PURSUANT TO S 160(1)(b) ACCIDENT COMPENSATION ACT 2001 THERE IS A SUPPRESSION ORDER FORBIDDING PUBLICATION OF THE APPELLANT'S NAME AND ANY DETAILS THAT MIGHT IDENTIFY THE APPELLANT

IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

[2022] NZACC 64 **ACR 185/21**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	RV Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing:	8 November 2022
Supplementary Submissions Completed:	28 February 2023
Heard at:	Wellington/Te Whanganui-a-Tara
Appearances:	J Miller and A Brown for the appellant R Roff for the respondent
Judgment:	27 April 2023

RESERVED JUDGMENT OF JUDGE DENESE HENARE
[Mental Injury s 21, Schedule 3 – Accident Compensation Act 2001]

Introduction

[1] This appeal concerns a decision of the Corporation, declining to provide the appellant with cover for a mental injury on the grounds the circumstances of the act she suffered did not fall within the description of an offence in Schedule 3 to the Accident Compensation Act 2001 (the Act).

[2] I consider it is necessary and appropriate to protect the privacy of the appellant. This order, made under s 160(1) of the Accident Compensation Act 2001, forbids publication of the name, address, occupation, or particulars likely to lead to the identification of the appellant.

As a result, this decision shall be known as *RV v Accident Compensation Corporation.* The male involved is is referred to as ED.

Agreed facts

[3] The parties agreed the following statement of facts:

2.1 In August 2020 RV discovered that private video images of her engaged in intimate sexual activity had been uploaded to several pornographic websites without her consent.

2.2 In the 10 month period between the images being uploaded and RV finding out, the images had been viewed thousands of times as well as shared.

2.3 RV ultimately contacted Netsafe, the New Zealand Police and sought orders under the Harmful Digital Communications Act 2015.

2.4 On 3 November 2020 an order was made under the Harmful Digital Communications Act 2015 for the defendant to take down the images and to pay RV's legal costs. Judge TJ Gilbert, in making the order observed that while RV had "consented to the intimate visual recording being made, she very certainly did not consent to [the images] being splashed about the Internet."

2.5 RV lodged a sensitive claim with ACC on 17 August 2020.

2.6 The ACC Injury Claim Form recorded the Injury Description as: "Sexual abuse Videoed." The accident date was 2 September 2019. The diagnosis recorded was "sexual abuse," and Injury comments were noted as "*confirmed sexually abused videoed and transmitted on internet.*"

2.7 An ACC 6426 Early Planning Report was completed by Psychotherapist, Wonita Woolhouse on 21 September 2020. This recorded:

Event: digital upload and distribution of intimate images and video recording of sex act.

...

Frequency of the event(s): unlimited with content available on the internet.

...

Please outline the meaning and emotional impact of the event for the client at the time of the event and subsequently:

[RV] has noticed that she struggles to find energy to function during the day and will spend a lot of her time crying. She has withdrawn from her typical social supports and has been experiencing body aches, nausea, and decreased appetite. She has also had to put her tertiary studies on hold as she feels too overwhelmed to cope currently. She has also required time off work... She finds it hard to concentrate on her day to day tasks and is no longer engaging in interests that have previously brought her enjoyment. Her body is also

> *responding to her situation with missing menstruation, skin break-outs, IBS symptoms and aches throughout her body. [RV] reports symptoms of dissociation and depersonalisation, experiencing numbing within her body and needing to stop in the moment to ground herself. She presents very tense and is breath holding and/or shallow breathing, although not consciously.*

2.8 The Corporation's Claim Summary Report recorded that Gavin Burgess of ACC Technical Services advised:

> *Event described in section 4 of the initial report (page 2) appears to be a crime (Harmful Digital Communications Act 2015) but does not appear to be a crime specifically put into Schedule 3 of the Accident Compensation Act 2001 by Parliament. As such, cover cannot be granted in this case.*

2.9 On 23 September 2020, the Corporation wrote to RV advising that her mental injury claim had been declined because it did not meet the criteria for ACC cover. The letter stated:

> *We can only provide cover for claims caused by events that are listed in schedule 3 of the ACC Act 2001.*

2.10 The review was heard on 24 June 2021. In a decision dated 12 July 2021, Reviewer Ms Trudi Jordan dismissed the application. RV now appeals the findings of the Reviewer.

2.11 The question of whether (and what) mental injury has been suffered by RV has not been investigated or decided by the Corporation.

2.12 However, the appellant has obtained a report from Psychiatrist Professor Richard Porter, dated 22 February 2022, on the issue of mental injury.

The positions of the parties

[4] It is submitted for the appellant that her case is analogous to *KSB*, in that the image based sexual abuse of which RV was a victim comes within the description of sexual violation (or indecent assault) for the purpose of s 21 and Schedule 3.[1]

[5] RV's alleged consent to the sexual intercourse during which the distributed recording was taken was obtained by deception. Therefore it was vitiated by a mistake as to *the nature and quality* of the intercourse (s 128A(7)), or was otherwise vitiated as per section 128A(8) of the Crimes Act 1961.

