IN THE SUPREME COURT OF NEW ZEALAND SC 60/2011

[2011] NZSC Trans 26

WARREN BRUCE FENEMOR

Appellant

v

THE QUEEN

Respondent

Hearing:	4 October 2011
Coram:	Elias CJ Blanchard J Tipping J McGrath J William Young J
Appearances:	G J King, B Paradza, L S Collins for the Appellant C L Mander and H R B Stallard for the Respondent

---

CRIMINAL APPEAL

MR KING:

If it pleases Your Honours, I appear together with my learned friends Mr Paradza, Mr Collins.

ELIAS CJ:

Thank you Mr King, Mr Paradza, Mr Collins.

MR MANDER:

May it please the Court, I appear with my learned friend Ms Stallard for the Crown.

ELIAS CJ:

Thank you Mr Mander, Ms Stallard. Yes Mr King?

MR KING:

Thank you Your Honour. We'll start with what I suspect is the good news. I don't anticipate it will take a very long time. The issue is really quite confined. The, I suppose, top of the wish list for the appellant would be a decision by this honourable Court effectively creating an exclusionary rule for admissibility of evidence as propensity evidence where it has been – where there has been previous acquittal. That may, to an extent, be asking this honourable Court to reinvent the wheel, to challenge the decision that the Court of Appeal, a full Court of Appeal made in *R v Degnan* [2001] 1 NZLR 280 (CA) in light of, I suppose, a change of philosophy and various commentary that has been made by that in international authority.

But as I say that might be top of the wish list for the appellant but it is by no means the end of the case if the Court is not persuaded that an exclusionary rule is appropriate because beyond that, it is submitted, that even if the Court were minded to follow the judgment in *Degnan* and rule that evidence is admissible despite the fact there has been a previous acquittal then in my respectful submission what is required is guidance on the exercise, the proper exercise of what was acknowledged in that case as the judicial discretion to exclude such evidence. Because in my submission although, of course, there is a general discretion to exclude evidence, where there has been a previous acquittal it involves a slightly different approach and considerations than where there has not been a previous acquittal. And that, as noted by at least one of the commentator's papers, Ms McDonald, is an area where greater guidance is desirable.

Thirdly, even if the Court is not prepared to enunciate principles of general application, it is the submission on behalf of Mr Fenemor that, notwithstanding the legal position regarding the admissibility generally, on the particular facts of this case this evidence should not have been led.

Can I start by referring the Court to the critical decisions made in the trial Court regarding this evidence? The first of these is the ruling that was made by His Honour

Judge McKegg, the trial Judge, as to the propensity evidence, and this is contained in the case on appeal, volume 2. This is under tab 3 at page 39A. There had been, as set out in the chronology, a somewhat tortured history of this case getting to Court. There had been a committal which the Justices of the Peace declined to commit at a preliminary hearing followed by an application to the High Court to lay an indictment on two counts, one in relation to each of the videos. That was partially successful, His Honour Justice Dobson ruled that the charge in relation to one of the videos was proper. After that there was the application for the propensity evidence and that leads to the ruling which is at 39A.

Now the significant feature, in my submission, is that there is scant reference in that judgment to the fact of the previous acquittal. His Honour refers to it at paragraph 13, which is on 44A, "The accused was prosecuted for an indecent assault on Ms B and Ms M was a similar fact witness in that trial. The accused was acquitted. Nevertheless the evidence of both witnesses is admissible to the Crown at this trial.

TIPPING J:
Available.

ELIAS CJ:
It's available.

MR KING:
Sorry, yes, of course. It is available to the Crown.

ELIAS CJ:
What's wrong with that, Mr King, because of course he is bound by *Degnan* so he is simply saying that the evidence is admissible in law?

MR KING:
Yes, no, I agree.

ELIAS CJ:
I mean not admissible, is available.

MR KING:
Is available to the Crown and there's not criticism of it at that point –

ELIAS CJ:

No.

MR KING:

– but when one goes through the judgment, the only other reference that I can see to the acquittal is at paragraph 21.

TIPPING J:

Are you saying that he didn't really address the question of fairness at all?

MR KING:

In my submission that's precisely the point I'm coming to. So it's one thing to say, I'm bound by *Degnan*, but *Degnan* laid out a process. *Degnan* talked about the need for a Judge to exercise a discretion. It didn't perhaps go on to articulate precisely how that was to be exercised, and that's one of the issues as I say that Ms McDonald has addressed in her paper, but here we have a classic case where His Honour has just held, right, it's available. The fact that there's been a previous acquittal does not disqualify it but there's no further analysis, there's not looking at whether it would be fair, or in any of the terms –

WILLIAM YOUNG J:

The arguments that were advanced are set out at pages 46A and –

MR KING:

Yes Sir.

WILLIAM YOUNG J:

And it would appear that the argument about acquittal was quite limited.

MR KING:

I agree Sir. Yes.

WILLIAM YOUNG J:

It's set out in para 21.

MR KING:

Yes.

WILLIAM YOUNG J:

And the judgment itself, the nitty gritty part of the judgment is nothing, if not, succinct.

MR KING:

Indeed. But, you know, His Honour does deal with the 43(a) issues and so on but in my submission what we have is really just a blanket acceptance that the fact of acquittal does not – well we – what we – as demonstrated is there is not special consideration given about the effect of an acquittal and how that might be seen to alter the balance.

TIPPING J:

Maybe, we don't know directly, do we, that the counsel didn't say –

MR KING:

Well I think that's right Sir and I think that's, as His Honour Justice Young has said, if you look at the submission, the summary of the points that were made, at paragraph 21 the argument is seemingly that the evidential videotape has been destroyed and that the unfairness arose from the destruction of that tape rather than from a more principled, or a wider perspective, an unfairness argument about the effect of the acquittal.

So that, on the pre-trial basis, that's as far as we get into any type of consideration of the issue at all and in my submission it might be slightly unfair to say once over lightly but it was not by either counsel or, in my submission, by the Judge, and certainly not by the Crown, their focus obviously it wasn't –

McGRATH J:

What would you now say about the prejudicial effect of the unfairness of the videotape not being available? How would you have run this argument?

MR KING:

Well it's, it's always extremely difficult. I mean this is quite different to any of the other cases because we're dealing with people who were very young at the time. She was a seven-year-old girl at the time that the videotape is made and then she's been

called to give evidence about the event when she's a young adult and so that's quite a different dynamic and how a seven-year-old expresses herself and whether one can read into it is quite different, in my submission, to how an adult might reinterpret those events with the passage of time and with growing up and maturing and everything else, it happens. So that is quite a distinguishing factor between the other cases. That, in my submission, it means that the jury does not get the best evidence first and foremost. It gets retrospective reconstruction. Sometimes that can't be avoided, I accept that, but in this case –

McGRATH J:
That might be helpful or it might be unhelpful to an accused.

MR KING:
Well one can say –

McGRATH J:
Can we take it any further than that?

MR KING:
– it's likely to have been helpful because he was acquitted. That's the, I suppose the short answer.

McGRATH J:
Well that's looking at it but at the time of the argument before Judge McKegg it wasn't known, was it, and it's still not known –

MR KING:
No.

McGRATH J:
– whether it would be helpful or not helpful, so we don't know whether it's going to end up in the prejudice or probative side of the balancing.

MR KING:
Well in my submission it would be very much in the prejudice, illegitimate prejudice side of it –

McGRATH J:

Because?

MR KING:

The failure to have that tape because the jury are deprived the opportunity to assess it, a relatively contemporaneous statement through the eyes of a young girl describing the actual conduct rather than someone years later and, of course, one only needs to look at her evidence, the evidence that she gave, to see the absolute vagueness of it. It's just, I don't know, I can't remember.

BLANCHARD J:

There was a transcript available, wasn't there?

MR KING:

There was, yes.

McGRATH J:

And you can draw the vagueness from that?

MR KING:

Well from her evidence that was given at trial, you certainly can. So the fleshing out of the actual details in the allegations because we're dealing with quite, quite fine, I mean it was described in the Court as subtle movements. We're not dealing with blatant conduct, if one can use that term. We're dealing with a person teaching music on instruments which are in close proximity to the young person. And so being able to hear in her words her description of that, to be able to see it, in my submission, would have been a distinct advantage. But I hasten to add it's only one very small component of the argument about prejudice.

ELIAS CJ:

Mr King, what you're addressing, though, is the merits that would have to be looked at in terms of the balancing required for the admission of propensity evidence anyway.

MR KING:

Yes.

ELIAS CJ:

If *Degnan* is correct, and I understand that you want to argue that it's not, but if it is correct I must say that I struggle to see that there is any additional unfairness through the acquittal itself. In other words, I struggle to see that you wouldn't just go straight to the sort of analysis you're just taking us to which is why this evidence, in its own terms, shouldn't have been admitted as propensity evidence. I don't see – I know *Degnan* says it's an aspect of fairness but I personally struggle to see how you'd articulate what that unfairness is.

MR KING:

In my submission, the – one does have section 43 and the guidance that it gives. It is, of course, silent to this particular aspect but it does talk about the weighting of factors and of course at the end we have section 43(4)(a) that, "Whether the evidence is likely to unfairly predispose the fact-finder against the defendant," and (b), "Whether the fact-finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions." In my submission, where there has been a previous acquittal, those factors assume a greater significance.

ELIAS CJ:

Well I can see that you might say that in making the assessment as to whether the probative value weighs the prejudice in the assessment that the jury has to make, I can see that you could make the submission that the fact that there was an acquittal indicates that at least one trier of fact didn't find this evidence compelling. But it's not, that's not the same thing as to say that the acquittal itself adds to the unfairness. And it's that bit I'm struggling to get a handle on.

MR KING:

No and I suppose I'm trying to have a buck each way because of course one of the witnesses we're talking about was not the subject of a charge and not the subject of an acquittal.

ELIAS CJ:

Yes, exactly.

MR KING:

But was the subject of, or had been, in a sense, tested and had been used as similar fact evidence at a proceeding and, of course, contrary to what His Honour said, it wasn't a jury trial, it was a summary hearing –

ELIAS CJ:

Yes.

MR KING:

– in front of Judge Walker so the, the fact of an acquittal in that case is probably, in my submission, important when one assesses the type of prejudice which can emanate from that but it's also important when looking at the overall admissibility of the propensity evidence because it has been tested and has, in my submission, found to be wanting.

ELIAS CJ:

What's the additional element that the fact of acquittal brings to that assessment?

MR KING:

It's less reliable.

ELIAS CJ:

Okay.

MR KING:

It's been tested and it's less reliable.

ELIAS CJ:

Well that's simply just a weighting matter –

MR KING:

Yes.

ELIAS CJ:

Rather than the fact that he was –

MR KING:

I think in the absence of the Court –

ELIAS CJ:

Yes.

MR KING:

– adopting a general exclusionary rule –

ELIAS CJ:

Yes.

MR KING:

– it must necessarily come down to a weighting exercise and my point really as I was commencing was that a special consideration that is required, where there has been a previous acquittal, was simply not undertaken in this case and –

WILLIAM YOUNG J:

Well what should that be, what – the evidence was unreliable?

MR KING:

Well, of course, in the *Mahomed v R* [2011] NZSC 52 case the Court, in Your Honour's judgment, identified the three types of propensity evidence, talking about evidence which had been established.

WILLIAM YOUNG J:

Yes.

MR KING:

And, or where there had been a conviction and evidence which was not the subject of previous charges and so on and so you had this whole, the reliability of the evidence is relevant because if the evidence is gold standard reliable, there's been an admission, there's been a plea of guilty, then the jury is not relitigating that issue at all so that means that the jury is not going to be distracted from focussing on the primacy of the allegations that they've called to consider into diverting into deciding whether the previous events have been proven or not because it's gold standard, it's been established. But where it hasn't, then in my submission, firstly, it can lead to a

jury being distracted from focussing on the actual case. Secondly, the evidence is not, has a lesser probative value because the less reliable the evidence is the less probative that evidence is and thirdly, in my submission, it can engender a number of different types of illegitimate types of prejudice, such as the jury thinking the sod's gotten away with it in the past.

TIPPING J:

What we had in mind, in part, in *Degnan*, as I recall, or what the Court had in mind, was a situation where it might not be fair to use the evidence again in the light of the nature of the defence, i.e., the alibi example that, I think, Lord Hobhouse gave in, *R v Z* [2000] 2 AC 483 (HL) so it wasn't, if you like, acquittal per se it was –

MR KING:

The nature of the acquittal.

TIPPING J:

In a sense, yes.

MR KING:

Yes. One can imagine –

TIPPING J:

And I'm not suggesting that's exhaustive but –

MR KING:

No, and there are other types of areas where one can see –

ELIAS CJ:

Well you've suggested one. You've suggested that the evidence currently, as effectively tested as it could have been 10 years earlier –

MR KING:

Yes.

ELIAS CJ:

– so that's another –

WILLIAM YOUNG J:

But that's more to do with a lapse of time rather than acquittal.

ELIAS CJ:

Yes, yes.

MR KING:

There are various ways one can look at it; a principled approach that the appellant would urge is to say that it, it just undermines the integrity of the justice system to admit evidence where there's been a previous acquittal –

TIPPING J:

That's out all together.

MR KING:

Yes.

TIPPING J:

You'd need to show how that can be reconciled with the Act.

MR KING:

Yes well the Act, of course, is completely silent on it. There is an interesting provision in the Act, which is section 49.

TIPPING J:

Well, can I suggest this to you before you move on?

MR KING:

Yes, certainly.

TIPPING J:

The Act – unless this evidence is irrelevant and I don't think anyone's suggesting that its prima facie ends subject to anything that might be in the Act, well it's out unless the Crown can show, on the balance, that it should be in, if it's propensity. Now doesn't it then come back to that as being the test?

MR KING:

I think that's right but in my submission –

TIPPING J:

And that's inimical to the idea that it's out at law, before you even start.

MR KING:

I suppose that comes back to whether the Act is a code, whether an exclusion rule could be developed in conjunction outside –

McGRATH J:

If it strikes at the integrity of the justice system, I think that you're a fair way down the track, but don't you, to establish that, have to really persuade us that the limits of the double jeopardy rule are what they were before *R v Z* and *Degnan*, that you've really got to come back, that in policy terms, the double jeopardy rule, I accept, has been trimmed back –

MR KING:

Yes.

McGRATH J:

– in those decisions and you would really have to persuade us that that trimming back has affected the integrity of the justice system, otherwise, I mean, I think that's the only way – I'm putting it to you –

MR KING:

Oh, no I think you are right, yes.

McGRATH J:

– that's the only way you can make that argument good about the integrity of the justice system being effective.

MR KING:

Look, it's a big ask to try and convince the Court to develop a, an exclusionary rule against the context of a full Court of Appeal decision in *Degnan* and against the context of the Evidence Act.

McGRATH J:

Well with respect, Mr King, you're the one who's making the argument for submission that the integrity of the justice system's affected and to me that's an important submission but I really need to see how you're going to make that submission good.

MR KING:

Right.

BLANCHARD J:

It's particularly difficult, I think, when the Law Commission was well aware of *Degnan* and clearly thought it was right.

MR KING:

It's, well, I know that it's the argument that's been put forward and there is, obviously, weight to that. It is unfortunate that the Evidence Act has not specifically sought to address it by identifying –

BLANCHARD J:

But the Law Commission did the draft and thought it was unnecessary to put something in. If they'd had any concerns about *Degnan* you would surely have expected that they would have put something into their draft.

MR KING:

Well, whether they have – they certainly haven't done so expressly, one must acknowledge that. But under section 43 we do have the – those principles to be taken into account, including 43(4)(a) and (b) and in my submission the issue of where there has been a previous acquittal is able to fit within that, but not perhaps to the extent that one would like of an express exclusionary rule but certainly as a fact of an acquittal being a weighty factor which could lead a jury to give disproportionate weight in reaching it. In my submission that could be interpreted as akin to a jury giving disproportionate consideration, having to be, in the sense of being distracted from the prima facie charges to focusing on propensity allegations.

TIPPING J:

But that's equivalent to saying the jury will always, therefore it's always out.

MR KING:

No, in my submission if, if we can't get to an exclusionary rule it should at least be a, be a weighty factor.

TIPPING J:

I see, you're off the whole – I'm just not quite sure where you're at.

MR KING:

No I know, sorry, it's –

ELIAS CJ:

So you were opening up on the whole thing and you got into the balancing and really you need to start with your –

MR KING:

Where I wanted –

WILLIAM YOUNG J:

At the beginning.

ELIAS CJ:

– higher point.

MR KING:

Exactly. Where I wanted to start and where I tried to start –

ELIAS CJ:

You want to say that *Degnan* is wrong, first.

MR KING:

Well, can I just – where I wanted to go first of all was to look at how this played out in this particular case and that's why I started with the ruling that His Honour Judge McKegg gave on the admissibility of this evidence and in my submission the point is that this was not the subject of a detailed analysis or consideration and that even if one accepts *Degnan* as absolutely word perfect there will still be additional required if considering the issue of fairness in the particular context of a previous acquittal, which has just not been undertaken. I don't mean any criticism of this Judge, it

clearly just wasn't argued by anybody. If we can then turn to what His Honour actually said to the jury about this evidence, and we find that in the summing up, which is under tab 4 at page 139 to 150. Simply stated from paragraph 18 onwards on 143 His Honour gives really, fairly stock standard propensity directions about the evidence but again, I would emphasise that His Honour did not give any specific direction about the fact that there had been an acquittal. It's mentioned at one point, which is on page 144, at paragraph 22, where in the penultimate sentence, "But even if they did then it was a situation that they were capable of several interpretations and are not to be held against the accused and, of course, the defence points to the fact that he was acquitted of any wrongdoing against MB."

BLANCHARD J:

Can I just ask, would the jury have been made aware that both women, girls as they had been, gave evidence at the trial relating to MB?

MR KING:

They were absolutely aware, of course, that there had been a prosecution in respect of MB. My learned friend will just check up on the evidence.

ELIAS CJ:

I thought the cross-examination had brought it out?

MR KING:

There was cross-examination on MB of the fact of the acquittal. I'll just check up. I just don't want to say without being sure in respect of –

BLANCHARD J:

Because the jury ought to be told that it was the evidence of both that was rejected at MB's trial?

