miscarriage was caused by its admission. It's speculative to think that C's hearsay, which would've been subject to a section 122 warning

and was fairly easily explicable as the product of family pressure or intense family dynamic between the two sets of aunts and uncles, and which had been denied by the complainant, she had said I didn't want to get rid of L, to suggest that that was the key to the defence and could've made a real difference to the outcome of this trial is speculative, in the Crown submission.

WILLIAMS J:
Well so is your response.

MS THOMSON:
That is my response.

WILLIAMS J:
Well it's just family dynamics and side A hates side B, you don't know that. Well you don't know that's the motivation in this case, that's just –

MS THOMSON:
No.

WILLIAMS J:
– you inferring it from –

MS THOMSON:
Yes, but –
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WILLIAMS J:
If what you allege is speculative on the part of the appellant, then you're engaging the same speculation, aren't you?

MS THOMSON:
Yes, your Honour –

WILLIAMS J:

The problem is that there are two available arguments and we can't know which one was true.

MS THOMSON:

No, although the jury wouldn't have known either because they didn't have the benefit of C being cross-examined.

WILLIAMS J:

No, quite.

GLAZEBROOK J:

I'm not sure a jury's quite –

MILLER J:

She became estranged from her mother when she made these complaints, didn't she? That was one of the reasons for not coming forward initially.

MS THOMSON:

That she feared that would happen and that is in fact what happened.

MILLER J:

I imagine that still remains the case, doesn't it?

MS THOMSON:

I believe so, your Honour.

The far more significant non-disclosure in this case was the non-disclosure to the counsellor which had been the point taken in the first appeal when the victim was speaking with a school counsellor about sexual abuse by another family member. She made no mention at all of the sexual abuse by L, and given her non-disclosure to the rest of her family up until the point when she talked to her aunt, one might think that non-disclosure to the authority figure about who one is already speaking about these types of things would've been more influential

than a further example of non-disclosure to another family member, which is all C's statement represents.

MILLER J:

And this is the point, that it wouldn't have had an impact on the jury?

MS THOMSON:

Precisely, your Honour.

WILLIAMS J:

I wonder how realistic that is because if you've got two major opportunities and neither of them are taken, that's better than one major opportunity not taken, if you're thinking about it from the defence point of view. Sometimes cumulative evidence can make a difference.

MS THOMSON:

The victim had also had an opportunity to disclose to the rest of her family for the five years since the abuse began, your Honour, so –

WILLIAMS J:

Yes, and of course the counterintuitive evidence, assuming it was given –

MS THOMSON:

It was given, yes.

WILLIAMS J:

– would have set up a response to that.

MS THOMSON:

Which would've applied equally to her non-disclosure to C.

WILLIAMS J:

Yes, but the more you have, the less stable that is. Particularly where it's dealing with either senior members of the family or officialdom. At least that's the argument and that would be the for jury to decide. I wonder how helpful it

is to put up possible explanations on appeal to answer points that are equally plausible the other way.

MS THOMSON:

Which is why the Crown's primary argument is very much that the hearsay was properly excluded.

WILLIAMS J:

Right.

MS THOMSON:

In terms of my learned friend's submission that this is an unfair trial and one does not turn to look at miscarriage at all, his road map made three points. That it was arbitrary, that C's evidence was excluded to due to the defendant's poor luck which at its most cynical could be a submission that the defendant was unlucky C was still alive because if she had been deceased she would've been unavailable. Trials come down to luck all the time. What evidence is available at the time of trial, what witnesses agree or don't agree to come forward, what evidence has been obtained by police or lost by police or contaminated, often comes down to arbitrary facts.

The Crown closing was not unfair. It would've been different if there were different evidence adduced but that doesn't make it unfair that the Crown closing is what it is, and the right to offer a defence was not undermined. L's defence was properly put to the jury and, for the reasons I've just mentioned, would not have been significantly advanced had the hearsay statement been in. It would be deeply unusual for the exclusion of evidence to result in an unfair trial.

Unless I can assist the Court further.

GLAZEBROOK J:

Thank you, Ms Thomson.

MS THOMSON:

Obliged.

GLAZEBROOK J:

Thank you.

MR MCKILLOP:

May it please the Court, it falls to me to reply since all the reply points are really about the interpretation question rather than the facts of the case.