[6] RV has therefore been the victim of an act that is within the description of an offence listed in Schedule 3, such that cover for her mental injury is appropriate.

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1 *KSB v Accident Compensation Corporation* [2012] NZCA 82, [2012] NZAR 578, (2012) 25 CRNZ 599.

[7] The Corporation submits that the circumstances described by RV do not fall within the description of any of the limited number of specified offences in Schedule 3. Therefore the Act does not provide cover.

[8] Even if RV was deceived as to the confidentiality of the recording, as a matter of law that deception did not vitiate her consent to the sexual intercourse. Accordingly, the act of which RV was a victim was not a qualifying offence listed in Schedule 3. Further, *KSB* is very much confined to its facts and not analogous to the present case.

Agreed issues

[9] Counsel agreed the following issues:

a) Whether RV qualifies for cover for a mental injury in accordance with s 21(1) of the Act. That is, whether a mental injury was caused by an act performed by another person that is within the description of an offence listed in Schedule 3 of the Act (namely sexual violation or indecent assault).

b) Whether RV's case can be considered analogous with the decision of the Court of Appeal in *KSB*.

Relevant law

The Accident Compensation Act 2001 (the Act)

[10] Certain mental injuries are "personal injuries" for the purposes of cover.[2]

[11] The Act excludes cover for mental injury with only three exceptions: mental injury because of physical injuries; mental injury which is work related; and mental injury suffered in the circumstances set out in s 21. Mental injuries caused by certain criminal acts are covered even if there are no physical injuries involved.

[12] Section 21(1) provides that a person has cover for mental injury where the mental injury is caused by an act performed by another person, and the act is of a kind described in s 21(2).

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2 Section 26.

[13] Section 21(2)(c) applies to an act that "is within the description of an offence listed in Schedule 3". Under s 21(5)(a) and (b) it is irrelevant that no person can be, or has been, charged with or convicted of the offence or the alleged offender is incapable of forming criminal intent.

[14] Cover for mental injury under s 21 is assessed as follows:

a) whether the claimant is the victim of an act falling within the description of an offence in Schedule 3; and

b) whether the claimant's mental injury was caused by that act.

[15] There is little authoritative comment to explain how cover for mental injury was extended to Schedule 3 offences. Judge Ongley observed that s 8(3) which is now s 21 of the Accident Compensation Act 2001 deals with a "recognised situation of social concern because it is notorious that profound psychological consequences can follow sexual assault even though no physical injury occurs."[3]

[16] Certain s 21 cases are summarised below, including the landmark judgment of the Court of Appeal in *KSB*.

(i) *Woodd v Accident Compensation Corporation* – the appellant had been assaulted and suffered post-traumatic stress disorder following the robbery of a pharmacy where she worked.[4] The appellant argued her belief that the offenders might rape her brought her claim within a Schedule 3 offence, even though there had been no actual sexual offence committed. It was argued the definition of assault in the Crimes Act 1961 was satisfied if the person making the threat has or causes the other to believe on reasonable grounds that he had present ability to carry out his purpose. The appellant acknowledged such an argument would not meet the threshold for a criminal conviction and submitted the accident compensation legislation should have a more liberal interpretation. Judge Cadenhead rejected this argument. However, as the appeal succeeded on other grounds, the matter was not appealed to the High Court.

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3 *AB v ARCIC* (1996) 1 BACR 336 at 343.

4 *Woodd v Accident Compensation Corporation* DC Wellington 54/03, 2 April 2003.

(ii) *CLM v Accident Compensation Corporation* – the appellant's partner did not disclose he was HIV-positive in their relationship of some four months.[5] Although the appellant did not contract the disease, she suffered a mental injury through the stress of waiting for test results. The partner was convicted of criminal nuisance. Since this was not an offence listed in Schedule 3, the Corporation declined the claim. On appeal, Judge Ongley noted while the acts of intercourse occurred with the appellant's consent, her case was that she could not have given a valid consent because she was unaware of her partner's HIV status. After reviewing cases in Canada, the United Kingdom and New Zealand, Judge Ongley concluded the failure by the partner to disclose he was HIV positive was not sufficient to vitiate consent to sexual intercourse, or to amount to fraudulent misrepresentation as to the nature and quality of the act. His Honour considered the criminal law in New Zealand had not moved to a different position in relation to HIV infection as distinct from other risks of sexual intercourse. He did not consider the Schedule could be enlarged to include any crimes of a sexual nature and criminal nuisance was not an offence listed in the Schedule.

An appeal to the High Court was dismissed. Randerson J reached the same conclusions as Judge Ongley, noting there might be room for some limited extension of the common law as suggested by McLachlin J in *Cuerrier* a case from the Supreme Court of Canada. [6] Randerson J commented while failure to disclose HIV status could not be said to go to the nature and quality of the act, "it arguably goes to the quality of the act".