MR KING:

Yes, well in my –

WILLIAM YOUNG J:

Well, not necessarily. It could have accepted the evidence, the propensity evidence but not that of the complainant.

BLANCHARD J:

Possibly but that's an unlikely scenario and in fairness to the defence –

MR KING:

We just don't have the judgment unfortunately. I mean it's different to some of the cases where there's been a jury acquittal because this is a professional trier of fact.

ELIAS CJ:

Well why couldn't we – what happened to that judgment?

MR KING:

I don't know.

ELIAS CJ:

It disappeared.

McGRATH J:

Well it may never have been typed up and just –

MR KING:

Yes indeed.

TIPPING J:

Surely counsel would have brought this up. I mean – I suppose one can't assume that in today's world.

MR KING:

I couldn't comment Sir.

BLANCHARD J:

Well I've been assuming it up until now but it suddenly occurred to me that there might be a point there.

MR KING:

We'll just check the evidence of and see whether that was. I just cannot recall off hand but my friends will check on that. But if one looks at the summing up the only

reference to the acquittal is in respect of MB and is in paragraph 22 and His Honour is restating a defence submission.

ELIAS CJ:

So does he not give any specific direction?

MR KING:

No, he doesn't Ma'am.

ELIAS CJ:

No.

MR KING:

And then at paragraph 23 we have the relatively stock standard direction –

TIPPING J:

Just before you move off that, 137, I'm not sure what this document is. This is somebody's submissions to the jury, it looks – the middle paragraph –

MR KING:

The closing address, yes.

TIPPING J:

Mr Fenemor is careless in that his fingers – that must be the defence, particularly given the previous allegations in years past from LM and MB. So it seems that it would have been in front of –

MR KING:

Well no they'd –

BLANCHARD J:

Yes it does.

ELIAS CJ:

Where's that page?

TIPPING J:

137. I mean it's not absolutely clear but –

MR KING:

No, I take, see Your Honour's point.

TIPPING J:

Yes. Sorry Mr King, I interrupted, but I thought that might solve the problem.

MR KING:

It may do, we'll just check up on the actual cross-examination. Yes, my friend will, we'll come back to it if we can. So we have the only reference at paragraph 22. At paragraph 23 we have, "If you reject the idea that the earlier incidents are like the current ones, or if you are not satisfied that they occurred, then you should simply put them out of your mind." That, in my submission, is getting very close to the point of challenging the previous acquittal. With saying that you have to be satisfied that these previous events occurred before you can use them. So that, in my submission, blatantly flies in the face of there having been a previous acquittal and the jury is effectively being asked to conclude, by being satisfied that these events had occurred, that the acquittal must have been in error.

TIPPING J:

But he doesn't say to what standard.

MR KING:

No he doesn't.

TIPPING J:

And rightly.

MR KING:

It's, I think in Your Honour's judgment in *R v Gee* [2001] 3 NZLR 729, dealing with the –

TIPPING J:

That – don't get diverted on that. That was to do with identity and the difficult areas that were in play there about the pooling and the –

MR KING:

Sequential and global –

TIPPING J:

– sequential, I don't think that's going to help us much.

ELIAS CJ:

What else do you say that the Judge should have said there?

TIPPING J:

Exactly.

MR KING:

Well, of course my point is that the evidence shouldn't have been there in the first place –

ELIAS CJ:

Yes but that –

MR KING:

But what His Honour has not done, in my submission, is given the defence a particularly fair assessment of saying, well, you must in deciding whether or not you are satisfied that these previous events occurred you should bear in mind that there had previous –

WILLIAM YOUNG J:

Someone else didn't think that occurred.

MR KING:

There'd been an acquittal.

WILLIAM YOUNG J:

Or someone else – it doesn't have to be satisfied beyond reasonable, the jury doesn't have to be satisfied beyond reasonable doubt that that occurred. The Judge could only have, the Judge in dealing with the earlier charge didn't have to be satisfied that the offending against the propensity witness had occurred but if reasonably confident that it had occurred then could take it into account but had to acquit in relation to the

offending alleged if not satisfied beyond reasonable doubt that it occurred. Explaining that to the jury might have been a bit of a mouthful, to be fair.

MR KING:

Well it's –

WILLIAM YOUNG J:

Which is why Judges tend to short-circuit it –

MR KING:

Yes but leaving them to –

WILLIAM YOUNG J:

– by saying, are you satisfied it happened?

MR KING:

Yes but leaving them to effectively relitigate that matter. Now just, it's a very peculiar scenario, I submit, that the charge in relation to LM had not been, that there had not been a charge in relation to LM when the police had gone to the extent of using her as a propensity witness in respect of MB in a Judge alone summary jurisdiction, it's extraordinary, with respect that there was no charge in relation to that and that can only reflect the fact that that evidence was, of itself, just so marginal. So it was not sufficient in itself to substantiate a charge in relation to her, even with the benefit of the cross-admissibility of MB's evidence. I mean that must be the conclusion in my submission.

TIPPING J:

Mr King, are you endeavouring to suggest that because of the way in which a Judge had to direct, this suggests that the evidence shouldn't be there at all?

MR KING:

No I'm saying in the particular facts of this case the evidence shouldn't have been there but my point is that being that it was something more was necessary for the Judge than simply a passing reference –

TIPPING J:

Well is this stage 2 you're addressing at the moment?

MR KING:

Yes, yes.

ELIAS CJ:

Well he's painting a factual background and then he'll go back to the beginning.

MR KING:

Yes that's what I'm still trying to do.

TIPPING J:

I find this all rather confusing. Either the evidence is in as a matter of law or it's not. And frankly I would have thought we'd be much better off concentrating on that then looking at what's the position if it –

MR KING:

Okay I –

ELIAS CJ:

Well except if Mr King wants – he'll need to take us to what happened at some stage so perhaps we can suspend law.

MR KING:

Yes, well I was rather just trying to paint the picture Sir and do it briefly by reference firstly to the judgment admitting it, which had scant reference to *Degnan* –

TIPPING J:

I defer to you Mr King.

MR KING:

No I defer to you absolutely Sir but I'll finish this.

ELIAS CJ:

Well how about deferring to me because I'd really like to see it. Thank you.

MR KING:

I will Ma'am. Thank you. So the point is simply that at the whole trial process this issue received very scant, if any, consideration whether at the pre-trial stage, where the evidence is simply assumed to be admissible – available, despite there being a previous acquittal, to what was said to the jury with really an underwhelming emphasis on the fact that there had been that previous acquittal and the jury is given no guidance on what that meant, and what that meant when they approached it. They've given no guidance on what "being satisfied" meant and those are the points that I make about the specific context in which this evidence was given.

In my written submissions I've set out a lot of other material about the particular facts of this case. I've already mentioned the fact that we have a scenario whereby when the evidence was initially tested before His Honour Judge Walker in 1998 the complainant and the propensity witness were very young. The video interview of the complainant was shown. That was subsequently 10 years later, almost to the day actually, of the acquittal. In fact to the day. Mr Fenemor was covertly filmed in action which His Honour Justice Dobson describes in his judgment as being really, it's certainly not clear, in my submission. It involves the Court drawing a conclusion. Mr Fenemor's explanation was that he needed to hold the guitar away from the child's face so that the child does not look down at it to see where her fingers are going on the strings, so in order to do that it's twisted away, so to avoid that natural tendency to look down so one relies on one's fingers to play and that's the explanation he provided. So he was holding the guitar there in that way. You can see, in my submission, the knuckles throughout. You can't see the finger movement. You can see – the fingers may have gone in that area but they equally may not have.

The jury is being asked to make this finding in a very unusual context where the complainant herself, Miss R, is not giving evidence. Where what they're being asked to rely on is the interpretation they can make from a video which is by no means clear. It is capable of an innocent explanation and really in that context the importance of the similar fact evidence, or propensity evidence, of events more than 10 years previously, now being recited through the eyes of adults, when we know that through the eyes of children His Honour Judge Walker did not find the evidence sufficient to convict. I do make the point that it is peculiar that the older girl, the 11 year old, was not the subject of any, of being a complainant herself. There was no charge and then when one reads her evidence it's quite subtle.

ELIAS CJ:

She really describes different offending, doesn't she, because her description couldn't have been inadvertent?

MR KING:

No, exactly.

ELIAS CJ:

Whereas the others were in connection with holding the book or holding the guitar.

MR KING:

Yes. Yes indeed. It's very peculiar, in my submission, that one – one can understand a parent not wanting a child to be a complainant and so on but when they actually go to the extent of calling the children as a complainant witness – as a propensity witness, it's a very unusual situation and of course we just don't have any explanation as to why that was so. We don't have the reasoning of His Honour about whether he found the propensity evidence compelling but for some reason didn't find it useful or –

TIPPING J:

What did the Court of Appeal make of all these points Mr King?

MR KING:

The Court of Appeal argument was that this evidence shouldn't have been admitted for a variety of reasons. As the Court notes in light of the authorities, and this is at paragraph 25 of the judgment, which is at page 32 of tab 2 of volume 1, the argument is really summarised from page 31, paragraph 21 onwards.

ELIAS CJ:

There's really no second stage assessment in this it seems to me.

MR KING:

Indeed and I must, I think, bear some of the responsibility for that because I did not mount a direct challenge based on *Degnan*. I looked at it and thought it was pretty conclusive, it was binding, if I've –

ELIAS CJ:

No, no, what I mean is the Court's reasoning is entirely contained in para 25, isn't it, as to the evidence having been likely admitted.

MR KING:

Well that's the conclusion. The argument was much more extensive than that and the written submissions of the appellant are contained from page 43 onwards in that so one can see what the, the extent of the argument was and the propensity evidence in that regard was dealt with, both in the context of the video, because remember there were two videos covertly filmed. Initially they were both the subject of charges but His Honour, the JPs having refused to commit or discharge or whatever, to dismiss the allegations, His Honour Justice Dobson allowed the charge only in relation to the 8 August video and not the 31 July one. Despite that, the 31 July video was nevertheless shown to the jury and much was made of it without any type of specific directions.

The defence, or the appellant's arguments in the Court of Appeal on the Miss B and Miss M evidence is set out at page 55, paragraph 32 onwards.

ELIAS CJ:

I wondered why we had that, in fact, but is it because you've put it in there to show that these points were raised –

MR KING:

Yes.

ELIAS CJ:

– even if not adverted to in the judgment.

MR KING:

In the judgment, yes.

TIPPING J:

Well whether we were right or not, Mr King, the leave ground was solely the *Degnan* point and certain other grounds, I can't remember what they were just off the cuff, leave was refused.

MR KING:

No I agree with that Sir and I'm not trying to circumvent that. What I'm doing is addressing the question about what the extent of the argument was –

TIPPING J:

I see, all right.

MR KING:

– in the Court of Appeal because although it's summarised in paragraph 25 as the Court's conclusion, in fact it was on a wider basis.

TIPPING J:

All right.

ELIAS CJ:

It is a point that bothers me, however, also Mr King, that the ground of leave is simply whether *Degnan* was right but there's no rule of law excluding and really what we're looking at here is whether the Court of Appeal was right in assessing that the evidence applied in *Degnan* should have been admitted.

MR KING:

In my submission, the way I had read it, and obviously I suppose I'd be accused of taking the widest possible interpretation, but when it says, "Following *R v Degnan* that propensity evidence may be led by the Crown despite the evidence having previously been led at a trial which resulted in an acquittal," that there is a number of components to that. Firstly, how I interpret it is to say whether there is a, whether *Degnan* was rightly decided. Whether there should be an exclusionary rule. Or whether the, if *Degnan* was rightly decided, whether the process outlined in that case of considering the overall fairness was appropriately balanced or applied in this particular case.

So in my submission I would assume that even if the Court were not prepared to revisit *Degnan* but were instead to apply *Degnan*, to follow *Degnan*, that had it been done properly in this case. So on that basis I'd rather see it as being open to try and convince this Court that the factors to be taken into account, in this case, placed in the *Degnan* unfairness consideration, should have rendered this evidence inadmissible.

ELIAS CJ:

Well you might have had a more wintry response had it not been that both in the District Court and perhaps in the Court of Appeal the reasoning on the application of *Degnan* does seem to be a little sparse.

MR KING:

Yes. In my submission that's the – because of that one needs to consider the fairness approach. How that is –

TIPPING J:

Well speaking for myself I didn't understand this. We've given leave to – because of the way (b) is framed but –

ELIAS CJ:

I hadn't either but –

WILLIAM YOUNG J:

I too am in the camp of Justice Tipping. I thought the grant of leave actually meant what it said.

MR KING:

Well if –

ELIAS CJ:

However we do say that these things are not strait-jackets.

MR KING:

No, in my submission I'd like the opportunity to address that because there's two ways that that, in my submission, following the *R v Degnan*, firstly was the Court right to hold that *R v Degnan* avails previous acquittal evidence. That's whether the Canadian approach is correct or whether the House of Lords approach is correct, whether *Degnan*, ultimately, is correct. But in my submission the next part of is it, did the Court of Appeal or the trial Court properly apply *R v Degnan*.

WILLIAM YOUNG J:

The grant of leave, I don't want to be – but the grant of leave doesn't relate directly to the application of the similar fact or propensity principles, it relates to the holding that propensity evidence may be led despite an acquittal.

MR KING:

But *R v Degnan*, in my submission, is more subtle than that. It doesn't just stand for that alone. What *R v Degnan* says is that you decide whether it's excluded on a principle basis of autrefois acquit, double jeopardy type of principles, finality of verdict and so on. But it nevertheless has that, it preserves that discretion and that fairness consideration.

TIPPING J:

'May be led despite' are the key words.

ELIAS CJ:

Well that's the way I had read it too but perhaps he should carry on.

TIPPING J:

Perhaps without prejudice we should –

ELIAS CJ:

Yes.

MR KING:

Yes. Well I would ask, I would invite the Court to consider it on that basis because ultimately the appellant's position is that this evidence should not have been led against him at the trial and that he was unfairly prejudiced as a result. Now whether – it's somewhat artificial, in my submission, to try and limit that submission to concerning whether at law previous acquittal evidence can ever be –

WILLIAM YOUNG J:

Well there are jurisdictions – in Canada and probably in Australia –

MR KING:

Yes.

WILLIAM YOUNG J:

– probably in Australia, this evidence couldn't have been led.

MR KING:

That would have been my position, yes.

WILLIAM YOUNG J:

Okay so that's the high issue of law that I think might have been flagged by the leave decision, and about which we've yet to hear any argument at all.

MR KING:

Well it is – I'm trying to lay the foundation still.

BLANCHARD J:

The leave decision was related entirely to a question of admissibility and whether *Degnan* was right or not. If you look at the leave grounds which were rejected as not meeting the statutory criteria, there is reference to various matters, particularly on page 6 of volume 1, relating to directions and so on. But leave wasn't granted in respect of those.

MR KING:

Yes, and I'm not trying to –

ELIAS CJ:

I think, Mr King, if you could go on and conclude the review you want to make of the background and then go back to the two points, as I understand, you want to address us on.

MR KING:

Yes, yes, thank you Ma'am. The –

ELIAS CJ:

Did you want to go to the Court of Appeal decision any further than you have?

MR KING:

No Ma'am. In my submission they've identified the substantive issue if one can call it that.

ELIAS CJ:

Yes.

MR KING:

But ultimately the defence position would be that this evidence, on any analysis, whether one follows *Degnan* or not, but certainly even if one does follow *Degnan* and looks at the fairness consideration, this just has not been the subject of that type of scrutiny. So I wanted to highlight, firstly, the effect of it because in some cases, of course, similar, or sorry, propensity evidence can just be on the side and not be central to a case; my point is, in the particular facts of this case, this evidence was absolutely central. There was no complainant giving evidence, there was a video that was capable of an innocent explanation as well as a sinister one, depending on the view one took of it, and in reaching that conclusion, about whether it was innocent or sinister, the jury must have given very strong consideration to this propensity evidence.

ELIAS CJ:

And indeed the Judge, I think I'm right, I didn't make a note of where it was, I think he actually said to the jury, didn't he, that there's only two bases on which you could convict; one is the video and what you make of it and the other is the propensity evidence.

MR KING:

Yes, he is, he's linked them, obviously, by saying in interpreting the video you are entitled to take into account, which is correct in law, of course, I mean that's the purpose of it but my point is simply that in the particular context of this case, this evidence was huge. It was not something that was marginal or of minimal relevance. I made the point in the submissions that most of the cross-examination of the appellant was in relation to the similar – is in relation to the propensity evidence, far more so than the substantive allegation. My friend makes the point in his written submissions that the same applied to the evidence-in-chief, that most of the evidence was in relation to the propensity evidence. So the point is that this was absolutely central and absolutely critical evidence.

TIPPING J:

Why on earth, then, was this not put forward as a specific ground of appeal on the contingent basis, application for leave?

MR KING:

Well, in what sense, sorry?

TIPPING J:

That if it was rightly admitted, the Judge failed to direct properly on unfairness or – I can't see anything of this in here, I may be being blind Mr King but it does seem odd. It's not as if you've been wrongly knocked back on this point on leave, it just didn't feature.

MR KING:

But I thought –

TIPPING J:

Your primary argument was wrongly admitted.

MR KING:

Yes and that remains the position Sir.

TIPPING J:

Yes, exactly and then when you turn over the page there are a variety of issues that were deemed, rightly or wrongly, not to be worthy of leave but I don't see any of them as encompassing these sort of matters.

MR KING:

I rather thought I had covered it. Certainly it was the subject, obviously, of extensive argument in the Court of Appeal.

TIPPING J:

Well, I may be being a little narrow but I can't actually see it here.

WILLIAM YOUNG J:

Is it possibly the second bullet point in little 2?

MR KING:

Yes, lack of judicial directions about evidence which may be unreliable and in that I'm using the wording which is from 122 of the Act, which talks about events that are more than 10 years old, which is specifically –

TIPPING J:

Oh yes, well that, the X factor, I suppose that's –

MR KING:

– the evidence of conduct alleged to have occurred more than 10 years ago relating to the evidence of MB and LM and what I was intending to convey by evidence, which may be unreliable, is also the fact that there had been an acquittal. I probably should have included that specifically but I thought it was certainly encompassed.