There was some discussion about the idea that the Crown might benefit from the interpretation that they're putting forward daily and I want to make very clear what my submission is on that front, which is that the Crown, the idea the Crown would benefit from this approach is just not right because our approach firstly only concerns section 16(2)(b) and our approach incorporates a consideration of the rights of a criminal defendant in section 25 into what it's reasonably practicable for the party adducing the evidence to do, and when that party is the Crown, then it's going – then overcoming the right of cross-examination is going to take quite some effort on the part of the Crown. It also – obviously everything we've said preserves the section 8 exclusion right – power. So I don't accept that the –

KÓS J:

I'm not sure I follow that. If the defence and the Crown are each confronted by a witness who is simply unwilling to, overseas, he's unwilling to participate, each do what they can. I mean it's the – at the end of the day, they can't physically frog-march the proposed witness into a hearing room and put a camera on them.

MR MCKILLOP:

No, that's right. They both have the same, that same limitation. The Crown has more resources though than the defence.

KÓS J:

But not to overbear will, and this is about willingness.

MR MCKILLOP:

Yes, and also these powers in the mutual assistance regime. I obviously accept that this has limitations, which is why I'm also referring to the other ways in which unduly prejudicial evidence can be excluded.

GLAZEBROOK J:

So is the point you're making that if the Crown has hearsay, wants to have hearsay evidence from a witness who's overseas who is perhaps the main prosecution witness, unwillingness might allow them, after they've tried very hard, to have that as admissible prima facie, but it would be excluded under section 8 because of the inability to cross-examine?

MR MCKILLOP:

Yes, exactly. I think –

GLAZEBROOK J:

Which might be the case also for a defence witness, mightn't it?

MR MCKILLOP:

Conceivably.

GLAZEBROOK J:

Because inability to cross-examine is still going to be an issue for the Crown.

MR MCKILLOP:

Yes, conceivably.

GLAZEBROOK J:

And may have been an issue here, arguably.

MR MCKILLOP:

Conceivably. I'm obviously making the point that in a criminal trial the rights which are affirmed by the Bill of Rights are the rights of a defendant and so they have a special weight, but I do accept your Honour's point.

The second thing I wanted to reply to was the – and I think your Honour Justice Glazebrook kind of made this point or offered this potential observation which was that section – it was about the 1991 hearsay report, and the point was that section 2(e) of that draft code was essentially subsumed within subsection (d) of not being able to find the witness within the New Zealand. I would also just add to that, that because a witness outside of New Zealand is not compellable, it didn't touch on subsection (b) either.

I'm just going to check with my learned friend. Nothing further from me, thank you.

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WILLIAMS J:

I wonder what you say to the submission about section 25(f) of BORA.

MR MCKILLOP:

The submission –

WILLIAMS J:

Same rules apply to defence as apply to the prosecutor as to the calling and examining of defence witnesses.

MR MCKILLOP:

I don't – the Bill of Rights Act doesn't confer rights on the Crown I suppose is a simple answer to that. It's obviously that when it's talking about comparable ability, part of what it's getting at is the lopsided nature of the resources of the Crown versus the resources of the defence, and obviously Crown advantages are not going to be fair. But the ability to cross-examine on evidence which is critical in a criminal prosecution is a very important right for criminal defendants,

and that's what I say that this gets at for exactly the reasons that Justice Kós was discussing with my learned friend about the importance of avoiding wrongful convictions, so I say that it has that important –

GLAZEBROOK J:

But that would be a section 8 issue, do you accept? I think it was sliding around a bit in respect of that. So it wouldn't be whether the witness was unavailable, the right to cross-examine, it would be whether the hearsay statement should nevertheless be excluded under section 8 because there isn't that ability to cross-examine, or do you say there's something inherent –

MR MCKILLOP:

I say it's in both places because there's a need to require plenty of the Crown duty of that right.

That concludes everything I wanted to say.

GLAZEBROOK J:

Right, anything else? Well thank you counsel and you came in within time so, even with the interruptions. So thank you counsel, we will take time to consider and deliver our judgment in due course. Thank you.

MR MCKILLOP:

As the Court pleases.

COURT ADJOURNS: 2.43 PM