Leave to appeal was granted by the Court of Appeal on the question of whether all elements of the offences listed in the Schedule need be established, so that the acts involved come within the description of an offence. *CLM* did not proceed to hearing as a settlement was reached.

(iii) *KSB v Accident Compensation Corporation* –This case did proceed to the Court of Appeal.[7] The appellant sought cover for mental injury after learning her partner had not disclosed he was HIV positive. The appellant was subsequently

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5 *CLM v Accident Compensation Corporation* DC Wellington 110/05, 7 April 2005.

6 *CLM v Accident Compensation Corporation* [2006] 3 NZLR 127 (HC).

diagnosed with PTSD. The former partner was convicted of criminal nuisance for failing to disclose his HIV status in unprotected intercourse. The Court accepted the appellant's primary argument that non-disclosure of the sexual partner's HIV status vitiated consent. The Court held it comprised a mistake as to the nature and quality of the act (s 128A(7)) because of the associated risk of serious harm.[8] Therefore, the apparent consensual sexual intercourse was sexual violation and the appellant had cover for her mental injury as that was the result of sexual violation, a Schedule 3 offence.

[17] The Court, in *KSB,* took a different view to Randerson J in *CLM.* The Court did not accept the submission of the Solicitor-General as intervener that there should be no change in the criminal law and withholding the risk of HIV from a partner did not mean there was a lack of informed consent to sexual intercourse. The Court of Appeal held the absence of reasonable belief in consent was not determinative of the question of cover.

[18] The Court rejected the appellant's argument that the wording of s 21 meant that all the claimant need establish was that harm had resulted from an act of sexual intercourse. Considering the history and wording of the legislation the Court stated:

> [29] Taking account of the wording of s 21, the limited number of offences in Schedule 3, and the overall statutory scheme, it is not conceivable that Parliament intended to provide cover for mental injury resulting from consensual sexual intercourse. This was the view reached in this Court's leave decision in relation to *CLM v ACC*.

[19] The Court preferred the decision of McLachlin and Gonthier JJ in *R v Cuerrier* (taking a narrower view) that unprotected sexual intercourse with a person who has not disclosed his or her HIV status, changes the sexual character of the act, giving rise to the risk of serious harm or probability, of infecting the complainant.[9]

[20] In *KSB*, the Court observed the English cases show that a mistake as to the "nature and quality" is not limited solely to mistakes about the physical act."[10] Further:

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7 *KSB v Accident Compensation Corporation*, above n 1.

8 At [74]. A mistake as to the nature and quality of the act under s 128A(7) has typically encompassed situations where a person was mistaken as to the sexual nature of the activity, for example, thinking the act was a medical procedure or being mistaken as to the identity of their sexual partner. See *R v Pearson* (1908) 11 GLR 139 (SC) and *R v Moffitt* CA382/93, 22 November 1993.

9 *R v Cuerrier* [1998] 2 SCR 371 (SCC).

10 At [84].

> [86] ... [T]he more recent expansion of s 128A to make the list of matters in the section non-exhaustive is consistent with our approach. It also appears to us that the general thrust of the rape law reform with its emphasis on the need for informed consent, is consistent with our interpretation of the phrase "nature and quality".

[21] The Court shared the view of McLachlin J that:[11]

> It is unrealistic, indeed shocking, to think that consent given to sex on the basis that one's partner is HIV free stands unaffected by blatant deception on that matter. To put it another way, if you would think the law should not condone a person who has been asked whether he has HIV, lying about that fact in order to obtain consent, to say that such a person commits fraud vitiating consent thereby rendering the contact an assault seems right and logical.

[22] Accordingly, the Court in *KSB* concluded that where there had been unprotected sexual intercourse without disclosure as to HIV status, the appellant's consent was vitiated by a mistake as to the nature and quality of the act (s 128A(7)) so as to constitute a sexual violation for the purposes of cover for mental injury under s 21. Section 128A(8) was viewed as an alternative position "that would be consistent with the focus on the need for consent to be informed and the more recent legislative history".

Crimes Act 1961

[23] Section 128(1) of the Crimes Act defines sexual violation as being the act of a person who rapes another person or has unlawful sexual connection with another person. Section 128 requires the following elements to be satisfied:

a) intercourse or sexual connection;

b) lack of consent of the victim; and

c) lack of reasonable belief in consent from the offender. The Court of Appeal in *KSB* held this element is not relevant for the purposes of cover under the accident compensation legislation.[12]

[24] Indecent assault under s 135 of the Crimes Act, requires the following:

a) an assault;[13]

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11 At [66].

12 Above n1 at [30] – [31].

13 Section 2 of the Crimes Act 1961 defines assault as the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly; or threatening by any act or gesture to apply

b) in the circumstances, the assault would be regarded as indecent by right-thinking members of the community;

c) the defendant was aware of the aspects of the assault, and the surrounding circumstances, which right-thinking members of the community would consider made their behaviour indecent; and

d) where the issue of consent is raised on the evidence:

(i) lack of consent of the victim;

(ii) the defendant did not honestly believe that the complainant consented.