TIPPING J:

All right.

ELIAS CJ:

In this case the, there were two issues, in terms of the direct evidence, the video evidence. One was whether there was any touching of the genitalia at all.

MR KING:

Yes.

ELIAS CJ:

And the second one was whether it was inadvertent or indecent.

MR KING:

Yes.

ELIAS CJ:

In this case the propensity evidence, one would expect propensity evidence to be called in rebutting the innocent explanation but here it was highly likely that it would be used, also, to confirm the touching.

MR KING:

Absolutely and that's what they were told.

ELIAS CJ:

So it's a sort of a doubling up.

MR KING:

Indeed and that's exactly what the jury were invited to do, yes.

ELIAS CJ:

And there's nothing, in principle, wrong with that, it's just that the risk of impermissible reasoning, he's done it before therefore he did it again, is quite high.

MR KING:

Oh it's exactly the type of inference which a jury is going to be struggling with when they've got a context of a vague video that is not particularly clear and if the Court – I mean, obviously I'd be more than happy for the Court to view it for itself, I mean, I've been content to rely on the description that has been given to it by Justice Dobson as being accurate. The only other point we would make in relation to that is that where he says it seems to be an unnaturally long time that he's holding the guitar, some four minutes, in fact that is explained, the appellant submits, by the need to hold the guitar, not supporting it, but to stop the child bending it towards herself to look at where her fingers are going but instead to rely on texture.

But apart from that it's a pretty clear explanation but it could not ever be said to be conclusive. So what makes it conclusive? In my submission the only thing that makes it conclusive is the Court relying on propensity evidence.

TIPPING J:

So really we've got two issues in your submission. One, should it have been in at all? Two, if it was in, inadequate summing up?

MR KING:

Well I'd say something more was needed. I mean the problem –

TIPPING J:

I'm just trying to summarise Mr King.

MR KING:

Yes, I know. The problem I struggle with on that Sir is to really come up with a permutation that would be adequate because it's exactly the type of evidence which is just so difficult.

TIPPING J:

Well that supports the proposition that –

MR KING:

That it shouldn't be in.

TIPPING J:

– it shouldn't be in at all.

MR KING:

Exactly.

TIPPING J:

Yes.

ELIAS CJ:

I had understood you had two points as to whether it should have been excluded. The first is that as a matter of law if there's been a previous acquittal it should be excluded. The second is that the assessment here wasn't an adequate application of section 43.

MR KING:

Yes. That's precisely right on the admissibility issue.

TIPPING J:

I think there's a third now. That even if it was – if it should have been in on that assessment, there was an inadequate treatment by the Judge in his summing up.

MR KING:

There's two ways that can be used, of course, as –

TIPPING J:

I just want to identify very sharply what we've got in front of us Mr King –

MR KING:

I know, Sir.

TIPPING J:

– because it's bigger than what I thought it was.

MR KING:

My concern is if I embrace that submission it will be seen to be cutting across the grant of leave but in my submission what it demonstrates is an issue of fairness which goes back to admissibility. So although I would welcome the Court to deal with it as a discrete point, I sense a reluctance to widen it. But in my submission it's all part and parcel of whether this evidence was properly in and whether justice has miscarried as a result. It can miscarry through it being in when it shouldn't have been. It can miscarry through it being in properly but inadequate guidance given to the jury on the use to be made of it.

TIPPING J:

However one categorises it, those are the three discrete topics.

MR KING:

Absolutely Sir, yes. Now on the big point, if I can turn to that. The appellant's submissions will come as no surprise to the Court, is really simply a restating of the rationale applied by the Canadians and largely applied, and I think it's pronounced *Grdic v The Queen* [1985] 1 SCR 810 and by the Australians, perhaps to a slightly different degree in *R v Carroll* [2002] HCA 55, (2002) 213 CLR 635, because in my submission, as has already been noted by the Court, it would be submitted that this evidence would not be admissible in either of those jurisdictions. Both of those judgments have set out their principles and although there could be an attempt to distinguish it on the basis of certain concepts such as res judicata and issue estoppel and so on not being applicable in New Zealand law, there is no reason, no statutory reason, no common law reason, why those principles could not equally apply to our jurisprudence.

BLANCHARD J:

Why do you say it wouldn't be admissible in Australia?

MR KING:

Well really on the *Carroll* basis.

BLANCHARD J:

But *Carroll*, as I understand it, refers to *Degnan* and to *R v Z*, without apparent disapproval and refers to them as being a different situation from the one in *Carroll*.

MR KING:

Well that's, I think –

TIPPING J:

Carroll was the perjury case?

MR KING:

Yes, he was convicted of – he was acquitted of murder, and 14 years later he was charged with perjury by saying he didn't kill his former partner, the allegation being that he did kill her, and thereby committed perjury by saying he didn't, and he was convicted on that count and the prosecution was ultimately – well the conviction was overturned –

WILLIAM YOUNG J:

We would allow prosecution in those circumstances. In fact not infrequently do I think.

BLANCHARD J:

But that's because it's statute I think.

WILLIAM YOUNG J:

Well, no, we just don't accept an issue estoppel.

ELIAS CJ:

But we might have accepted abuse of process.

WILLIAM YOUNG J:

Yes, we could accept but if all there is, is what on the Crown case is a lying defence involving perjury, an acquittal, and then a later prosecution for perjury then without more that's okay.

ELIAS CJ:

As a matter of issue estoppel.

WILLIAM YOUNG J:

Yes, there's no issue estoppel.

MR KING:

It's never been, with respect, been entirely clear why we don't recognise things like issue estoppel, cases in the past, and I've put in the case of *R v Arbuckle* [2000] 3 NZLR 49 (CA), an earlier decision which predates *Degnan* where the Court did seem sympathetic. Nobody, I suspect, has ever said never.

WILLIAM YOUNG J:

Aren't there cases on perjury? There's the *Hines* case isn't there? Isn't that a perjury case?

MR KING:

No, *Hines* was the stabbing I think.

WILLIAM YOUNG J:

Wasn't there the chap who was acquitted of murder and then got quite a long sentence for perjury later?

BLANCHARD J:

Moore.

MR KING:

Got the maximum seven years, yes. That, hadn't he called evidence, hadn't he called the false evidence rather than given it, just from recollection.

WILLIAM YOUNG J:

Well it doesn't matter does it? That can't matter though can it because –

MR KING:

Probably not.

BLANCHARD J:

But then there were statutory amendments subsequent to that.

MR KING:

Yes.

WILLIAM YOUNG J:

I think there were earlier cases actually than *Moore.*

TIPPING J:

It's the Canadian position you really want us to adopt Mr King.

MR KING:

It's the Canadian which I embrace and that –

McGRATH J:

Just before we leave Australia Mr King, might the difference in *Carroll* that resulted in the, apparently, uncritical reference to *Degnan* might that be that in *Carroll* they were concerned that the events being charged had such a close relationship to the events that were the subject of the earlier charge. Now that would be a distinguishing factor from *Degnan* and also from the facts of the present case.

MR KING:

Yes and with respect that would follow the logic in some of the other cases, there's the Malaysian case, *Sambasivam v Public Prosecutor* [1950] AC 458 (PC) as well.

McGRATH J:

On that basis *Carroll* wouldn't help you though, would it, because they're clearly signalling by referring to *Degnan* as being a separate case and being implicitly a case that they were not disagreeing with, it was because of the events were the subject of – sorry, there was a second set of events that were the subject of the charge and that's why *Degnan* was not to be, in any respect, the subject of what they were saying in *Carroll.*

MR KING:

Well *Degnan* was different and did not require them to give a consideration so obviously it was cited and they mentioned it but it certainly wasn't decisive on the facts of that case and the way the Court approached it.

McGRATH J:

It seems to me, what I suppose I'm saying is that you, if you are relying on *Carroll* I don't see how it helps you. I can see how some of Chief Justice Barwick's earlier remarks might, passing as they generally seem to be, they might help you but I can't see how *Carroll* helps you.

MR KING:

It may not help me but it doesn't hurt me would be my submission.

MCGRATH J:

Well there's a lot of cases in that category.

MR KING:

Volumes of them.

TIPPING J:

The rule in *Russell v Russell* doesn't do you any harm either Mr King.

MR KING:

Well look, in fairness that case, of course, was one that was specifically cited by the Court of Appeal in their paragraph 25, which rather meant in my submission that it had to be before the Court for consideration.

TIPPING J:

Isn't it really a matter of philosophy of approaching this idea of double jeopardy, as my brother McGrath said quite early on in the hearing that we have a narrower conception of double jeopardy than certain other jurisdictions and, in particular, for present purposes, Canada.

MR KING:

Yes.

TIPPING J:

Isn't that the fundamental issue here?

MR KING:

Well that's one of them. The other one is what is the status of a previous acquittal and this is, again, a philosophical point. The Canadians have taken the view that that finding is equivalent to –

TIPPING J:

A declaration of innocence.

MR KING:

Yes.

TIPPING J:

We've never taken that view.

MR KING:

New Zealand Courts have generally taken, well, always taken the view that it is simply reasonable doubt in a scenario so it doesn't undermine it, so if one was to adopt the Canadian philosophy that a previous acquittal should be regarded as a declaration of innocence then even on our narrow interpretation, or narrower interpretation, of double jeopardy, in my submission that would come very close to qualifying. Arguably, it still wouldn't but we'd be in a much stronger position because to say that someone has been found, is innocent of the previous event but then we use it as evidence in a case like this, as proof of guilt and very vague or very absent other compelling evidence, then that does strike right at the very heart of whether we are asking a jury to effectively reach a different conclusion on evidence that has not previously been the subject of belief.

McGRATH J:

As I see it the concept of a declaration of innocence is really the traditional argument –

MR KING:

Yes.

McGRATH J:

– in favour of the wider view of double jeopardy.

MR KING:

Absolutely, yes.

McGRATH J:

The trouble is that it really seems to defy the reality of the situation.

MR KING:

Well there are other, there are principles around it, of course, as well as the finality of verdict –

McGRATH J:

Yes.

MR KING:

– the avoiding the accused being subject to ongoing costs and – yes, being forced to relitigate in that way. Can I start with the analysis, as I was saying, we actually have the opposite, it seems, in force in New Zealand and that is section 49 of the Evidence Act, 49(1) says that if you're convicted of an offence it's conclusive evidence that you actually committed the offence, subject to general exclusionary provisions and recognising 49(2) says in exceptional circumstances you can challenge it. Now that provision is now being used in your proverbial propensity cases where there has been a previous conviction so the Judges are directing them, you must take that as conclusive proof that those events occurred. So the fact of a conviction is conclusive proof that the –

ELIAS CJ:

Does that mean they don't, that they're not calling the previous complainants necessarily, that they may simply be adducing proof of the conviction?

MR KING:

Yes. Obviously it can be even more limited than that in the sense that the fact of a conviction would not normally itself qualify as similar, in fact it's the circumstances –

ELIAS CJ:

Yes.

TIPPING J:

Yes.

MR KING:

– of the allegation so what you have is the strange situation where a complainant is called to recite what it was that she alleged occurred and then the jury being advised and that resulted in a conviction and it must be conclusive proof that the offending occurred but then they need to go on and decide whether it happened –

WILLIAM YOUNG J:

Might that not only –

MR KING:

– in the way that was alleged.

WILLIAM YOUNG J:

– apply where the fact that the offending occurred is an element which has to be established?

MR KING:

Well that's an argument. One thinks of a third or subsequent drink driving, where they produce evidence of convictions for that, but this is now being applied – I've just come off a four week trial in the High Court where this provision was the subject of a direct direction to the jury that they must regard that as conclusive evidence that the offending occurred.

TIPPING J:

But it wouldn't get you very far if the accused says I accept that there was this conviction, but it didn't happen that way.

MR KING:

Yes well that's, then the jury must go on and consider –

TIPPING J:

Yes.

MR KING:

– whether the circumstances of similarity or whatever are applicable.

TIPPING J:

And that's almost invariably going to be the case, isn't it, if that point is challenged?

MR KING:

Yes, but what it does preclude an accused doing is obviously getting up and saying, 'I was innocent of that charge'.

TIPPING J:

Yes of course.

MR KING:

And that's an issue but my point is that –

TIPPING J:

But it doesn't –

MR KING:

– that really is the flip side of the coin that we're talking about.

TIPPING J:

Well this is a case where one side of the coin isn't necessarily the mirror image of the other side.

MR KING:

It may not be but it's –

WILLIAM YOUNG J:

Well the legislature didn't think so because it didn't declare that an acquittal is conclusive evidence of innocence.

MR KING:

No, I don't even know if the Canadians have gone quite that far. They've held that there's an exclusionary rule but there are circumstances in which –

TIPPING J:

I wonder how it would work in defamation in Canada.

MR KING:

I think that's a whole new industry.

TIPPING J:

Well yes, as I say, you've got to bear in mind these collateral – it's got to be consistent.

MR KING:

True, true. But the, one of the features, in my submission, which comes through in all the authorities is how specifically they seem to be tailored to the facts of the actual case. *R V Z*, I think anybody could rightly see, would just result in an injustice if evidence on a specific issue about belief and consent and the fact that the person had on four previous occasions been tried and advanced the same defence, well in my submission that is one of the – if an academic was sitting down to write an article about it, that is one of the very extreme examples one would automatically come to, to say to justify the inclusionary rule. Some of the other cases, of course, deal with other factually specific areas and that includes the Canadian case of *Grdic*.

TIPPING J:

How would you reconcile this proposition that we should follow Canada with the Act? I mean, would you have to say that it wasn't relevant because –

MR KING:

No. In my submission what would one say is that it invoked, at a very high level, the types of specific, illegitimate prejudice envisaged in section 43(4)(a) and (b) of the Act. So to – it's admissibility but it's weighting.

TIPPING J:

You mean that it will always have such weight as to exclude it, that's if we could exclude the evidence though.

MR KING:

I don't know if one could get to the point of saying “always”.

TIPPING J:

Well don't you have to?

ELIAS CJ:

If you want a rule of law that it can't be adduced.

MR KING:

Well the one can be prima facie exclusion rules, of course.

ELIAS CJ:

I don't have the text of the Bill of Rights provision of presumption of innocence in front of me but you're not advancing any interpretation of section 43 in the light of that are you?

MR KING:

Well not on a –

ELIAS CJ:

It’s like an interpretive –

MR KING:

Not on that, I mean, obviously the right to be presumed innocent, the right to defend yourself, I mean, that’s – I’ve really invoked that rather specifically by saying here we have a situation where the accused is effectively compelled to give evidence. He is given a video interview in relation to the substantive allegations, not asked about the propensity evidence but at trial, of course, he needs to answer that so is put there so in my submission that invokes Bill of Rights considerations.

TIPPING J:

Well we were faced with that in *Degnan* and answered it as we did in *Degnan* but you are fully presumed innocent of the charge you are actually facing. These other incidents only have evidentiary significance.

MR KING:

Again, it comes down to that philosophy of whether, whether the previous events need to be proven beyond reasonable doubt.

BLANCHARD J:

Is there any case law in which New Zealand Courts have held that it's a breach of the Bill of Rights or contrary to the principles underlying the Bill of Rights that someone in practical, if not legal terms, is forced to give evidence?

MR KING:

No.

BLANCHARD J:

I would have thought not because it arises practically very often.

MR KING:

Well, it, but again it's quite contextually specific and in my submission the argument could never be stronger than in a case like this, where there's a video interview on it, not asked questions about it, this comes in, it's so central and so critical that he needs to answer it. It's always a matter of fact and degree. I argued in the Privy Council, as the Court will well know, in *R v Howse* [2005] UKPC 31 that so many unattractive features of his life had come in that it made it impossible for him to give evidence and that was flatly rejected by the Privy Council but the argument is not unique but whether a person – in a trial situation, whether a person gives evidence or not is perhaps the most critical decision to make and it's one thing to say, well, you don't have to, but there are situations where it is a practical necessity if you want to have a chance of a jury acquitting, you practically have to get in and explain this evidence. And in my submission, every case where that submission is made, needs to be looked at in its context but it's the type of submission which should always be looked at, I submit, rather than simply –

TIPPING J:

How does that support an absolute rule of law? It might support a discretion, if it's fact and degree it might support something discretionary.

MR KING:

Yes and I understand that Sir but I've never seen, with respect Sir, *Grdic* as being quite at that level of absolute rule of law. What I'm essentially inviting the Court to do is to look at something like a prima facie exclusion rule so that in certain cases it could be admitted but generally speaking it would not be.

TIPPING J:

So that instead of prima facie in à la *Degnan*, it would be prima facie out à la *Fenemor*?

MR KING:

Subject to a situation like *R v Z* or perhaps *R v Maru* [2007] NZCA 275 with the New Zealand example where their defences are just so similar to what has been advanced on previous occasions, and so on, that one – we almost get to a point of once bitten, twice shy. To say that someone like Mr Z has previously been in a situation where he was charged with rape and he was acquitted because a jury wasn't sure about his belief in consent but then afterwards he's involved in an identical situation, no, it's just, it's intuitive that that's got to be relevant, it's intuitive when assessing whether he really believed that there was consent that he had had such a forceful education in that whole concept at a previous trial and a previous case and everything that that entailed so for him to then turn around at the next trial and say, "Well I believed in consent," without any reference to that would be artificial.

McGRATH J:

It seems to me, Mr King, that the prejudice, really though, applies to all allegations of previous similar offending, not just those that had charges which resulted in an acquittal.

MR KING:

Well –

McGRATH J:

It's really an argument against propensity evidence being admissible.

MR KING:

No in my submission it can be made very specific to the previous acquittal and I've attempted to address that at the, perhaps paragraph 9 of my submissions on page 4.

Where its danger really bites, in as far as illegitimate prejudice is concerned, is the fact of the jury believing that the accused had gotten away with it previously and that there was a general need of public protection, in the sense that this wasn't a one off, this was a person with a habit of committing this type of offence, obviously raises concerns about the need to protect the public. That it takes the focus away from the present allegations because effectively the jury is being asked to relitigate the previous matters. That in a case such as this one, of course, that the jury can lead to speculating as to the basis of the previous acquittal.