[25] Section 128A of the Crimes Act sets out the circumstances in which in which allowing sexual activity does not amount to consent. The relevant provisions here are s 128A (7) and (8) which provide:

128 A Allowing sexual activity does not amount to consent in some circumstances

(1) A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.

(2) A person does not consent to sexual activity if he or she allows the activity because of—

(a) force applied to him or her or some other person; or

(b) the threat (express or implied) of the application of force to him or her or some other person; or

(c) the fear of the application of force to him or her or some other person.

(3) A person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious.

(4) A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.

(5) A person does not consent to sexual activity if the activity occurs while he or she is affected by an intellectual, mental, or physical condition or impairment of such a nature and degree that he or she cannot consent or refuse to consent to the activity.

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such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that they have, present ability to effect their purpose. The assault need not be forceful or violent; a gentle caress may suffice. The term "assault" as defined in s 2(1), does not necessarily involve a "battery", but may be no more than an attempt to apply force, or a threat by any act or gesture to do so.

(6) One person does not consent to sexual activity with another person if he or she allows the sexual activity because he or she is mistaken about who the other person is.

(7) **A person does not consent to an act of sexual activity if he or she allows the act because he or she is mistaken about its nature and quality.**

(8) **This section does not limit the circumstances in which a person does not consent to sexual activity.**

(9) For the purposes of this section,—

allows includes acquiesces in, submits to, participates in, and undertakes

sexual activity, in relation to a person, means—

(a) sexual connection with the person; or

(b) the doing on the person of an indecent act that, without the person's consent, would be an indecent assault of the person.

[Emphasis added]

[26] The Adams commentary summarises the law regarding free and informed consent, as follows:[14]

> To consent to any sexual activity the victim must have understood the essentials of his or her "situation" or "the scope of the activity": *R v Isherwood* CA182/04, 14 March 2005 at [35]; *R v Lee* [2006] 3 NZLR 42, (2006) 22 CRNZ 568(CA) at [309]. At the very least this means that the complainant must agree to the specific physical sex act performed and understand the sexual nature of that activity (ie that the act was sexual in nature as opposed to being for a different purpose, such as a medical examination). On the other hand, ignorance of peripheral matters, or the mere fact that the victim would not have consented if they had been aware of a particular fact or circumstance, will not in itself render an activity non-consensual.

[27] *R v Nelson* is a criminal law case.[15] The accused had been charged with numerous offences, including sexual violation by unlawful sexual connection, as a result of a ruse that he had perpetrated against six complainants. Each of the complainants was clear that he had only consented to the sexual activity because he believed it was required for him to gain employment in particular prostitution or pornography employment.

[28] The issue was whether s 128A(7) or s 128A(8) applied to vitiate any consent the complainants had given to the sexual activity that had occurred.

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14 Simon France (ed) *Adams on Criminal Law* (online ed, Brookers) at CA128A.07. Emphasis added.

15 *R v Nelson* [2016] NZHC 1236.

[29] Dunningham J observed:

> [15] The Courts have regularly said that consent must be 'full, voluntary, free and informed' to be 'real, genuine or true' consent. However, the law has also traditionally been reluctant to criminalise the use of deception in sexual relationships…
>
> [16] Consequently, consent to sexual activity given on the basis of fraud or deception is still normally regarded as valid and genuine consent. **The common law has, however, long accepted that there are two exceptions where deception vitiates consent. This is where the complainant is mistaken as to the identity of the defendant or where the complainant is mistaken as to the nature and quality of the act.**
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> [Emphasis added]

[30] Jonathan Herring, academic commentator expressed a broad view of what fraud should vitiate consent:[16]

> It should no longer be enough just to ask did the complainant say "yes" in relation to the proposed sexual activity. Now the values that should underpin our sexual offences law are those of mutual respect, reciprocity, connection and honesty. If we respect sexual integrity and the importance of being able to choose with whom to have sexual partners, then the choice must be one that is free from coercion and fraud.

[31] Dunningham J recognised there was much force in the sentiments in the Herring article. However, that would:[17]

> ..represent a sea change in our criminal law and one which is so sweeping that I consider it would require engagement of the New Zealand public, through the legislative process, before it is implemented. In particular, I consider there will be difficulty in delineating the kind of fraud or deception which would justify attracting the stigma of a conviction for rape or sexual violation, from deceptions which, while not to be condoned, do not, in society's eyes warrant such sanctions.

[32] Her Honour stated she had not been assisted by counsel in describing the threshold that needed to be reached before a deception which was used to obtain consent to sexual intercourse or sexual activity would warrant a criminal conviction on the offences charged.

[33] Dunningham J found the complainants consented to the acts because of their personal circumstances, including a need for money. Her Honour concluded on the facts that though the complainants suffered harm from their experiences with the defendant, including his

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16 Jonathan Herring "Mistaken Sex" [2005] Crim LR 511 at 524.

17 *R v Nelson* [2016] NZHC 1236 at [66].

deceit, "it is not a case where, as in Cuerrier, the deceit exposed them to a harm they would not otherwise have anticipated could arise from the activity".[18]

[34] Her Honour observed the English courts have extended the situations where consent can be vitiated based on a mistake as to "the nature or purpose" of the act, when it is undertaken for therapeutic or other reasons, not sexual reasons. For example, in situations where someone lies about their HIV status; lies about whether a condom was being worn during sex;[19] engages in intercourse not intending to withdraw having promised to do so;[20] and engages in sexual activity having misrepresented one's gender.[21]

[35] A distinction is made in the English cases between matters which are central to the physical sexual act and matters which are peripheral or part of the broad circumstances surrounding the sexual act:

(i) In *R (on the application of "Monica") v Director of Public Prosecutions*, the appellant had entered into a relationship with an undercover police officer believing him to be a dedicated member of the same protest movement which she was heavily involved with.[22] It was accepted that the apparent genuineness of his "radical, street protest and/or environmental credentials [were] central to her wish to start a relationship with him".[23]

On the question whether the respondent's deception in this regard could vitiate her consent, the Court distinguished the *Assange v Swedish Prosecution Authority* line of authority, holding that the "relatively modest extension of the way in which the law examines 'consent' in the context of sexual offending" in those decisions was limited to situations where the deception is "closely connected to the performance

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18 At [70].

19 In *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) at [86], the Court held that deliberately having sexual intercourse without a condom in circumstances where the complainant had made it clear that she would only have sexual intercourse if one was used, would "amount to an offence under the Sexual Offences Act 2003 (UK), whatever the position may have been prior to that Act" (ie at common law). While the "deception" involved was plainly not one as to the "nature or quality" of the act and was therefore not caught by the conclusive presumption in s 76 of the Act, it was nevertheless more than sufficient to "remove any purported free agreement by the complainant" as required by the general definition of consent in s 74 of the 2003 Act whereby "a person consents if he agrees by choice, and has the freedom and capacity to make that choice".

20 *R (F) v DPP* [2014] QB 581.

21 *R v McNally* (2013) EWCA Crim 1051.

22 *R (on the application of "Monica") v Director of Public Prosecutions* [2018] EWHC 3508 (Admin).

of the sexual act, or [is] intrinsically so fundamental, owing to that connection, that they can be treated as cases of impersonation".[24] In reaching this conclusion the Court accepted the respondent's characterisation of *Assange v Swedish Prosecution Authority* as "cases which relate directly to the sexual act and where the deception puts the sexual health of the complainant at risk". Therefore, although it was clear that the supposed attributes of the respondent were crucial to the appellant's willingness to engage in a relationship with him, her consent to the sexual activity was not vitiated by the deception. The deception was as to "the broad circumstances surrounding [the sexual activity]", not the performance or nature of the sexual activity itself.[25]

(ii) In *R v Lawrance*, the Court held that a false representation that the appellant had had a vasectomy, which the complainant relied on in agreeing to unprotected sexual intercourse, was not "so closely connected to the nature or purpose of sexual intercourse rather than the broad circumstances surrounding it" that it was capable of negating consent.[26] Rather the "deception was one which related not to the physical performance of the sexual act but to risks or consequences associated with it". It was accordingly different from other cases where deception had vitiated consent.

Is consent vitiated?

The submissions of the parties

[36] Mr Miller argues the appellant was induced into consenting to recorded sexual intercourse by ED's assurance that his recording of it would remain private on his phone. Mr Miller submits the agreement to keep the recorded sexual intercourse private was breached a month later when ED uploaded the recording to the worldwide web. This breach of the agreement to keep the recorded sexual intercourse private amounted to a deception. In turn, the deception changed the nature and quality of a recorded private sexual act where consent was given, to a recorded public sexual act where consent was not given. Thus, RV's consent

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23 At [36].
24 At [72] and [80].
25 At [72].
26 *R v Lawrance* [2020] EWCA Crim 971 at [35] – [37].

is vitiated under s 128A (7) because she was mistaken about the nature and quality of the act or otherwise under s 128A(8) because she did not give informed or true consent.

[37] Ms Brown submitted that RV's evidence shows she was reluctant to engage in recorded sexual intercourse as shown by the fact she initially said no and was persuaded to do so only on the condition agreed by ED that it remain private. In consequence, the deception has caused harm to physical integrity and significant psychological harm being PTSD, an Axis 1 disorder diagnosed by Dr Porter, Psychiatrist, that would not otherwise have resulted from recorded sexual intercourse remaining private. This greater harm goes to the nature and quality of the act. Recorded sexual intercourse kept private is different in nature and quality to public uploading of it to worldwide websites receiving over 35,000 views forever more.

[38] Ms Roff submitted the Corporation's position is the actions of ED are morally repugnant and outrageous. RV has suffered detrimental impacts from the events here. However, they do not meet the criteria for a grant of cover for mental injury under s 21 of the Act.