And most importantly is that, and this can be articulated in numerous different ways, but this, relieving the jury of the burden of office. With respect we've all seen it, we've all seen how absolutely serious jurors take their responsibilities, it's a burden that weighs very, very heavily on them. They are determined to get it right and they clearly can worry themselves silly in that process. But in a situation where they've heard that the person has been engaging in like conduct, and there has been a previous acquittal and there is a sense that he might have got, or she might have gotten away with it, and there is a greater for public protection, that office, that burden of office can just be significantly lifted. It just doesn't matter. A jury will approach it differently than if an outstanding citizen with no previous convictions were – or no previous past allegations were there and that, in my submission, is a very real factor. That jurors are just, should be avoided from having to confront themselves, except in the clearest of cases.

And look, in *R v Z*, that's one of those cases where one can just totally understand but here we're talking about a basis of an acquittal, which we just don't know, but the fact was it was a Judge who gave reasons for it, although those are lost. They had the benefit of propensity evidence at that time and then more than 10 years later that's pulled up again, they're now adults, they're no longer children, and they come along and they give their adult interpretation of events that occurred. We're not able to measure that against what they – or see what they said about it at the time. It's a classic scenario where these types of prejudices arise not because of propensity evidence, per se, but because – directly linked with the fact of that previous acquittal. Now –

BLANCHARD J:

But that would be in spades in a case like *R v Z*. The jury there would obviously be thinking he seems to have got away with it previously.

MR KING:

And in my submission the same would apply in this one.

BLANCHARD J:

Yes, but on that argument *R v Z* was wrongly decided on its facts.

MR KING:

No, in my submission – ultimately it's always a balancing of probative versus prejudicial, a legitimate prejudice. Where something, in the *R v Z* case one can see that evidence as having the highest level of probative –

BLANCHARD J:

Very probative –

MR KING:

Very probative because it's dealing with that specific offence, whereas in this case, it's my submission, the probative value is far less because the evidence is a) unreliable and b) it's just so old –

BLANCHARD J:

But isn't there then less chance that the jury will automatically be thinking 'well he got away with it previously', because they'll be looking at previous evidence that perhaps, by itself, isn't that strong.

MR KING:

But one suspects if they thought that, it would have had to have been an acquittal because this evidence was just so inconclusive.

BLANCHARD J:

But I don't think you can reason from that that they must have thought that he got away with it previously and that they convicted him because of that thought?

MR KING:

To refine it even further to the specific case here. The jury is looking at a video screen that shows a man holding a guitar. That's in front of a child. The child is wearing tights, there's no – and the hand is there. Now they're having to make an assessment about whether this is innocent or criminal conduct. In that –

ELIAS CJ:

On two levels. Whether there was touching –

MR KING:

Indeed.

ELIAS CJ:

– and whether it was with –

MR KING:

It was indecent.

ELIAS CJ:

– indecent intent.

MR KING:

Indeed. And so on both of those bases the jury is looking at this. Now in my submission, looking at it in isolation they just could not be sure and the ground of appeal would be that that was unreasonable but when one brings in propensity evidence, and the Judge tells them that you can use this in interpreting what you see on the video, as His Honour directed them, and obviously that's why the evidence was there. It becomes very troublesome in my submission and it just shows the reliance firstly that the Crown place on this evidence and the risks therefore of a prejudicial approach to that evidence being taken by the jury illegitimately prejudicial. And as I said earlier, it's not helped in my submission where there is such scant submissions made about it.

But in terms, trying to come back to Your Honour's question, about where does this separate out from run-of-the-mill propensity evidence, I suppose one has to look at those factors. That on a principled basis it means that he's lost the benefit of the previous acquittal, that the evidence that had been resolved in his favour that's now been relitigated. He's lost the finality that that litigation –

BLANCHARD J:

He hasn't lost the benefit of it. He's not been convicted of the earlier offending. He's not being sentenced in relation to the earlier offending, assuming it was offending.

MR KING:

Yes, I – that submission Sir and I'm taking the Canadian approach in that which I know is –

BLANCHARD J:

But isn't that unrealistic?

MR KING:

Well I submit not but beyond that – I mean, look, I can't improve the arguments above what the Supreme Court have done and above what the academic papers have done.

McGRATH J:

The potential prejudice that in your submission Justice Sopinka identified, this is immediately, this is in paragraph 10, immediately following the paragraph you've taken us to –

MR KING:

Yes.

McGRATH J:

But the potential prejudice that he identifies is very close to the illegitimate prejudice that you're submitting?

MR KING:

Absolutely and it's here in this case. The allegation has not been proven against him previously.

McGRATH J:

But Justice Sopinka is talking about all similar fact evidence?

MR KING:

He was indeed and that's why I've tried to refine that and it's really the first – from page 4 to, really to page 7 where I've tried to crystallise, as best I'm able, where I say the prejudice arises in this case. And of course I make the point, I'm not being facetious, that when the jurisprudence is being – or when the judgment is given down, one still has to go back to these cases of Justice Sopinka and so on where it's

actually enunciated what the types of illegitimate prejudice are. Now we had, in my submission, with the passing of the Evidence Act, we had a much clearer position because the legislature, the one thing it did do, was set out the considerations to be taken into account and it did give us the benefit of section 43(4)(a) and (b) which are examples of the types of illegitimate prejudice.

But those are not conclusive but a list of the types of prejudices, which I've endeavoured to set out in those submissions, would be of enormous benefit to the Courts, the trial Courts, in assessing it because we've got so much on why is it probative. How does this become probative? And we've got so much said about that, but there's not a corresponding list of what are the types of prejudice that the Judge should bear in mind as potentially arising. And on that list I would include the fact that an accused person may be compelled to give evidence in their defence. Not as a conclusive factor but as one of the potential prejudices that can arise through the admission of propensity evidence. And there's no harm in that. A Judge can look at it and say, well on the facts of this case I think that's a weighty factor or on the facts of this case I don't give that much consideration at all but at least it would be of benefit to have that identified. And, of course, the criticism of *Degnan* that Ms McDonald has made in her papers is precisely what she is getting at, in saying that there is insufficient guidance given to the Court on how they are to approach this esoteric concept of fairness.

BLANCHARD J:

Did she come up with any suggested guidance?

MR KING:

It's a good paper Sir. Well in my submission –

WILLIAM YOUNG J:

Isn't part of it, isn't it, - I mean often enough it will be the case that to fairly analyse, fairly take into account the propensity evidence which has resulted in acquittal at an earlier trial, it will be necessary to fully deal with what might be quite a detailed defence and you get into a situation where you get a great herniating side-issue that involves effort that's quite disproportionate to the value and isn't that the sort of situation where the evidence should be excluded because it's simply too distracting and it's not worthwhile?

MR KING:

Yes.

WILLIAM YOUNG J:

But what else? What other reasons? I mean I can understand that –

MR KING:

Well, what I've set out in those first few pages Sir. Those are the types of prejudices which, in my submission, the Court should –

WILLIAM YOUNG J:

But here this evidence, the total propensity evidence in this case took less than an hour.

MR KING:

And yet it –

WILLIAM YOUNG J:

It started, it came after afternoon tea and was finished before 5 o'clock.

MR KING:

But it consumed most of the cross-examination of the, and the evidence-in-chief as well, of the appellant. It has assumed huge significance in the closing address of the Crown and it's assumed, its importance is completely emphasised to the jury in the directions of the trial Judge so it was critical and central I submit.

ELIAS CJ:

In the context of an ambiguous observed occurrence it was overwhelming, is your submission.

MR KING:

Indeed; central and critical.

ELIAS CJ:

I've been thinking about what you were saying about prima facie exclusion or not which is, I think, something none of us would want to get back into but it seemed to me that it's not – what section 43 indicates is that propensity evidence has to be

treated with more care because otherwise you would simply deal with it under section 7 and 8, so there's a specific regime and it is only admissible if its probative value outweighs its prejudice, so it is inevitably a contextual assessment.

MR KING:

Absolutely.

ELIAS CJ:

Because your submission really has to be that it was treated not as a contextual assessment.

MR KING:

Yes, well, that just simply didn't do it, on the basis of the previous acquittal, that just didn't seem to have formed any part of the dynamics at all.

ELIAS CJ:

Well even if it, even if he hadn't been previously acquitted, as he wasn't in respect of the other complainant, there isn't any grappling with the particular context, which was how significant this evidence was in relation to the other evidence or how easy it would be to reason that he shouldn't be allowed to get away with it, or something like that.

MR KING:

Well it just seems to go straight in, with respect to 43(4)(b), whether the fact finder will tend to give disproportionate weight, in reaching a verdict, to evidence of other acts or omissions. I mean, in my submission that's exactly what we're dealing with here. You're looking at a video, you're having to interpret it; you've got this other evidence, you're not told about what the effect of it being the subject of an acquittal or so on as in relation to that but are they likely to give disproportionate weight to it. In my submission, inevitably. In a case like this there must be a weighty factor –

WILLIAM YOUNG J:

Well if they think it's true they're going to give it lots of weight.

MR KING:

Proportionate weight.

WILLIAM YOUNG J:

But is that – would that be disproportionate? I mean, if the evidence were true then –

MR KING:

The fact that a person –

WILLIAM YOUNG J:

– then any weight given to it would not be disproportionate.

MR KING:

Well, without getting too far into the detail of it the fact that a person who's taught thousands of students over numerous years has had these allegations made against him more than 10 years previously and was acquitted, that – to give that the type of weight to carry the verdict home – I mean there was an argument –

WILLIAM YOUNG J:

Well coincidence thinking, I agree in that situation is of – might require some pretty careful thought where, presumably, there have been thousands of interactions.

MR KING:

Well he actually called evidence, he called propensity evidence about himself from students to say he'd always acted entirely properly and appropriately and one of the criticisms in the Court of Appeal was that His Honour had not directed the jury on that propensity evidence whereas the Act makes it clear a person's entitled to call propensity evidence about themselves, and the argument being that it was relevant in two ways. One, as stand-alone propensity evidence to show he was not a person in the habit of acting in this way, but secondly, to assist the jury when assessing the propensity evidence called by the Crown of L and M, whether that is, in a sense, rebutted so that they cannot find that there has been a pattern established. And so that was an argument that was unsuccessfully mounted in the Court of Appeal.

ELIAS CJ:

Mr King we'll take the adjournment shortly but where do you want to – have you effectively completed your submissions?

MR KING:

Pretty much. I just wonder if I might just have the adjournment to see if there's something I can –

ELIAS CJ:

Yes, of course, yes.

TIPPING J:

I wonder if you could just – this is probably just clarifying or building on something that the Chief Justice was asking you about Mr King but does your submission really come down to this; that in a sense, in this case, we're all being distracted by the acquittal. If this had been simply an allegation, like it was for the other complainant, and you then had to decide whether, not being distracted in any way by the concept of an acquittal, this was sufficient for admissibility, under section 43, it wouldn't have got there.

MR KING:

Well that's been the argument throughout Sir, it's just – unfortunately it's, it might be a stretch to say that that comes within the grant of leave in this Court.

TIPPING J:

No, no, I'm not talking about the grant of leave now –

MR KING:

Yes but no, that's saying that this evidence –

TIPPING J:

I'm just saying, in essence that's what you're arguing.

MR KING:

– in any event but I'm, yes, but – that's true but I'm saying the fact of the previous acquittal takes away its reliability and its probativeness far more –

TIPPING J:

I'm not trying to be cute about the grounds here Mr King, I'm just saying that in essence it's not a similar, sufficient similar fact case.

MR KING:

Yes, that's what I would argue, yes.

ELIAS CJ:

But in context –

MR KING:

In the particular context, yes.

ELIAS CJ:

– the acquittal, the acquittal has some bearing on your assessment of the probative value of the evidence.

MR KING:

Yes, yes indeed.

ELIAS CJ:

Whereas, of course, if it had been a conviction it might have flicked it entirely the other way.

TIPPING J:

And in a sense if it wasn't going to be good enough without the acquittal then the acquittal can only make it more difficult.

MR KING:

Yes. It's, in my submission, what it probably, ultimately comes down to is a weighting of the various considerations to be given.

TIPPING J:

Is the correct view in law then, perhaps, and I know this is inimical to your first argument, that you just simply carry the acquittal into one of the factors that goes against it.

MR KING:

Well several of the factors actually.

TIPPING J:

Well, yes, several of the factors.

MR KING:

Yes, and weighty factors, so we almost get to a point, without having to say there is a prima facie exclusion rule or there is an absolute exclusion rule, one can, can deal with 99% of cases completely properly, in my submission, by saying where there has been a previous acquittal that should be a weighty factor or a factor that comes into play, especially when considering the statutory requirements –

TIPPING J:

Because it does say, amongst other things doesn't it, on each – both the prejudice one and the probative one says, amongst other matters.

MR KING:

Yes so I submit –

TIPPING J:

And what Professor McDonald doesn't like is that the Courts haven't been prepared to tie us down to what other matters.

MR KING:

Exactly and that's what I, I have tried to do that, I've tried to list what I regard as the types of prejudices which can arise from no other basis –

TIPPING J:

Was her article written before the Act was passed?

WILLIAM YOUNG J:

Yes.

MR KING:

Ah, yes it was, it was 2003.

TIPPING J:

Well I would have thought her article, her plea becomes much harder to justify – why should we assay a categorisation if Parliament hasn't accepted in certain respect.

MR KING:

Well my answer to that Sir, before we take the adjournment, is that what Parliament has seen to do is to set down the types of, in a non-exclusive way, the types of considerations to be taken into account. It's for the trial Court or the appellate Courts, in an individual case, to weigh up those factors, whether it's strong in this particular case and that's ultimately what this is about, measuring its probative value versus its prejudice. Where there has been a previous acquittal its probative value, in my submission, is much lower because it's not at that gold standard. Where – but the prejudice is higher because it will involve, necessarily, a relitigation of that issue and all those other factors which have been talked about.

So ultimately it's in, I think, with respect, Professor, or Ms McDonald, that's what she's getting at, is that guidance but it's simply a list of the types of prejudices the Court should consider as potentially arising. We've done it with the probative value, we've identified numerous ways in which it can be probative but simply prejudice is usually dismissed in a single paragraph and there's always that, there's always that comment saying, well, of course, propensity evidence is always prejudicial against an accused, it's illegitimate prejudice we're talking about, which again flies in the face of the wording of the legislation, which talks about the prejudicial tendency and that's what is meant when people are talking about it. If I can just have – I may not come back with anything

ELIAS CJ:

No, no, that's fine. We'll take the adjournment, thank you.

COURT ADJOURNS: 11.34 AM
COURT RESUMES: 11.56 AM

MR KING:

Just very briefly in conclusion Your Honours. Can I come back to a question that was asked very early in the proceedings about whether the jury were aware of LM having been a propensity witness in the first case involving Judge Walker. It's clear from the evidence that she gave that no question was asked in chief or in cross-examination in regards to that. Her evidence is at pages 23 to 31.

BLANCHARD J:

Which page?

MR KING:

23 to 31 which is under tab 4 in volume 2. The evidence-in-chief is two and a half pages. So for example the name of the other witness, MB, is not even mentioned at all in the entirety of her evidence. There's no reference to her having given evidence on a previous occasion. What is obvious, though, is her recall issues. Not surprising as she's been, as she made the point at page 26, line 4, "Is your memory of this event not very clear given that it was some 13-odd years ago?" "It is a reason – parts of it are reasonably clear but it is quite hard to remember that far back."

BLANCHARD J:

So are you saying the jury would not have known that she'd given evidence at the earlier trial?

MR KING:

Well, not from her evidence but if one looks at the next witness, MB who was the complainant, then we can see that at page 34, right at the very start of the cross-examination we have the question asked, line 25, " LM who you saw come out of the courtroom a moment ago, she gave evidence in a case in which you gave evidence against Mr Fenemor some years ago?" "Mmm, yeah, but, ah…" and then it stopped.

If you turn over we see that there was legal discussion. The jury return at 4.29 and there is not further reference to that whatsoever.

BLANCHARD J:

So the jury would have known only from that if they'd picked up the significance of it.

MR KING:

That's the only reference I could find. I'll stand to be corrected but that's the only reference we could find. In the closing address of defence counsel, which is contained at page 124, tab 4 at page 124, and in my submission it's obviously not a lengthy address but so much of it is focused on this propensity evidence. At page 126 we see at the top, in response to the criticism that Mr Fenemor seemed to have crystal clear recollection of the events with these two witnesses, whereas they didn't, he makes the point it might stick in your mind, "even if you're acquitted, which of course he was in respect of the MB matter, that it might even years later stick in your mind." So that's the reference in the defence closing to the fact of their being an acquittal.

TIPPING J:

Was that passage I had in mind was that on a different topic or something Mr King was it?

MR KING:

I'm just trying to find that Sir. I thought it was –

BLANCHARD J:

It was at page 137.

MR KING:

Page 137. That is still the defence closing then.

BLANCHARD J:

But it's significant, perhaps, that the jury is not told directly that the evidence given by, it's M isn't it?

MR KING:

Yes, L is the propensity witness here.

BLANCHARD J:

Did not – was not considered by the previous Court to be sufficient to sustain a conviction against, in relation to the incident against L.

MR KING:

Yes.

TIPPING J:

Other way round.

MR KING:

Other way round Sir.

BLANCHARD J:

All right.

MR KING:

Yes, L to M, and you're right there is that, particularly given the previous allegations in years past from LM and MB. Now what it seems to me, with respect, is that a jury would have gleamed from the subtle references that there had been a previous case in which LM and MB had given evidence but there was no conviction in relation to MB. In my submission the danger is that they might well think that there had been a conviction in relation to LM.

WILLIAM YOUNG J:

Well if this was a danger wouldn't we have heard – seen rather a lot of it in the Court of Appeal or perhaps in the application for leave to appeal?

MR KING:

Well in my submission it was there. The argument has been throughout from the pre-trial that this evidence shouldn't be admitted –

WILLIAM YOUNG J:

Yes, I know that.

MR KING:

– and that the directions around it were insufficient. Leave was sought on a wide number of grounds. It was granted only on one but the fact remains, in my submission, that this is how the case played out and I'm stuck with, if the Court takes the view that it's outside, but in my submission this is the final Court of Appeal. This is the last opportunity that Mr Fenemor has to rectify what he sees is a substantial miscarriage of justice.

WILLIAM YOUNG J:

You're identifying a risk now which I'm not aware, which as far as I'm aware has not been previously identified.

MR KING:

I think that's probably a fair assessment Sir.

WILLIAM YOUNG J:

If it had been a real risk might it not have been, might not mention of it have surfaced before?

MR KING:

Well in a perfect world, absolutely, but this was a case, has been noted, my friend has made the point, that numerous grounds were advanced in the Court of Appeal. A specific question was asked by this Bench about whether the jury were aware of that and it's in response to that, that this analysis has taken place over the adjournment to see exactly what the position was. But it's quite clear that the jury could well have not understood, at all, whether there had been a conviction or otherwise in relation to LM and there seems to be a pathway, quite legitimately so, where they learned subtly and it stopped, that there had been a previous case in which they'd both given evidence but there was no conviction in relation to MB but silence in respect of LM.

Now in the *Carroll* case of course, probably the best reference, or the best use of that case, as Your Honour Justice McGrath identified, the fact that they quote various other decisions from Chief Justice Barwick and so on in cases such as *Storey* and *Rogers* which he refers to again without, in my submission, without disapproval. So whereas the facts of *Carroll* might be entirely self-sufficient, it does certainly talk about those principles, about the effect of a previous acquittal and so on and those are the principles, really, which ultimately the appellant is inviting this Court to give cognisance too.

But I conclude by saying that we are, of course, in the regime of the Evidence Act. Admissibility of propensity evidence is to be determined on a specialised balancing exercise, and I say specialised because it's not simply the section 8 balancing, is the particular balancing required under section 43. In my submission the fact that the legislature has sought to separate it in that way is demonstrative of the fact that this type of evidence does require special consideration. It's clear that the factors identified by the legislature in paragraph 43 are not to be regarded as conclusive and it's silent completely as to the effect of a previous acquittal. But, in undertaking that balancing exercise, a Court in my submission should be entirely cognisant of the previous acquittal and the various effects that that can lead to, and those are the ones that I've identified in the early pages, most notably, asking a jury essentially to go behind the fact of a previous acquittal, that a jury might be illegitimately prejudiced by an accused thinking they've gotten away with it in the past, that an accused person is placed in the situation of having to re-defend him or herself in respect of allegations which have already been determined in his or her favour, and invoking the types of prejudice Justice Sopinka identified, but at the same time of course, and

very importantly I submit, ultimately the evidence has a far lesser probative value than evidence which has been proven.

So, even when one weighs it up on the traditional propensity basis and looks at the weighting, one starts at a lower point, where this evidence is not as probative as evidence which has previously been proven, for which the Crown have the benefit of section 49(1) to say it's conclusive proof of the offending being committed. This absolutely requires a jury to re-litigate that issue. And so the probative value is lesser, the potential for prejudice is higher. Maybe not hugely so, and in a case like this of course my submission is that this evidence shouldn't have been admitted, whether there had been a previous acquittal or not, it simply didn't, it was unreliable and too prejudicial in any event. But the fact that there had been a previous acquittal meant that those factors should be weighted more significantly in favour of the accused person, looking at those potentials for jury distraction, for jury prejudice, the fact of an accused –

WILLIAM YOUNG J:

I might just come back – the character evidence was that Mr Fenemor had no previous convictions.

MR KING:

It was far wider than that, they called a number ex-students, seven –

WILLIAM YOUNG J:

Yes, but it was. So the suggestion that the jury may have been, may have thought he'd been convicted in relation to the –

MR KING:

Oh, I see, yes, good point, yes, no, Sir, it is. But what they heard is that she'd given evidence, yes. I'm sorry, that's the danger, Sir, of trying to respond to things –

WILLIAM YOUNG J:

Doing it on the run.

MR KING:

Yes, indeed. But, in my submission, notwithstanding that, the factor remains as a potential source of illegitimate prejudice to the accused. So, whether one doesn't go

to the point of saying prima facie – we've almost got that, we've almost got a prima facie exclusion or with propensity evidence anyway, the Crown have to satisfy the Court on a whole range of factors before it can be admitted. So all that's being suggested is that it needs to be articulated and defined where there has been a previous acquittal, how that potentially changes the dynamic and what considerations the Court should take into account. And, in my submission, we keep coming back to the fact that this was not the subject of that type of scrutiny, either in the trial Court, the pre-trial, or in terms of any type of directions given to the jury on the assistance to be given to it. And, unless I can attempt to try and answer any questions, I think that I'm content to rely on obviously what's set out in the written submissions.

ELIAS CJ:

Yes, thank you Mr King. Yes, Mr Mander.

MR MANDER:

Yes, may it please the Court, before I embark on my substantive submissions if I can just add one further reference to that which my learned friend reviewed with the Court in relation to the information that was before the trial Court relating to the evidence of the propensity witnesses, at page 127 of the case on appeal, volume 2, defence counsel's closing address, at the bottom of page 127 in the last paragraph trial counsel refers to the appellant's character, the lack any previous criminal convictions, and at the last line refers, and I quote, "And of course the one time he was charged he was acquitted," and over the page, "And then the Crown, as they are entitled to, and I'm not going to criticise them but I'm just making the point subtly that they, the witness that they relied upon in that case, LM, to support, was brought again. They're entitled to, but just put it into context." So, defence counsel did make a reference in front of the jury to the fact that LM's evidence had been called earlier in support of the original complainant.

If it may please the Court, I intend, if you like, to start from the top rather than from the bottom, where my learned friend started from. In my submission, the approach to the admissibility of acquittal propensity evidence, as taken by the House of Lords in *R v Z* and by the New Zealand Court of Appeal in *Degnan,* is consistent with the approach to propensity evidence that is required to be taken under section 43 of the Evidence Act. That approach, in my submission, allows for the proper balance to be struck in the individual case between the need for a fact-finder to have available all relevant and probative evidence, on the one hand, and the need to ensure that that

defendant is not unfairly prejudiced by having to repeatedly defend allegations upon which the accused has previously been acquitted.

In my submission, section 43 allows for the very type of assessment that was contemplated by Lord Hobhouse in the case of *R v Z* which, in the Crown's submission, should govern the admission of acquittal propensity evidence. If I, with the Court's leave, can take Your Honours to the case of *R v Z*, it's in the appellant's bundle of authorities under tab 3 at page 510 of the judgment, starting at line C, commences, "But there does remain the important question of fairness. Fairness requires that the jury hear all relevant evidence. It also requires that the defendant shall not, without sufficient reason, be required more than once to rebut the same factual allegations. In principle, a case supported by probative similar fact evidence is a sufficient reason. However, in exercising his discretion under section 78" – that's the provision under PACE, which provides for the Court's ability to exclude for fairness – "the Judge must take into account the position of both the prosecution and the defendant. If the fairness of the trial will be compromised by the non-exclusion of the similar fact evidence, the evidence should be excluded, although otherwise admissible. Trial Judges are experienced in exercising their discretion under section 78 and regularly have to balance probative value against prejudice. Any prejudice for the defendant arising from having to deal a second time with evidence proving facts, which were an issue at an earlier trial, are simply another factor to be put into the balance. The fact that the previous trial ended in an acquittal is a relevant factor in striking the balance, but is no more than that. It is not, as would be the result of upholding the rule in *Sambasivam*, conclusive.

In my submission, under the Evidence Act the fundamental principle is that all relevant evidence is generally admissible endures. The legislation specifically provides rules governing the admissibility of propensity evidence and no prohibition is placed on the admissibility of propensity, or so-called propensity acquittal evidence. As has been alluded to already this morning, given the state of the law at the time of the enactment of the Evidence Act in 2006 as reflected in *Degnan*'s case, in my submission is implicit that the legislature saw no reason to introduce such a prohibition when enacting the rules governing the admission of propensity evidence.

Section 43, in my submission, provides that if and only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant, is

it to be admitted. And that, in my submission, is a sufficient safeguard to ensure that an accused person is not unfairly prejudiced by the admission in an individual case of evidence upon which he or she may have previously been acquitted.

In my submission that test set out in section 43 allows a Court to assess any unfairness to an accused which may arise out of the admission of acquittal evidence measuring it against the probative value of that evidence. And that would include any unfair or illegitimate prejudice arising from having to deal a second time with the same allegation which was the subject of the earlier acquittal.

There, of course, remains the further residual power of preventing an abuse of process although, in my submission, that really that would not arise having regard to the gateway which section 43 provides for evidence to pass in order to be admitted.

In my submission the need to provide for the admission of acquittal propensity evidence is illustrated by the very cases of *R v Z* and *R v Degnan* themselves. Situations where the cumulative probative power of individual incidents, when considered together, is quite undeniable. Yet because those incidents have previously been viewed in isolation, they appear to have resulted in acquittals.

To illustrate the point a number of commentators, and Roberts, which is in tab 11 of the Crown's bundle, have provided the counterfactual to the Brides in the Bath case, Smith's case, to illustrate the unsatisfactory outcome of an offender being immune from the weight of proof that such an offender might otherwise have faced had, as was the case – as may have been the case in Smith, been individually prosecuted and acquitted of each of the deliberate drowning of his wives. Of course he had not faced trial in that particular example and therefore all that evidence was admitted on his trial. But it does illustrate the point of the probative value of such propensity evidence and it would be quite wrong, in my submission, if such evidence was not available to the prosecution simply because an accused had previously been tried in isolation in relation to one of those incidents.

As was reviewed in both *R v Z* and *Degnan*, what was said to stand in the way of the admission of acquittal propensity evidence was the rule against double jeopardy. The Privy Council Judgment in *Sambasivam* was cited as authority but a verdict of acquittal does more than just prevent an accused being tried again for the same offence. It was said that it was binding and conclusive in all subsequent proceedings

between the parties to the adjudication. The second of those two propositions has, of course, been qualified by the House of Lords and by the New Zealand Court of Appeal.

Lord Hope in *R v Z* clarified the effect of the double jeopardy rule. And if I may refer Your Honours again to that authority, at tab 3 of the appellant's bundle, at page 487, at line – commencing just above line F, halfway through that paragraph, if I may quote it again, "The principle which underlies both statements is that of double jeopardy. It is obvious that this principle is infringed if the accused is put on trial again for the offence of which he has been acquitted. It is also infringed if any other steps are taken by the prosecutor which may result in the punishment of the accused on some other ground for the same offence. But it is not infringed if what the prosecutor seeks to do is to lead evidence which was led at the previous trial, not for the purpose of punishing the accused in any way for the offence of which he has been acquitted, but in order to prove that the defendant is guilty of a subsequent offence which was not before the Court in the previous trial." And, to similar effect, are the words of Lord Hutton at page 504 of the judgment, commencing at E…

ELIAS CJ:

It's also consistent, I suppose, with the statutory expression of the rule against double jeopardy in section 26 of the Bill of Rights Act –

MR MANDER:

Indeed.

ELIAS CJ:

– or not inconsistent with it.

MR MANDER:

Section 26 is limited, "No one who has been finally acquitted or convicted or pardoned for an offence shall be tried or punished for it again," which again is consistent with section 10(4) of the Crimes Act, which simply provides and does no more than provide, "No one shall be liable, whether on conviction, on indictment or on summary conviction, to be punished twice in respect of the same offence." And of course again, as has been alluded to, New Zealand has no issue estoppel in its criminal law, as with England.

In my submission, any wholesale prohibition of the admissibility of acquittal propensity evidence would, having regard to the correct New Zealand law definition of double jeopardy, would be based, in my submission, on a doubtful premise which, with respect, the House of Lords and the New Zealand Court of Appeal were correct in not following.

TIPPING J:

Of course, the English position, going back as far as *Ollis'* case, was to the effect ratified in *R v Z*, it was only this side-shoot, if you like, from the Privy Council that put the question into some degree of doubt, wasn't it?

MR MANDER:

It seems as if the Privy Council decision, it really just took everyone down a, rather a dead alley way, if I may say.

TIPPING J:

Mmm.

MR MANDER:

The Canadian case, their line of authority seems to have its genesis in the case of the Supreme Court's decision in *Grdic*, which –

ELIAS CJ:

What date's that?

MR MANDER:

That is 1985, which is contained in the Crown's bundle at tab 7. At page 825 of the judgment of His Honour Justice Lamer, His Honour held in that case, it's about the second full paragraph on page 825, there were not different kinds of acquittals and on that point I share the view that, quote, "As a matter of fundamental policy in administration of criminal law it must be accepted by the Crown in subsequent criminal proceeding that an acquittal is the equivalent to a finding of innocence," referring to an article by Professor Friedland. It goes on, "To reach behind the acquittal to qualify is in effect to introduce the verdict of not proven which is not and has never been and should not be part of our law."

Now that is the critical part of the judgment which it appears has been adopted in subsequent Canadian cases. But as the commentator Stuesser in his article, which is contained in the Crown's bundle at tab 12, has observed the case of *Grdic* was a case about res judicata, or issue estoppels. It was certainly not about similar fact or propensity evidence and that learned commentator has opined with that subsequent Canadian case law, has in fact misapplied this passage of the judgment, and hasn't interpreted in the context in which it was made.

BLANCHARD J:

It was a perjury case, wasn't it?

MR MANDER:

It was a perjury case, yes. It was a case not unlike the Australian case of *Carroll* in which the Crown effectively sought to get behind the acquittal by laying another charge, one of perjury, in respect of a matter for which the accused had been acquitted.

TIPPING J:

It would have traversed exactly the same issue rather than being illustrative or illuminating of a completely different issue.

MR MANDER:

Indeed Sir. And effectively would have the effect of re-trying the accused, albeit for a different offence, but in my submission what is significant is that the Canadian Supreme Court did observe that the Crown would have been entitled, under the doctrine of issue estoppels, to have retried the individual for a charge of perjury if they had available to it additional evidence. So if the case changed. So the Crown were entitled to prove a charge of perjury, to prove what they described as fraud, in relation to the original acquittal and the Crown could not be estopped from doing that and from inviting a Judge to relitigate the issue. But if, in its endeavour to do that, all the Crown is actually doing is tendering the same evidence as it did on the original charge and looking for a different verdict then issue estoppel kicks in. And indeed in my submission the issue of double jeopardy effectively arises.

ELIAS CJ:

Or at least abuse of process.

MR MANDER:

Or at least abuse of process as was the case, was found in *Carroll*. In the Canadian decision Justice Lamer refers to the words of Lord Hailsham in *DPP v Humphrys* [1977] AC 1, and that's set out at page 828 of the Canadian decision, Lord Hailsham stated in that case, again in relation to a similar type of situation where a perjury charged was laid, Lord Hailsham stated, "In an indictment for perjury like the present I would think that it is the duty of the Court to apply the double jeopardy rule against the Crown, not as a matter of discretion but as a matter of law, where it is satisfied in substance that all the prosecution is doing is trying to get behind the original verdict by re-trying the same evidence," re-trying the same evidence in relation to the same incident.

But both Justice Lamer and Lord Hailsham expressly state in those respective cases that where the Crown has available to it fresh evidence, new evidence, that it did not have available to it originally, in the sense available at the appropriate time by reasonable diligence, the same test for fresh evidence, then the Crown is not estopped from trying the accused, because the accused has not been put in jeopardy for the original alleged offence but for the crime against justice, which the charge of perjury represents, and no double jeopardy arises in that situation, it's a distinct and separate allegation which the Crown cannot be prevented from trying the accused upon.

And again, referring to Lord Hailsham's words, as quoted with approval by Justice Lamer, at the bottom of that quoted passage at page 828, halfway between lines E and F, "There is no double jeopardy, and the prosecution is entitled to adduce the evidence and make the assertions necessary to achieve its purpose, whether or not the effect is to give rise to the inference that the previous verdict of acquittal was unsupportable, or the previous conviction and punishment right."

So, in my submission, and number of points can be made in respect of the approach of the Canadian Supreme Court in *Grdic*. First of all, an acquittal is not the equivalent of a finding of innocence and, if one reads fully *Grdic*, I'm not sure Justice Lamer was saying that beyond the situation where a true issue estoppel arises.

TIPPING J:

Well, would it be fair to say it's not for all purposes the equivalent?

MR MANDER:

Indeed, Sir, that's a better way of putting it, Sir. And, as is observed by many Courts in various cases, a verdict of not guilty really can be treated as a positive determination as to the accused's innocence, and is perhaps a very basic and fundamental premise that an acquittal represents the failure by the prosecution to discharge the responsibility upon it to prove its case to the required threshold of proof, whereby the presumption of innocence is dislodged, and that indeed was accepted in *Carroll* by the Australian High Court, it's fundamental.

It may be possible that there may be cases where a jury's verdict, or indeed a Judge's reasoning in a Judge alone case, it's possible that there is a positive finding of innocence, and that may ultimately be a good reason not to admit evidence as propensity evidence on the ground of potential fairness, but it will depend on the individual case and really be the situation.

ELIAS CJ:

Well, what – give me an example of that.

MR MANDER:

An example of that might be a situation where, in a Judge alone case's reasons for verdict, the Judge may expressly state, come to a positive finding, that the person lied in the witness box, that they accept the other witnesses' evidence who have been called on behalf of the defence, subsequently there is another charge against the same accused, the Crown seeks to elicit the same evidence from the same complainant, and a subsequent Court may take the view that, no, there was a positive finding there, having regards the other witnesses, the evidence that was called, it would be onerous and unfair to require the accused to yet again call, assemble these witnesses and call this case again.

ELIAS CJ:

So you're talking about the application then, the unfairness, rather than the question of –

MR MANDER:

Estoppel –

ELIAS CJ:

– power, yes.