[39] Ms Roff submitted the "alleged" deception does not amount to deception of the sort that vitiates consent to the sexual connection that occurred here, based on the law and in the circumstances described by RV. Therefore, there is no Schedule 3 offence for which cover can be claimed for the following reasons:

(i) There is no evidence that ED intended at the time of the sexual activity to post the images online. While he subsequently did so, the question is what his intention was at the time. For example, if Party A and Party B engaged in sexual intercourse on day 1, and on day 100 as an act of revenge (the Corporation not saying ED acted out of revenge), Party B posts images online, there can be no suggestion that Party A has been the victim of sexual violation within the meaning of s 128B of the Crimes Act. This scenario is far removed from the scenario in *KSB*. Here, the upload occurred one month after the sexual activity, and RV found out about them ten months later.

(ii) There was no deception as to the sexual act to be engaged in, nor any deception as to the recording of it. At most there was deception as to what would happen with the recording.

(iii) While it may be morally outrageous that ED induced RV to engage in sexual intercourse with an assurance he did not intend to keep, it is in its nature a different scenario in which (1) Party A and Party B agree to engage in sexual intercourse on the basis they would tell no one of it; but (2) Party B always intended to tell their friends and others about it; and (3) Party B did tell their friends and others about it. Though morally outrageous it is not conduct amounting to sexual violation.

(iv) While the circumstances here are morally repugnant, they are not of a nature or quality as to qualify the conduct as sexual violation.

(v) The feared harm here is harm to dignity, which is different in nature to that in *KSB*, where the feared harm was as to contracting a sexually transmitted disease. There is a substantial difference in law between fear of harm to one's bodily integrity and fear of harm to dignity and reputation. The trigger for the claimed mental injury is different here.

(vi) The conduct in issue is more appropriately given criminal sanction under s 216J of the Crimes Act, a crime against personal privacy, rather than one of the sexual crimes. RV was not harmed by the sexual connection here, or the recording of it, rather it is the recording to the internet. That act did not occur at the time the sexual connection and the simultaneous recording was made. It occurred later.

[40] Ms Roff submitted if the Court allows the appeal, the question of mental injury has not been investigated by the Corporation. In consequence, the Corporation will need to consider whether and what mental injury has been caused.

Discussion

[41] The context of this appeal is a claim for cover for mental injury under s 21 of the Act.

[42] There is no dispute the statutory accident compensation regime is victim focussed, in contrast with an offender focus under the criminal law. There are different statutory purposes, different statutory requirements and different standards of proof leading to different results. The criminal law is concerned with punishment. The accident compensation regime is concerned with treatment and rehabilitation for those suffering injury. I take this into account when reviewing cases from overseas jurisdictions because no other country has New Zealand's accident compensation scheme.

[43] There are other policy and practical considerations that distinguish the jurisdictions as noted in *KSB.* For example, the Corporation does not either contact or name the wrongdoer when considering s 21 claims. Section 21(5) is plain, not all the requirements necessary to prove a criminal case are needed, and whether a person is charged or convicted is irrelevant. In *KSB* THE Court took a different view to Randerson J in *CLM*, and did not accept the submission of the Solicitor-General as intervener that there should be no change in the criminal law that withholding the risk of HIV from a partner did not mean there was a lack of informed consent to sexual intercourse. The Court of Appeal held the absence of reasonable belief in consent was not determinative of the question of cover.

[44] Nonetheless, taking an overview of s 21, the Court in *KSB* stated, "it is not conceivable that Parliament intended to provide cover for mental injury resulting from consensual sexual intercourse".[27] Each case has to be decided on its own facts

[45] In terms of *KSB,* a conclusion must be reached that the actus reus of the offence has been committed on the balance of probabilities. The key point being the offence of sexual violation occurs where the actus reus occurs "without [RV's] consent to the connection" under ss 128(2)(a) and 128(3)(a) of the Crimes Act. In order to establish the sexual intercourse or connection was non-consensual, it must be vitiated under s 128A.

[46] The starting point is the facts in this case. I then turn to consider whether consent is vitiated based on the reasoning in *KSB.*

[47] The appellant's affidavit describes the events:

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27 At [29].

> [ED] then suggested to me that we make our own "private video". However, he proposed that this time it would be recorded on his mobile phone. I was reluctant at first and initially said no., but [ED] assured me that the recording would be kept private between him and me. I then agreed to the videos being taken on his phone, on the condition that they were kept between him and me., and the understanding that they were not taken for distribution and were not intended for viewing by any third party.

[48] The Reviewer stated:

> [46] [RV] strikes me as a brave and candid woman. I have no reason to doubt the events she described. For the purpose of considering the issue of cover for a mental injury, I accept the facts as she has presented them in her affidavit of 29 September 2020, and it is on that basis I make my decision as follows.
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> [49] While I accept [RV's] statement that she would not have consented to the sexual activity if she had known the recordings would be uploaded to the internet, I am not persuaded this makes the two acts inextricably linked for the purpose of considering cover.