MR MANDER:

– as such, yes. The other observation that I would make in relation to the analysis of *Grdic* case is that the purpose of adducing acquittal propensity evidence is, of course, to supplement other evidence for the purpose of proving an entirely separate charge in relation to a quite different matter. So in terms of a parallel with *Grdic*, the situation where one is calling propensity evidence at a later trial is to change the nature of the case because more evidence is being called. The total sum of the evidence has increased. It's not a situation of relitigating the same evidence in relation to the same issue and as the Supreme Court of Canada observed, where the Crown seeks to prove the charge of perjury, and has more evidence which was not available to it at the time of the original hearing, that does not amount to an issue estoppel. That does not amount to an abuse. That does not prevent the Crown proceeding. So again there can't be any matter of principle derived from *Grdic* which would prevent, in principle, the Crown calling acquittal propensity evidence

So in the Crown's submission the Crown cannot, and out not to be estopped from adducing evidence in support of an entirely separate and different allegation when the pool of evidence now available to assess the factual issue, previously determined on a more limited basis, is so much greater. That new evidence, which of course forms the direct evidence of the charge, obviously was not earlier available on the hearing of what is now the propensity evidence and as is the nature of such evidence, both the direct evidence and the propensity evidence called, that evidence is mutually supportive and the whole point of calling the propensity evidence is to boost the reliability and the probative value of the original evidence. So in my submission the whole dynamics of the trial has changed completely and the circumstances in which the propensity evidence is now to be considered has changed because it now, of course, has the support of the additional evidence, which is the direct evidence of the charge at the second trial.

I turn now to the case of *Carroll*, the Australian authority, which is the other authority which is seen as being in conflict with the English and New Zealand approach. In my submission *Carroll* is not in conflict with the New Zealand and English approach or leastwise the ratio of that case is not in conflict. The Queensland Court of Appeal in *Carroll* held that the further evidence relied upon by the Crown for the perjury charge

was deficient and unsatisfactory, adding little to the original evidence and therefore that the laying of the perjury charge in the face of the acquittal was an abuse of process. It adopted the similar approach as in *Grdic*, there was no, in reality, any new, reliable, fresh evidence, it was simply relitigating the original charge of murder. And so on the approach adopted in *Grdic* the Queensland Court of Appeal held that it was an abuse of process.

But the High Court of Australia didn't examine the issue in those terms. It concluded that the subsequent perjury prosecution was an abuse of process because the Court held that the allegation in the new indictment, the perjury indictment to the effect that the accused's evidence that he had not killed the named deceased, was false, was simply another way of making the same allegation that he was the murderer. Because the only matter at issue at the earlier trial was the identity of the killer.

TIPPING J:
Was there any question of fresh evidence not reasonably available in *Carroll*, so as to bring it with in the Canadian escape or exception?

MR MANDER:
There was, but –

TIPPING J:
But it didn't turn so much on that?

MR MANDER:
The Queensland Court of Appeal held that, analysing that evidence, they didn't think it was good enough, it wasn't reliable. It didn't add to the case you were really re-trying –

TIPPING J:
So in substance it was simply relitigating?

MR MANDER:
Indeed.

WILLIAM YOUNG J:

But – I haven't read it as carefully I perhaps I should – I thought that the High Court was of the view that it would be an abuse of process anyway, to…

MR MANDER:

It would – yes, indeed, Sir.

WILLIAM YOUNG J:

Even if there was –

MR MANDER:

That's right, Sir.

WILLIAM YOUNG J:

– more crunchy new evidence.

MR MANDER:

They didn't examine the issue in those terms, although I think, in my submission, what's important to note is that the further evidence that was called related to the proof of the murder charge. It wasn't direct evidence relating to the accused's fraudulent conduct, it was some further evidence that went to say, "Well, the first time we didn't have enough evidence to prove the murder, we're going to prove perjury and saying that your contention that you didn't do it was false, because we've got more evidence to show that you did commit the murder." So it wasn't evidence that went to show, it wasn't the evidence of a witness that said he's confessed to me that he lied on the witness box, it wasn't that type of evidence. It was evidence that in effect gave the Crown a second chance to prove the original charge.

WILLIAM YOUNG J:

Well, I think most people would accept that, if it's the same evidence, a second shot would be an abuse of process.

MR MANDER:

And, in my submission, that's what's at the –

ELIAS CJ:

And, if it's a criminal trial, in breach of section 26.

WILLIAM YOUNG J:

Well, I'm not sure about that, because it –

ELIAS CJ:

Well, it's punishing.

WILLIAM YOUNG J:

But it's perjury rather than –

ELIAS CJ:

I know –

WILLIAM YOUNG J:

– the crime.

ELIAS CJ:

– but that would be a technical sort of difference.

TIPPING J:

But the essence of –

WILLIAM YOUNG J:

Sorry, sorry – even if there's new evidence it would be a breach of 26 on that theory.

ELIAS CJ:

Yes, that's what I meant.

TIPPING J:

But to prove perjury they had to prove murder.

BLANCHARD J:

The legislation.

TIPPING J:

That's, in essence, I think what the High Court of Australia said, wasn't it?

MR MANDER:

Indeed, Sir, yes.

TIPPING J:

There was no escape from that.

MR MANDER:

Yes. And –

TIPPING J:

Which you simply can't do, new evidence or not.

MR MANDER:

Indeed. And the Crown, quite candidly, said they were going to prove the murder, to show that you were, that your –

TIPPING J:

Well, it's the only way they could prove perjury.

MR MANDER:

– claim in the witness box was perjury. So the ultimate issue was exactly the same as it had been for the murder trial: did this man commit the murder? So it's unsurprising, in my submission, that the High Court of Australia came to the conclusion that it was an abuse of process and, in my submission, it would be, in all likelihood, an abuse of process in New Zealand.

TIPPING J:

Well, I hope it would.

MR MANDER:

So, in my submission, it certainly isn't an authority that undermines the proposition that acquittal evidence cannot be adduced.

WILLIAM YOUNG J:

But it must be inconsistent with *Moore*, isn't it?

MR MANDER:

Not in my submission, because in *Moore* the Crown didn't attempt to prove that he – although that was the background to it – the Crown attempted to prove that this person basically was involved in a conspiracy to adduce false evidence. So, the additional evidence the Crown had available to it in that case –

WILLIAM YOUNG J:

Well, there wasn't such a precise overlap between the Crown case at the perjury trial and the Crown case at the murder.

MR MANDER:

It went directly to the deliberate fraud and the conspiracy to execute the fraud.

WILLIAM YOUNG J:

But he was then sentenced as though he's escaped, wrongly, a murder conviction.

MR MANDER:

Well, he was sentenced to the maximum. Again, as has been alluded to already this morning, the High Court in its judgment expressly limited, or certainly made no – were at pains to point out that they weren't expressing any view as to whether or not their decision in that case had any impact on the admission of acquittal propensity evidence, at page 651 of the judgment which is at tab 4 of the appellant's bundle. I won't read it out, but it makes direct reference to the case of *R v Z* and *Degnan*, observing that there may well be cases where, at a later trial of other allegedly similar conduct of an accused, evidence of conduct may be adduced even though the accused had earlier been charged with, tried for and acquitted of an offence said to be constituted by that conduct.

And indeed, the English Court of Appeal in the case of *R v Terry* [2004] EWCA Crim 3252*,* which is at tab 5 of the Crown's bundle at paragraph 47, noted that again the High Court of Australia was not attempting to limit in its judgment in *Carroll* the admissibility or the potential admissibility of such evidence, and acknowledged the scope of the distinction between the propriety of adducing such evidence and the situation that the High Court of Australia was faced with in *Carroll.*

Now, in my submission the present case is not an example, clearly not an example, of a proceeding that is being brought in order to relitigate or circumvent a previous

judicial determination, which *Carroll* clearly was an example of. The only reason for the propensity acquittal evidence being introduced into the proceeding was evidence that was relevant to the determination of another charge relating to a different matter, and which was considered of sufficient probative value so as to be admissible under the applicable rules that apply. So held the trial Court and the Court of Appeal and, in my submission, clearly the admissibility of such evidence does not infringe the double jeopardy principle. The accused was not placed in double jeopardy because the facts that gave rise to the prosecution were quite different from those which gave rise to the earlier prosecution.

That is in accordance with the observation made by Lord Hutton in *R v Z*, at page 505, tab 3, the appellant's bundle, at line A, which really is a repetition of the previous submission I've previously made that here the appellant was not being retried in relation to the same or substantially the same facts, and certainly was not being prosecuted in the same or substantially the same facts as gave rise to the earlier prosecution. That was an observation repeated again by Lord Hutton at page 506, the case of *R v Z*, at line D. And, just to emphasise the point in relation to *Carroll*, the situation in *Carroll*, in my submission, would fall under Lord Hutton's description of double jeopardy, because both the murder charge and the perjury charge in *Carroll* effectively involved the accused being retried on the same or substantially the same facts that gave rise to the original charge. That is not the situation in the present case.

So, in my submission, there is no bar in principle or law to the admission of propensity evidence which has previously been the subject of acquittal. Provided no double jeopardy arises, the evidence is admissible subject to section 43 of the Evidence Act.

Further, in my submission, no inconsistency follows or conflict naturally arises between the verdicts, so long as the nature and the essence of criminal proceedings is properly appreciated. The admission of such evidence at a subsequent proceeding on a trial for different offending, which results in a conviction, is in my submission reconcilable with the earlier verdict, having regard to the additional evidence called at the second trial to prove the charge, which of course the acquittal propensity evidence is mutually supportive of. So, the propensity which might not have been sufficient originally to have supported a conviction, when now supported by other evidence, there should be no difficulty or there should be no lack of

confidence in the finding that such evidence can be relied upon notwithstanding the previous acquittal.

TIPPING J:

What do you say to the argument made by Mr King, I mean, this may more naturally fall into the second stage, that the acquittal puts a big question mark over the probative value of the evidence?

MR MANDER:

Well, in my submission, that can't necessarily be the conclusion drawn from the fact of acquittal, that all we have is the label "acquittal", and there is a whole range of reasons as to why the acquittal may have resulted. But, more importantly, the probative value of the evidence needs to be gauged in the context in which it is being adduced at the second trial, not from the application of a label –

TIPPING J:

Is there perhaps a maybe unintended hind of a sequential approach there, as opposed to a pooling approach, if you understand what I mean, Mr Mander?

MR MANDER:

I think that that could be the result, and there ought not to be, in my submission.

TIPPING J:

Yes, yes.

MR MANDER:

Indeed.

McGRATH J:

But how does the acquittal come into it? Does it come into it in the assessment of probative value or does it come into it in some other way?

MR MANDER:

My submission is that the fact of acquittal, of itself, the fact that you apply the label "acquittal" to this particular evidence, takes one nowhere.

WILLIAM YOUNG J:

Well, you'd say it's just one person's view on the evidence and the jury had to form their own view.

MR MANDER:

Well, there is that.

WILLIAM YOUNG J:

That's one way of putting it, isn't it?

MR MANDER:

There is that. The fact that it's been the subject of acquittal may be a warning light to examine further why was there an acquittal. And the classic example, which has already been referred to, is because the person proved at the previous trial that they weren't there, they couldn't have committed the crime, they called all these alibi witnesses. So by examining why there was that acquittal in that situation, there may be good reason why it would be unfair, under section 43, to the defendant, to require that person on a second trial to have to go through the rigmarole of calling all that evidence.

ELIAS CJ:

That's not to say it's irrelevant though, to the assessment of cogency, because it does mean that the evidence wasn't treated as cogent.

WILLIAM YOUNG J:

Conclusive.

ELIAS CJ:

Well, wasn't treated as conclusive, fine.

MR MANDER:

It wasn't sufficient in and of itself –

ELIAS CJ:

Yes.

MR MANDER:

– having regard to the other evidence that –

ELIAS CJ:

No, I understand that, that it's a relative consideration.

TIPPING J:

It's the isolation point that seems to me, as has always seemed to me, to be the key dimension here. A piece of evidence viewed in isolation may well not carry the mind to that degree of certainty, whereas when you pull and view everything and you're focusing on the later allegation, you do have that level of certainty. You may not, but you can.

MR MANDER:

Indeed, Sir. And that's my submission, that it would be illegitimate to presumptively draw the inference that, because this evidence had resulted in an acquittal on a previous occasion, it's somehow of a lesser standard in a subsequent hearing when it is part of the mix of other evidence.

McGRATH J:

Are you saying the acquittal doesn't go to admissibility, it goes to weight, is that another way of looking at it?

MR MANDER:

Well, in my submission – it wouldn't even go to weight, in my submission.

McGRATH J:

Well, that might be the jury, for the jury.

MR MANDER:

I wouldn't seek to stop the jury hearing the fact –

ELIAS CJ:

It's a question for the Judge, the Judge has to decide whether it's admissible under section 43. So the Judge does have to attempt some sort of assessment of whether the evidence is probative, and it can't be irrelevant that it wasn't sufficiently cogent at

a previous trial, depending on the defence that was run and the circumstances perhaps of the earlier case, but it would have to be a factor.

MR MANDER:

It would be a factor but again, in my submission, at the risk of repeating myself, it would be a factor having a look at the circumstances pertaining to that acquittal, that's the submission.

ELIAS CJ:

Yes, yes.

TIPPING J:

How would one distinguish between evidence that had led to an acquittal and evidence that actually hadn't been the subject of a charge at all?

MR MANDER:

Well, that's – indeed, Sir.

TIPPING J:

You just don't know, do you, until the ultimate fact-finder is able to look at the whole picture?

WILLIAM YOUNG J:

Well, the jury may have accepted the evidence of the girls as being absolutely correct, but had a reservation as to whether there was an indecent intention, a reservation that then is, as it were, resolved when something very similar happens later.

ELIAS CJ:

Which is why, in the context of this case, there is the double use that needs to be considered. Because it's not just indecent intention, it's the fact of touching that it will go to.

MR MANDER:

That's correct, Ma'am, yes. Perhaps an example of where previous acquittal – the fact of the previous acquittal certainly bore on the admissibility of the propensity evidence, as the case of *Blackburn v R* [2011] NZCA 365, which is contained in the

appellant's bundle at tab 10. That was evidence that was admitted by the trial Court but the appeal overturned that ruling. That was a case where there was common ground that the reason the appellant had been acquitted at trial in relation to the proposed propensity evidence was because it was, "Seriously deficient," so even the Crown acknowledge that. It was a case where the jury came back within three minutes, where there were internal – by examining the evidence there were internal inconsistencies in the propensity witness's evidence, and she was acknowledged to be an unsatisfactory witness.

TIPPING J:

I suppose it's a question of what inference you draw from the testing of the evidence at the first trial, which would distinguish it from the evidence of a person who hasn't been the subject of a trial, because that evidence hasn't been tested in the same way. You would say, "Well, this evidence was tested and found totally wanting," –

MR MANDER:

Yes.

TIPPING J:

– à la *Blackburn.*

MR MANDER:

Yes.

TIPPING J:

Or, "This evidence was tested and the most one can say is it didn't, in the whole context, lead the jury to convict beyond reasonable doubt," –

MR MANDER:

Yes.

TIPPING J:

– and you'd have to try, if the materials were there, if you like, to make that sort of assessment.

MR MANDER:

Indeed, Sir.

TIPPING J:

I'm just trying to think what one would do, as a trial Judge, when you were faced with –

MR MANDER:

No, I think that's, with respect, right.

TIPPING J:

– this sort of issue.

MR MANDER:

But the submission that I would make is that, again, you have to, it could – evidence, propensity evidence that hasn't been the subject of an acquittal, could very well be subject to the same criticisms.

TIPPING J:

Useless, it could turn out to be useless, it could turn out to be very powerful.

MR MANDER:

So not a great deal, in my submission, if anything, turns on the fact that it was the subject of an acquittal –

TIPPING J:

Well, it might do.

MR MANDER:

– but it may do.

TIPPING J:

If it's been the subject of testing –

MR MANDER:

Yes.

TIPPING J:

– like *Blackburn*, then that might be quite a strong point.

MR MANDER:

And one would then have to – as was done in *Blackburn* – gauge its probative value. And in *Blackburn* it wasn't held to be particularly probative, didn't really take the matter a great deal, so again it's just the balancing act that saw it finally being excluded. But, in my submission, that is the proper context in which the evaluation is carried out, and section 43 provides for it.

TIPPING J:

So you're in effect saying, "Add notionally to 43(4), para (c), the fact that the previous evidence had led to an acquittal," or some words like that?

MR MANDER:

No, I wouldn't go that far, Sir.

TIPPING J:

No, no, you wouldn't go that far.

MR MANDER:

No.

TIPPING J:

But surely you should – it has that effect, doesn't it? It's just – that's what Lord Hobhouse said, didn't he, it was just one of the things you take into account?

MR MANDER:

Indeed.

TIPPING J:

I'm not suggesting a literal redraft, but that's where it would fit in, it would fit in, if at all, on that side of the ledger, wouldn't it?

MR MANDER:

It would, in my submission. And, again, at the risk of repeating myself, one has to look behind just the simple words that's been the subject of acquittal, to look at, well, why was there acquittal, is there anything that is relevant that bears upon the balancing exercise, the assessment of prejudice.

The other two cases that have been provided, more recent cases, again in the appellant's bundle is the case of *Than v R* [2011] NZCA 25, which is at tab 9, where the Crown in fact, on appeal, acknowledged that it would not be appropriate to allow the propensity witness O to be called at trial. Paragraph 3 is really the essence of the reason why. And one could see how, in that case, the trial could spiral out into an examination of a whole lot of accusations which would have to be examined in order to see whether there was any probative value.

TIPPING J:

Was this the case where the similarity was almost too good –

MR MANDER:

Yes.

TIPPING J:

– to be true?

MR MANDER:

Well, it was not so much that, Sir, it was a case where the propensity witness had made strikingly similar allegations against a whole lot of different men, and indeed the – and you're right, Sir, the complainant was very, was almost too good to be true.

BLANCHARD J:

It was the wrong sort of consistency.

MR MANDER:

It was the wrong sort of consistency. I don't think the Crown did itself any harm –

TIPPING J:

No.

MR MANDER:

– in ultimately conceding on appeal not to call that evidence, frankly.

ELIAS CJ:

And there was some risk of contamination, by contact between the complainants.

MR MANDER:

Indeed, Ma'am, yes. *Thomas v R* [2011] NZCA 443 was the other case, at tab 8, where the Court of Appeal excluded the evidence. The first submission I'd make in relation to this is that it has nothing to do with acquittal, it's just that the circumstances that unfolded in relation to the type of contest that the trial Court would ultimately have to deal with in relation to the propensity, on balance it was held that it would be unfair to the defendant to require that type of inquiry to develop, in the context of propensity evidence. That was a situation where the accused had been convicted at trial, there was an appeal, there was fresh evidence on the appeal. The fresh evidence related to the sexual orientation of the complainant, who had said at trial that she was a lesbian, that she would never have willingly engaged in sexual relations with the appellant. The fresh evidence was to the effect, from another witness, that she had in fact engaged in sexual relations with him. The Crown sought to, in relation to a different complainant, sought to adduce her evidence at the second trial, and the Court of Appeal concluded that, given the nature of the contest, the inquiry with which the trial Court would have to embark upon to examine the propensity evidence, that was, it would be unfair for the defendant to have to engage in that type of process and would change, it would skew the trial, and there was a risk that the jury would be diverted completely off into another area. But again, in my submission, that really has very little to do with the fact of acquittal, that could equally have been the situation if prior to the trial the Court had been advised of the type of contest that was to be taken with the propensity evidence.

The Crown makes the submission that all those cases illustrate how in fact the law is working perfectly properly at the moment and is able to make, in applying section 43, is able to evaluate the probative value, as against the unfair prejudice to a defendant in any situation, including of course situations where the propensity evidence has resulted previously in an acquittal. So, in my submission, *Degnan's* case is working perfectly well in the context of section 43.

ELIAS CJ:

Mr Mander, how much longer do you expect to be?

MR MANDER:

I just have to deal with the present case.

ELIAS CJ:

That's fine. We'll take the adjournment now and resume at 2.15.

COURT ADJOURNS: 1.06 PM

COURT RESUMES 2.16 pm

ELIAS CJ:

Yes, Mr Mander.

MR MANDER:

Yes, may it please the Court, the final area that I seek to address the Court on relates to the circumstances of the present case. In the Crown's submission it is difficult to see any consideration that arises in the circumstances of this case which relates to unfair prejudice that can be sheeted home to the fact that the propensity evidence was the subject of a previous acquittal. In my submission the appellant has been unable to identify any prejudice that can be said to arise from the previous acquittal which would render it unfair for the evidence to be admitted, in terms of the section 43 test.

ELIAS CJ:

Is that the right way to put it? You're saying that that's the way the appellant was putting it, presumably? But, just in terms of section 43, it is just a straight assessment of prejudice against probative value that's required, isn't it?

MR MANDER:

It is. The probative value must outweigh the risk that the evidence may have an unfairly prejudicial effect on the defendant and, in my submission, the appellant has been unable to identify any feature of this case which arises out of the fact that the propensity evidence was the subject of an acquittal, which renders the admission of the evidence unfairly prejudicial, having regard to the probative value of that propensity evidence.

ELIAS CJ:

Mightn't it be though that the acquittal impacts upon the assessment of probative value, and then the prejudice is the contextual one of potential impermissible chain of reasoning?

MR MANDER:

Not in my submission. In my submission, again going back to what I was submitting this morning, one has to identify a consequence or a repercussion from the acquittal to identify the prejudice, in my submission. In other words, one has to, for the purposes of this appeal, in my submission, one has to be able to identify what it is about the fact of the acquittal that renders this particular evidence, this particular propensity evidence, or the admission of that evidence, unfairly prejudicial to the defendant.

ELIAS CJ:

Well, are you saying that because of the way the case has been argued, or are you making it a more general point? All I'm putting to you is that it seems to me that it's possible to argue that the probative value of this evidence has to be assessed in the light of the previous acquittal, and that in that context the prejudice from the fact that it will be so powerful and may overwhelm the jury assessment is not outweighed. Because the whole thrust of section 43 is slightly suspicious of propensity evidence.

MR MANDER:

Certainly there is a threshold to be crossed. The difficulty that I have is, in replying to my learned friend, identifying what in the circumstance of this case he points to as prejudicing the appellant as a result of the fact that the propensity evidence was the subject of a previous acquittal. Now as I'm –

TIPPING J:

I think he tries, Mr Mander, I think he tries to escape from that strictly analytical approach to say that it really, really shouldn't have been in there in the first place, and the fact that it was an acquittal sort of just, if that's not so, tips it that way. I hope I haven't misconstrued the argument, but…

MR MANDER:

Well, in my submission, if one looks for the tipping element –

TIPPING J:

Yes, I asked for that, Mr –

MR MANDER:

I'm sorry, Sir, I didn't mean that.

TIPPING J:

No, no, I asked for that, Mr Mander.

MR MANDER:

If one looks at where the difference might be made by the fact that it is acquittal evidence in the circumstance of this case that brings the balance down on one side of the exercise, again I repeat the submission that, in my submission, it's difficult to identify the substance of that claim.

TIPPING J:

You probably, with some understanding, don't feel you're here to argue that it shouldn't have been there anyway, in anyway.

MR MANDER:

Not, Sir, in terms of the – again, I don't wish to be now reminding, but not in terms of the –

TIPPING J:

So that the acquittal has to be the fulcrum, if you like?

MR MANDER:

Indeed, Sir, it has to be the fulcrum.

ELIAS CJ:

But the acquittal may be the fulcrum on the other side of the balance that's required by section 43, because if there had been a guilty verdict it certainly would be put into the scales. So the fact that it hasn't been must be part of the circumstances in which probative value falls to be assessed.

MR MANDER:

Well, I'm not sure, Ma'am, whether the – if it was guilty, if it was a guilty propensity evidence, whether that would necessarily count in favour of its admission. My learned friend would be saying –

ELIAS CJ:

But you'd say that the evidence was –

MR MANDER:

– it would overpower the – sorry, Ma'am.

ELIAS CJ:

– probative, would you not? I mean, if it was sufficiently connected, it would still have to be sufficiently connected.

MR MANDER:

Indeed, it would, and reference to the fact of conviction might so prejudice a jury that they would be unable to, they would be unable to look at the direct evidence relating to this particular charge, it might – that may be a case of overwhelming –

ELIAS CJ:

But we're –

MR MANDER:

– the exercise.

ELIAS CJ:

– dealing with the getting past the Judge stage of it. The Judge has to affirmatively be of the view that the probative of the evidence outweighs its prejudicial effect.

MR MANDER:

Indeed, Ma'am.

ELIAS CJ:

So why should the Judge not assess the evidence in the light of the fact that there was an acquittal?

MR MANDER:

Well, in my submission, a Judge may assess it against that factor, but the question which will always remain for the Judge is, what is the effect or what is the influence or what's the substance of that fact on the exercise of examining the evidence and seeing whether or not it has probative, its probative value outweighs the risk of prejudice? And the submission that I'm making is I find it very difficult to identify any substantive influence that the fact of acquittal would have, outside examining such things as would the accused be put to unfair financial pressure and difficulties, and

having to rally his case again to fight the same issue which he had the benefit of the acquittal on.

ELIAS CJ:

If the decision of the Judge had been available and if it had said "I find the witness unreliable for various reasons" – I know that Justice Young would say, "Well, that's one opinion" – but surely it's a factor that the Judge would have to take into account in deciding whether the probative value outweighed the prejudicial effect?

MR MANDER:

I would accept if there is some piece of evidence or some indicator that flags some unreliability or qualifies in substance the propensity evidence that's sought to be adduced arising out of that previous proceeding, I would accept that that could be taken into account, as indeed it was in the case, I think, of *Blackburn.*

ELIAS CJ:

Mmm, but accepting that it's not transparent, on the information that we have, and would never be in the case of the previous acquittal by a jury, one would have thought that it was still open to the Judge to, in the circumstances, to draw some inference as to whether the evidence was probative.

MR MANDER:

In my submission, there is a risk of speculating in that situation. *Blackburn* again provides an example of where the circumstances relating to the previous proceeding were able to be examined, and reasonable and logical deductions were able to be made as to the quality of the propensity evidence, having regard to what happened at the proceeding, such that it did impact upon the assessment of admissibility. But my submission is that in this particular case we don't have that material upon which that exercise can be embarked upon safely, and so –

ELIAS CJ:

We've only got the verdict.

MR MANDER:

Only got the verdict, Ma'am, yes.

TIPPING J:

Is it helpful to look at acquittals in two ways? One, the fact of the acquittal, which per se probably tells you very little, and then, if you can illuminate it, the nature of the acquittal? By "nature" I mean what looks as though it's led to it. And if, the mere fact of the acquittal, it might be very difficult to be used at all. But if you can get something to illuminate the nature of the acquittal, if I can put it that way, then that might help in the balance.

MR MANDER:

I would agree with that, Sir. I think the difficulty then becomes is that when you look at the nature of it you're not –

TIPPING J:

You're not normally, with a jury trial, unless perhaps you can demonstrate that the defence was such-and-such, like the alibi case. Unless there's an affirmative defence that looks as though it was probably accepted, you're not likely to get very far, as a matter of experience anyway –

MR MANDER:

In my –

TIPPING J:

– in my experience.

MR MANDER:

In my submission that's, with respect, correct, Sir, yes.

ELIAS CJ:

It may however be a strand with other factors, such as the length of time that's elapsed, which, if you're applying, if you're looking at the statute as a whole, there is a legislative indication in there that evidence that's more than 10 years old is to be regarded with some care.

MR MANDER:

It is, but again, Ma'am, in my submission, there's no link with the acquittal.

ELIAS CJ:

But you're never going to get it, it's a standard that's impossible. Surely a Judge can say, "Here are all the factors that caused me to have some doubts as to how cogent this evidence is. It was led as, and the second one was led as propensity evidence, there wasn't a conviction, it's more than 10 years old, altogether I'm not, I don't think that this is particularly compelling evidence. Against that I have to look at the prejudice that it will cause in the particular trial, in the context." I'm just really, I suppose, pushing back on an absolutist approach, because it does seem to me that, without being able to identify any particular weight that should be accorded to this, it must enter into the mix.

MR MANDER:

The difficulty I have –

WILLIAM YOUNG J:

Always must or often may?

ELIAS CJ:

Well, may, let it be may.

MR MANDER:

Well, certainly it may, but the point that I seek to make, Ma'am, is that when one concedes and accept that it may, one would have to be able to point to why that is. Because, if you take the example of the length of time, the vintage of the case, when the person was tried all those many years back clearly they weren't acquitted because of the vintage, because they were obviously acquitted when the complaint was very fresh, there's no linkage there. And the other example that has been given is a case where, because of the complexity of the trial, the complexity of the defence's case that had to be presented, which produced the acquittal, that may be another, there is obviously a linkage there between the acquittal and the prejudice that's going to arise subsequently at a subsequent trial, because we can see why it would be unfair, the person's secured the acquittal, having done all that, and it would be unfair to ask the person to again rally all that resource again to do that.

TIPPING J:

Your primary point seems to me, Mr Mander, in this case, to be that there must be some logical link between the unfairness and the acquittal per se.

MR MANDER:

In my submission. Otherwise one can't, it's not consistent with all those cases that I went through.

TIPPING J:

But there may be manifold reasons why, ignoring the acquittal, the evidence shouldn't be put in, but if it's said that it shouldn't go in on account of the acquittal then there has to be that linkage.

MR MANDER:

In my submission, yes, Sir.

TIPPING J:

That's your argument, anyway.

MR MANDER:

It is, Sir, it is. And applying that to the present case, it can't be identified in this case. And my learned friend hasn't been able to identify anything, in my submission.

ELIAS CJ:

Well, when would you be able to identify it, except in the case where there was some sort of complexity or some sort of evidence, rebuttal evidence, that it wouldn't be reasonable to expect the defendant again to produce?

MR MANDER:

Well, it could come in again when – again, it's perhaps a variation on examples you've already given, Ma'am, but the situation where there is a danger of the trial being diverted because of the nature of the contest, which it –

WILLIAM YOUNG J:

Well, say the first trial took three or four weeks and there's a mass of alibi evidence, a mass of evidence of opportunity, dozens of witnesses, perhaps intercept evidence, perhaps text messages, it may be disproportionate to say, "Okay, we'll call that evidence without spending another three or four weeks re-examining it," but that may be out of kilter with a case that might otherwise only take two or three days to try.

MR MANDER:

Indeed, Sir, yes, and it would, in that situation, would be bordering on oppressive to ignore the acquittal.

ELIAS CJ:

It's pretty oppressive if you get a – doesn't matter, no.

MR MANDER:

The probative value of the evidence obviously relates to its similarities, and they're set out in the subparagraphs at paragraph 74 of the Crown's written submissions, I don't intend to take the Court through those, but clearly the evidence was admitted in this case on the basis of its connection, the propensity evidence connection with the direct evidence, and it was an unusual case in that, it was unusual in that the Crown had available to it a video or real evidence of the alleged offending relating to the latter offending. In my submission, it's clear that the video of the actions of the appellant and the propensity evidence was potentially mutually supportive, should the jury decide to accept the evidence, accept the propensity evidence. This wasn't a case, in my submission, where the jury became unduly bogged down or tied up in the determination or their evaluation of the propensity evidence, the contest was very much a garden variety contest, evidence only came from each of the individual propensity witnesses and the appellant gave evidence in response to those allegations. It was a typical propensity evidence situation, in my submission. It's apparent, from reading the notes of evidence, that the appellant had no difficulty in recollecting the circumstances and events as they related to the lessons which he had given to the two propensity witnesses. He was able to give an account in some detail of his interaction with both former pupils and to the circumstances surrounding his interaction with them. So there's nothing on the face of the record which would indicate that he was prejudiced and having to again readdress the allegations in the context of a second trial.

TIPPING J:

Mr Mander, I wonder if you would allow me, before you finish and to enable Mr King to deal with this if he thinks it appropriate, in the *Degnan* case at page 331 of the report, it's tab 1 in appellant's bundle of authorities.

ELIAS CJ:

Three hundred and…

TIPPING J:

Thirty-one, right at the end, under the heading, “Conclusion,” and the passage I’m about to refer to is at the bottom of paragraph 37. This, of course, was written on the premise that the evidence was otherwise admissible on similar fact principles. The Court said, “To obtain such exclusion,” that means, because it had led to an acquittal, “the accused must be able to point to some particular feature of the case which requires that outcome against the general admissibility of evidence of this kind.” Now, that of course was said before we had the Evidence Act, which in a sense doesn’t – well, the evidence is general in a sense, generally admissible because it’s relevant, but it’s not generally admissible under section 43 because the Crown had the onus. Now, I just wonder whether that perhaps, in relation to the law as it stands under section 43 now, if that's the finding we come to, whether that statement perhaps needs some reconsideration.

MR MANDER:

Well, in my submission, it’s clearly no longer a two-stage process. Section 43 encompasses the evaluation –

TIPPING J:

Yes, yes.

MR MANDER:

– of undue fairness, undue prejudice.

TIPPING J:

I think what we were trying to say in *Degnan,* the Court, was that if you're relying on the acquittal per se as an excluding factor, you’ll generally miss out unless you can show something particular about that acquittal, or the need to re-run the case, if you like, those sort of issues. Now –

MR MANDER:

It’s not admissible in law.

TIPPING J:

Well, no, but it wouldn't – it would be excluded as a matter of fairness.

MR MANDER:

Yes.

TIPPING J:

Now, I wonder whether that is perhaps not quite the right approach any more, in that the ultimate onus is on – well, "onus" may not be the right word, but burden perhaps, is on the Crown, isn't it, to get this evidence in, and the acquittal is simply part of the scenario, I think is the proposition you've been advancing.

MR MANDER:

Yes Sir.

TIPPING J:

So, strictly speaking, the slant that was taken in *Degnan* there at common law may not be sound any more.

MR MANDER:

No, in my submission, that overall, the typical, the common law discretion to exclude on the grounds of fairness, notwithstanding it's admissible as a matter of law…

TIPPING J:

Is encompassed, is comprehended, if you like, in the composite section 43.

MR MANDER:

Indeed and we don't need to go back to section 8.

TIPPING J:

No.

MR MANDER:

Because of, because the test is included within section 43 itself and if the Crown can't establish – if there is –

TIPPING J:

Well that was my tentative view –

MR MANDER:

– arguably a higher onus.

TIPPING J:

– tentative view so I just thought it was important, perhaps, to put it to you because that might just have to be – it's a small point but it might have to be addressed.

MR MANDER:

Thank you for that Sir. At a risk of going back to old ground, in my submission there's nothing to suggest that the previous acquittal, either explicitly or implicitly, involved findings that the complainants were unworthy of belief or inherently unreliable and I make that submission because in my submission, again, we don't know the reasons for the acquittal, it may be simply, for instance, the accused was perceived as being a reliable and credible witness, the complainant was seen as being, for her age, a reliable and credible witness and clearly the accused had to be acquitted in such a scenario. There may be many reasons why a seven year old and an 11 year old, as they were when they first gave evidence, may not have provided the type of evidence sufficient to convict a previously unblemished – an accused with a previously unblemished record, particularly in the face of the type of detailed and comprehensive denial that the appellant exhibited that he was capable of providing, in relation to the second trial, which of course, then begs the question, should the Crown be denied the opportunity to bring into the mix, at a second trial, propensity evidence which may indeed discharge, and as it did in this case, discharge the burden of proof.

My learned friend refers to the perceived prejudice in not being able to address the propensity evidence when he was interviewed by the police. It is apparent, again from the evidence that the accused, in this case, clearly wanted to give evidence. I can take Your Honours to the various portions of the evidence but it probably will suffice to just refer to the opening address by defence counsel, at page 54A of the case on appeal, volume 2. The second paragraph –

McGRATH J:

Sorry, did you say 54A?

MR MANDER:

Sorry, 55A is the page, second paragraph. And that accords with what he said in evidence –

ELIAS CJ:

How much reliance can you place on this, this is putting your best foot forward in front of the jury. It's after the section 344A determination isn't it?

MR MANDER:

It is Ma'am but just in terms of, whether in this case, my friend has relied upon the proposition that one reason why an accused might be prejudiced is because they have got the opportunity to address when – they're forced to give evidence because they're not taxed about the propensity evidence at interview; that comes along later. The first point, of course, to be made is, well, that might arise whether or not there's been an acquittal or there's been any proceedings previously or not, and indeed often arises with the addition of further evidence after an accused person is interviewed, forensic evidence comes to hand, all sorts of things. But in this particular case that submission ought not to be considered in a vacuum, having regard to the merits of this case, because this was a case where we know, from the notes of evidence, that the appellant wanted to give evidence.