[49] The submissions of the parties read RV's evidence differently. The Corporation does not accept the Reviewer's expression of RV's statement or that ED's agreement to keep the recording private is explicit. Having read all the evidence in the appeal, including Dr Porter's report, I disagree with this submission.

[50] The core elements of an agreement leading to consent were present. RV was reluctant to consent to recorded sexual activity. When she was initially asked, she said no. She consented upon obtaining ED's agreement that the recorded sexual intercourse remained private between them.

[51] I accept Mr Miller's submission that the assurance provided, and the consent given, were reached before the recorded sexual intercourse occurred. To characterise the events here as a privacy case that RV did not consent to uploading videos misses the point.

[52] The agreed facts set out earlier in the judgment refer to Judge Gilbert's statement that in consenting to the recording of sexual intercourse, the appellant "certainly did not agree to them being splashed about the internet". That addresses the situation under the Harmful Digital Communications Act.

[53] This case concerns the clear basis upon which consent was given by RV to recorded sexual intercourse. RV's consent to the recorded sexual intercourse is inextricably linked to

the assurance from ED the recording would stay private. Dr Porter also agreed with this position.

[54] In my view, RV's consent to private recorded sexual intercourse is vitiated by a mistake as to the nature and quality of the act. As in *Cuerrier*, the threshold can be determined by whether the deceit exposed RV to a risk of serious harm. The nature of private recorded sexual intercourse is different in nature to sexual intercourse for public consumption. For this reason, RV did not consent to the recorded sexual intercourse.

[55] I turn to consider *KSB* and whether it is analogous to the present case.

[56] The Court of Appeal was careful not to reach any broad conclusions when fraud vitiates consent noting "[we] do not have to go beyond the present factual situation, which involves unprotected sexual intercourse and non-disclosure of HIV status."[28] Ms Roff submitted ED's conduct is not comparable to the conduct which persuaded the Court in *KSB* to find s 128A(7) to be triggered on the facts of that case.

[57] It goes without saying, the facts in *KSB* and in this case are different. However, I consider there are points of principle in *KSB* that are analogous to this case for reasons that follow.

No evidence of the wrongdoer's intention

[58] The Corporation submits there is no evidence that ED intended at the time of sexual connection to post the images online. ED's mental state is not the focus here.[29] However, three facts are clear. First, the reluctance of RV who said no when ED asked her if he could make the recording. Second, ED's persuasion of her leading to the assurance he would keep the recording private. Third, ED's subsequent actions of uploading the videos on the worldwide web.

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28 At [92].

29 This was the reasoning behind the Court of Appeal in *KSB* determining the mens rea element of reasonable belief in consent is not necessary for an assessment in the accident compensation jurisdiction.

Misapprehension/ Deception

[59] Ms Roff submitted there was no misapprehension/deception as to the sexual act to be engaged in, nor was there any misapprehension/ deception as to the recording of it. At most there was misapprehension/deception as to what would be done with the recording.

[60] There was no misapprehension as to the sexual act in *KSB*. It was the wrongdoer's deception in withholding information on his HIV status that vitiated *KSB's* consent.

[61] The focus here is RV's evidence of the events that caused her to consent to the recorded sexual intercourse. ED's assurance given prior to the recording that the video of the sexual act would be kept private, and then the blatant disregard of that assurance by posting it shortly thereafter attests to an act of deception. I accept Mr Miller's submission that the word "assurance" should not be downplayed in context of the facts here. The breach evidenced a deception that goes to the nature and quality of the sexual act.

[62] Further, under s 128A(7), as Mr Miller submitted, only a mistake is required as to the nature and quality of the sexual act. The higher standard of deception (that is, consent induced by fraud) is required in other countries such as England and Canada but is not required in New Zealand. For the purposes of an accident compensation inquiry, it is sufficient that ED gave a representation the recordings would be kept private between himself and RV, and he published them despite this assurance. These facts are clear on the agreed facts.

Exposure to harm

[63] The courts have held that consent is vitiated to sexual activity where a person is exposed to significant risks at the time of the sexual activity.

[64] The reasoning in *KSB* applies to risks which someone is exposed to as an inherent part of the sexual activity. The Court reasoned it was the "associated" and "significant" risk of serious harm that changed the nature and quality of the act.[30] The case law highlights a difference between the "essentials" of the situation and the "broad circumstances" or "risk or consequence associated with" the physical performance of the sexual act.

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30 At [73] citing [72] of *Cuerrier*.

[65] In *KSB* the feared harm was to contracting a harmful sexually transmitted disease, being "serious bodily harm". The Corporation submitted the harm in this case is to dignity, noting the substantial difference between fear of harm to bodily integrity and harm to dignity or reputation.

[66] In her evidence, RV reports although her face was not shown, she has distinctive tattoos and scars which allowed a friend to identify her in one video and alert her to it. These factors served to magnify the seriousness of the harm to RV. Further, RV stated in her affidavit that she suffered physical symptoms from the publication of the images and the resulting anxiety including chest tightness, feeling like her "heart is in [her] throat", nausea, trouble sleeping and a loss of appetite. She talked of not been able to eat full meals. The physical and psychological symptoms are set out in the report of Ms Woolhouse in the agreed statement of facts.