ELIAS CJ:

Well, that's what his counsel is saying to the jury. But counsel always say that sort of thing to the jury. I just don't know what you can really take from it, Mr Mander.

MR MANDER:

Well, in terms of the, the theory of the case for the accused, he interviewed poorly, he had no explanation for why his hand was between the young girl's legs, under her skirt, for what was timed as being four minutes. When he was asked for an explanation he couldn't give an explanation as to why his hand would be there. Clearly, in this case, he needed to give evidence to account for why his hand was positioned the way it was, as captured on the video. He explains in his evidence that he was shocked, and the way he was feeling, he was a mess, he just didn't, couldn't think at the time. So, clearly, the defence was presented on the basis that you ought not to hold anything against him, having regard to his replies to the police at interview. And he came along and gave evidence and these were, these were the true explanations as to why his hand was there, was part of his training technique, he

was holding the guitar. The submission I'm seeking to make, Ma'am, is that while my friend may have a point that prejudice might arise, this wasn't a case –

ELIAS CJ:

Yes, I see.

MR MANDER:

– where that was apparent. And if one puts the submission in the context of this particular case, it's simply, in my submission, with respect to my learned friend, doesn't hold water to suggest he was forced to give evidence.

I'm not sure whether I can assist the Court further in relation to the particular case.

ELIAS CJ:

Thank you, Mr Mander.

MR MANDER:

May it please the Court.

ELIAS CJ:

Yes.

MR KING:

Yes, if it pleases the Court. Just briefly, just on that last point, if there were deficiencies in the appellant's video interview, then those would have been adequately remedied by the expert evidence that he was able to call from a music teacher to explain how – and you'll see that's referred to on the same page, 55A, that my learned friend has just referred to. So this was not, I submit, a situation where the accused needed to give evidence to try and explain why he would be holding a guitar like that, he had expert evidence from a music teacher, two music teachers, that were able to cover that. So I stand by the submission that's made, that the reason the accused gave evidence in this trial is primarily, I don't say exclusively, but primarily to address the propensity evidence.

Also, my learned friend seems to be in a position – I'm not trying to put words in his mouth and forgive me if I've misinterpreted him – of suggesting that a distinction needs to be drawn between the nature of the acquittal, the reasons underlying the

acquittal, rather than simply the fact of the acquittal. Now, that, with respect, is a difficult area to get into, because normally of course one is dealing with a jury verdict of not guilty, and one is to a certain extent left to speculate as to the basis upon which an acquittal was reached. I take my friend to be saying that in an obvious case, where alibi evidence is called and there's a full-scale defence, an attack on the Crown case and so on, then one can read more into a verdict than if it's a straightforward not guilty one.

But the point I make is that we're not dealing in this case, of course, with a jury acquittal, we're dealing with an acquittal by an experienced Judge who not only had the benefit of hearing from the complainant in that earlier case, but also had the benefit of hearing from the propensity witness and, in my submission, the fact that the reasons for the decision are no longer available is demonstrative of a prejudice to the accused. If we can't advance any type of argument about the nature of the acquittal because we don't have the reasons, well, that's through no fault of Mr Fenemor's that the judgment isn't available, it should be available, it should be able to be looked at, we shouldn't be left to speculate. But what we do know is that it was a professional Judge, unlike a jury, who gave reasons – well, he must have given reasons – who heard both the complainant and the propensity witness and did not convict. And, in my submission, certain logical deductions can be made from that, to the point that one can see that question marks are raised about the cogency of that evidence. The fact that it can't be taken further than that is a pure example of the types of prejudice which Mr Fenemor faces when he's forced to answer these charges so long after the event, and with that goes the loss of the video.

Now, my friend's referred to the case which is in the defendant bundle, of *Blackburn*, that's also discussed obviously in the appellant's written submissions. But what we have there is, I respectfully submit, a textbook application of the principles in *Degnan* as to the way the approach should be made. And at paragraph 17 – this is under tab 10 of the defence bundle of documents – we have, in subparagraphs (a) to (e), we have a description of the specific prejudices which it is alleged that the appellant in that case, Mr – or the appellant in that case faced.

ELIAS CJ:

Sorry, para what?

MR KING:

This is, it's paragraph 17, but it's the page over.

WILLIAM YOUNG J:

That's the argument of counsel, isn't it?

MR KING:

It is, but you'll see how that's accepted, and I'm coming to that, Sir, I'm not trying to pull the wool over anyone's eyes.

WILLIAM YOUNG J:

Yes.

MR KING:

But we have, this is the description of arguments which could, in most respects, be overlaid into the present case. Now, at (c), we have reference to a partner who's no longer favourable to Mr B, and that obviously doesn't apply in this case, but those other features that are identified there are all examples of prejudice. Now, in themselves, of course, those do not relate to the fact that he had previously been acquitted in relation to the allegation of this witness H, but the Court goes on to consider that. So having traversed and identified those submissions, and including of course the submission was made, Mr Blackburn, at (d), Mr Blackburn's right to elect not to give evidence will be compromised –

WILLIAM YOUNG J:

Yes, I know, those are the submissions that – the reasons are para 20, aren't they, which are a bit more limited?

MR KING:

They are, and I'm coming to that, Sir. And so the argument's there, so it's not an argument that's been invented for this Court and this case. And then at paragraph 20 what we have is an acceptance of those, and they don't go on – as I'm sure Justice Young was meaning – they don't go on to say, "We accept that his right to give evidence has been compromised," but really what we do have is a recognition that the types of prejudice to be faced are serious, and of course the point is made there, they would include the evidence against him being given by a mature woman instead of an adolescent girl. Now, in my submission that's exactly what has arisen

in the present case, where you have a seven year old and an 11 year old in 1998, who are 17 and 24 in 2008.

WILLIAM YOUNG J:

What's the counterfactual? I mean, when – there will always be the problem of a mature woman giving evidence and not a little girl, where for some reason or other there's a time lapse between the alleged incident and the trial.

MR KING:

Mmm, of course.

WILLIAM YOUNG J:

Whether the evidence is propensity evidence or directly referable to the offending, and irrespective of whether there's been a trial in the middle.

MR KING:

What we have here in this scenario – I'll accept that –

WILLIAM YOUNG J:

Yes.

MR KING:

– and if someone went to the police today and said, "Something happened to me 20 years ago," you're not going to get stayed on it, you're going to go to trial on it. But what we have here, of course, is we have the jury, knowing that this evidence was given and tested 10 years ago and now is being repeated years later, it's almost recent-complaint evidence of course, which is inadmissible under the Evidence Act. So Crown have the benefit of, if you like, consistency, and a long-held complaint rather than a delay factor. I don't know if I've enunciated that at all clearly –

WILLIAM YOUNG J:

Yes, I understand what you're saying.

MR KING:

Yes, so here they have that. They know that this is a young girl, she's given evidence, and there she is now as a young lady, she's coming and repeating the same evidence. Now, in a normal course of events, the fact that she'd given

evidence previously would not be admissible. And if one takes the example – and I know this is probably slightly off beam, but – no one would ever allow a case where a young, a seven year old has given evidence and been acquitted, but then there's fresh evidence because 20 years later she's mature and is able to express herself and is able to recall details and see them through adult eyes and interpret them, so therefore we can have another crack at it. Because, in my submission, on one level there's been a change of evidence, the evidence has improved because the witness has improved so much. And really, this is the type of issue which is faced in a case such as the present one. So I submit that those factors that were considered by the Court of Appeal in *Blackburn* have a great deal of similarly to the full one, and then you see how the Court has then applied that, that those, if you call them "general prejudices through propensity evidence," as opposed to relating specifically to previous acquittal.

They've then gone on to apply those factors in the context of previous acquittal, and they do this at paragraph 22 in some cases, *Hague v R* [2010] NZCA 79 is an example, the essential quality of propensity evidence offered by the Crown is unaffected by an acquittal, this is not such a case, it is common ground that Mr Blackburn was likely to have been acquitted because the evidence against him was seriously deficient. So, what they've done is they've overlaid all of those factors which are there, the delay, the age change, and therefore the difference in character of the witness, the loss of the original material, the fact that he, the accused, would have to re-litigate that issue, and then applied that against the context of a, perhaps the reasoning of the acquittal.

But there it's – in my submission, are we in any different position in the present case to say that the acquittal by Judge Walker, having heard both the complaint and similar-fact evidence, should be interpreted as anything less than a serious deficiency in the evidence? And, again, I repeat the point that we shouldn't be in that situation, the judgment should be available, but of course it's not after the passage of time. And that should not be something which is prejudiced against the appellant, it's something that he should be entitled to the benefit of the doubt, as to the basis of the acquittal.

TIPPING J:

Are you in effect saying we should assume that the evidence was seriously deficient, à la *Blackburn*? Because if the Crown can't produce it, all things should be assumed in favour of the accused, that seems to be what you're saying.

MR KING:

What I'm saying is, as well as that, Sir, that there are indices of deficiency in the evidence. The fact that there was no charge in relation to L, who was the older complainant, and yet she was called as a viva voce witness, can be seen to indicate that there was concern that that couldn't stand alone.

TIPPING J:

There could have been a number of reasons, other than deficiency for the…

MR KING:

Frankly, Sir, I mean, it's – one can think of reasons why they wouldn't want her involved at all –

TIPPING J:

Yes.

MR KING:

– they wouldn't want to traumatise her. But the fact that she's actually brought along as a witness –

TIPPING J:

Well, that's true, that is a fair rejoinder, it doesn't make much difference, you can say.

MR KING:

No, it makes no difference, in my submission, it would have been so easy to have included another count or another information in that. If it's cross-admissible, and it would have been cross-admissible as propensity evidence, so there's no difficulty about the charges being heard together or anything of that nature, it's just inexplicable that there was no charge in relation to that, explicable only because in my submission, or the logical inference, is that that complaint was not sufficient in itself.

TIPPING J:

Well, if they didn't think there was enough to justify a charge, then it's not entirely satisfactory that the Crown leads the evidence of similar fact.

MR KING:

Yes, precisely.

TIPPING J:

We're speculating.

MR KING:

Yes.

TIPPING J:

You can point ex facie to a curiosity.

MR KING:

And then my point is the fact that we're in a situation where we're forced to speculate on something that should not be held against the appellant, because it's through no fault of his own, it's through the passage of time that this is lost. And I should say that trial counsel was Judge Maize, who was very good at trying to find what she could for trial counsel but was not able to remember the specifics. But I submit that it's actually a dangerous area to go down, in any event, when one is weighing up the basis of an acquittal, because that so often will involve a level of speculation which may or may not be accurate.

TIPPING J:

But you have to have that, don't you, in order to get in the alibi?

MR KING:

Yes, I accept, Sir –

TIPPING J:

I mean, it can cut both ways, Mr King.

MR KING:

Yes. Where affirmative evidence is called, and you've got a Judge saying, "I accept that" –

TIPPING J:

Or a jury, or a jury.

MR KING:

Well, you don't know the reasons.

TIPPING J:

Well…

MR KING:

But, generally speaking, I take Your Honour's point. So, one can – there are always indicators, or there are usually indicators, but how far that gets one is the question. But, in my submission, what we have in *Blackburn* is a classic example where the factors are identified, they're laid out, and then overlaid on the fact that there had been an acquittal and what that meant to the, in that case, the probative value of the evidence. If it were a situation where the Court was concerned that there'd been a three-week trial and there'd been DNA and text messages and all that and the defence had mounted this massive defence in rebuttal, then that is the type of evidence which would necessarily be excluded, notwithstanding a section 43 analysis that it was technically admissible as propensity evidence, but under section 8 of the Act, on the basis that it would, a general exclusion, that it would have an unfairly prejudicial effect on the proceedings, or would needlessly prolong the proceeding. So, section 43 determines admissibility of propensity evidence, it involves the specific balancing that is set out there, it involves the consideration of the points of interest, it involves specifically the considerations under 43(4)(a) and (b), but one would see that even if evidence was technically admissible under all of those bases, if it didn't come under unfair there, then an argument could be mounted specifically under 8(a) that would needlessly prolong – 8(b) rather – would needlessly prolong the proceedings. So you would still have that as a fallback position.

So, all that's really being submitted is that when there has been a previous acquittal, something more than just saying, "There's been a previous acquittal but that evidence is still available to the Crown à la *Degnan*," is required. That was not

undertaken in this case, we just have that base assessment without any type of qualitative analysis of the actual effects of an acquittal.

Now, my friend has made the point repeatedly that the appellant has not been able to identify any specific prejudices through the admission of this evidence. Again, without –

TIPPING J:

He didn't put it like that, Mr King, he said he – or the contention was that there was no prejudice from the acquittal per se.

MR KING:

Yes, and that's what I'm – so, that's what I meant.

TIPPING J:

I'm sorry, you did –

MR KING:

That's what I meant, I apologise.

TIPPING J:

– put it a little loosely.

MR KING:

In the first – from page 4 to page 7 I've identified many features which, in my submission, were direct prejudicial factors here. There are the factors identified in paragraph 9 on page 4, avoiding illegitimate prejudice influencing the jury, in the sense that he had gotten away with it. Now that, in my submission, cannot be understated. Secondly, keeping the case focused on the present allegations and not the past ones on which he was acquitted, that's the diversion argument. And, in any reading of this case, the propensity evidence was central and was crucial. Most of the evidence-in-chief related to that, most of the cross-examination related to that, most of the closing addresses. In fairness, in my submission, that's the proper assessment.

Most of the closing addresses of both the Crown and the defence were focused on the propensity evidence, and a large part of the Judge's summing up was dealing

with it. He repeatedly came back, both in the context of his general directions, but also in the context of summarising the Crown and defence cases, kept coming back, time and time again, to the evidence, the propensity evidence. And you'll note that probably the one point we got closest to in the Court of Appeal is the Judge's criticism of a defence that there was no evidence, because of course the complainant, M, I think, the complainant M's evidence was that it had happened on numerous occasions in front of numerous people in her class, and I'm referring now and it's at page 38 of the casebook, volume 1, under tab 2, and it's set out there under (vi), "Judge's criticism of defence submission," and paragraph 45 sets out the defence submission, paragraph 46 sets out the Judge's comments in relation to that, which we termed and accepted by the Court to be a criticism of the defence submission.

So even this, even on this aspect, this is all about propensity evidence. It's about a submission defence counsel made when responding to M's claim that this happened at numerous times in front of – or it happened on multiple occasions when he's meant to have touched her and that there should have been someone who saw something out of order, not one, and she said it happened on a virtually fortnightly type basis. So he's made that orthodox submission, trying to deal with the evidence that the propensity witness has gone, and he is jumped on for it, in a way which the Court of Appeal considered was not ideal – I'm not saying they held it, but when one looks at it in context it's just an example of two things. It's an example of just how central and how important this propensity evidence became, and it's an example of how unfair it is, because that submission was frankly unfair, on defence counsel, that direction to the jury on that evidence. Defence counsel, having to deal with evidence 10 years old, no directions given to the jury about being cautious about evidence more than 10 years old, defence do their best to say, "Well, she says it happened on multiple occasions in front of multiple people and no one else appears to have seen anything," I mean, and he's jumped on for it. It is a classic example, in my submission, of how Mr Fenemor's trial just completely miscarried through the admission of this evidence.

TIPPING J:

Who was being referred to here, between the appellant and B? Was this one of the propensity witnesses?

MR KING:

Yes, Sir.

TIPPING J:

So it was really an attempt, was it, or invoking the so-called collateral evidence rule?

MR KING:

Mmm, yes, well, it was – the point was –

TIPPING J:

I mean, I think this is fairly far removed from the essence of the appeal, but I just couldn't –

MR KING:

Well, no, it's, in my submission, it's an example of just how these things can go off – when evidence of this type is admitted. The complainant, or the witness, says, "This happened on multiple times in front of multiple people," the defence says, "Well, no one else appears to have seen it," and the Judge is critical of that, saying, "Well, corroboration isn't required" – sorry, that they'd be precluded from calling such evidence, which is absolute rubbish, of course. If there'd been an eyewitness to him doing this, that evidence would be admissible.

TIPPING J:

Well, presumably then, there would have been a charge relating to the propensity witness for whom –

MR KING:

Well, there had been in –

TIPPING J:

– there had been not previous charge. That's who I understood it to be.

MR KING:

No, no, no, this is the complainant, Sir, this is the complainant in the first case.

TIPPING J:

Oh, the complainant in the first case?

MR KING:

Yes.

TIPPING J:

I see. I'm sorry, I misunderstood.

MR KING:

The complainant in the first case said that she'd been touched multiple times –

TIPPING J:

Yes, I'm with you now, Mr King, yes.

MR KING:

Yes, sorry, Sir. So, had there been a eyewitness to that, then that would have been admissible, and that was what counsel was trying to say and, frankly, gets jumped on because of it, to the detriment of the defence. And even the Court of Appeal acknowledged that, albeit concluding it didn't occasion a miscarriage of justice.

And just finally, Your Honour Justice Tipping, in respect of your comments on *Degnan* at 331, though I agree with the discussion that took place about that –

TIPPING J:

It may be that people wouldn't be misled, but I think it would be wise to address that point.

MR KING:

Yes, well, it must be looked at in the context now of the Act.

TIPPING J:

Yes.

MR KING:

I've argued in this Court, I think on two or three previous occasions, that section 43 did not lead to a lowering of the threshold for the admissibility of propensity evidence. In fact, in may respects it was the opposite, because what it did was it codified it, a whole series of new considerations, including 43(4)(a) and (b), that the Court was required to take into account in a non-exhaustive list. So that was new and that was

helpful, but was not a lowering of the threshold, so clearly, in my submission, at the very least, in a minor way, *Degnan* should be applied to that context.

TIPPING J:

Yes.

MR KING:

Unless there are any questions, Your Honours?

ELIAS CJ:

No questions, no, thank you, Mr King.

MR KING:

Thank you, Your Honours.

ELIAS CJ:

Thank you, counsel, for your assistance, we will take time to consider our decision.

COURT ADJOURNS: 3.10 PM