[67] I accept Ms Brown's submission that in both *KSB* and the present case, the harm was a mental injury suffered by the victim. The diagnosis of PTSD in both cases is serious harm. In both cases there was a deception by the wrongdoer to gain access to sexual intercourse with the victim. The sexual activity would not have taken place had there been no deception. The issue of timing is also analogous. In *KSB,* harm was only feared when the deception came to light. There was no infection suffered. The harm was mental injury and there was no publicity. In the present case, when the deception came to light, not only has RV suffered mental injury from knowing she was deceived into the sexual connection, but extensive damage had already occurred because of the images being accessible on the worldwide web. The harm suffered in both cases was suffered when the deception was discovered. At that stage the consent to the sexual connection was vitiated *ab initio*.

Criminal sanction

[68] The Corporation's submissions refer to a criminal sanction through a conviction, which is not necessary in an accident compensation case. A conviction for criminal nuisance was appropriate for the wrongdoer's action in *KSB*, but that did not prevent the Court from determining the conduct came within the description of an offence in Schedule 3.

[69] In the present case, the Corporation's submissions focus on sexual violation. However, counsel for the appellant also argue these circumstances fall within the description of indecent assault. However, this does not affect the primary analysis which concerns consent.

[70] The Corporation's submissions refer to the stigma of a conviction. Following *KSB*, it is not necessary to form a definitive view that the wrongdoer would be convicted by a jury beyond reasonable doubt if the matter was brought to a criminal court. Further, this position is codified in s 21(5) of the Act. In any event, the proper focus for cover under the accident compensation scheme is on the victim, not a wrongdoer as in the criminal law.

Section 128A(8)

[71] The Corporation's submissions refer to a number of scenarios which appear to limit the wide ambit of s 128A(8) to the examples of previous criminal cases in the previous subsections.

[72] The Court in *KSB* set out a detailed legislative history leading to s 128A. The more recent history in the parliamentary debate in 2005 together with observations of the Court of Appeal in recent cases, are instructive on consent issues.

(i) When s 128A was substituted in 2005, members of Parliament recorded some reservations because of difficulties in codifying the concept of informed consent. The following speech at first reading is by way of an example:[31]

> I turn briefly to the new section 128A to discuss the difficult situation that emerges from it. It is headed: "Allowing or agreeing to sexual connection does not amount to consent in some circumstances". It is an attempt, and a clumsy attempt, to codify the present criminal law. … **These are difficult areas to codify. These issues are best left to the common sense of the judges, either sitting alone or advising a jury upon the particular circumstances of a case**. Often criminal breaches of the law occur under the influence of alcohol; whether that influence is partial, or total will be an issue to be decided in the particular circumstances of the activity. … This whole aspect of informed consent in criminal law is difficult and does not lend itself to codification of this type.
>
> [Emphasis added]

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31 (2 March 2004) 615 NZPD 11474. Dr Worth MP – first reading.

(ii) In R v Brewer, the Court of Appeal observed:[32]

> Section 128A which came into force on 1 February 1986 departed from earlier provisions listing specific matters which could vitiate consent. It … goes on to declare in subsection [(8)] that nothing in the section shall limit the circumstances in which there is no consent for the purposes of s 128. **This may be taken as an indication that all matters bearing on the reality of consent will be relevant**, and in the circumstances of this case they would obviously include coercion of the kind described by the Judge in the above answer he gave the jury.
>
> [Emphasis added]

(iii) Recently, in *Holmes v R*, the Court of Appeal said: [33]

> [54] … Section 128A is not a code and it does not place limits on what might constitute the withholding of consent to sexual activity.

[73] The Court in *KSB* stated if it had not been possible to decide the case under s 128A(7) they would have concluded the case fell within s 128A(8) as "that would be consistent with the focus on the need for consent to be informed and the more recent legislative history." Also, in *Nelson,* Dunningham J observed that s 128A(8) gave wide scope to find that consent had not been given to the sexual activity. This Court observes that Dunningham J noted the circumstances in *Nelson* that consent was provided on the promise of future benefits (money or employment).

Conclusion

[74] I conclude on the evidence before me that the deception here vitiates consent when considering the purpose of the connection and the type of connection to which RV consented. The sexual act was recorded with ED's agreement to the video staying private. This means consent to the sexual act and the recording are inextricably linked. RV would not have consented to the recorded sexual intercourse without ED's agreement to the recording staying private. Therefore, RV's consent to private recorded sexual intercourse is vitiated by a mistake as to the nature and quality of the act.

[75] There is no doubt the nature of private sexual intercourse is different in nature to sexual intercourse for public consumption. On balance, I conclude RV did not consent to the recorded sexual intercourse.

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32 *R v Brewer* CA516/93, 26 May 1994 at [11].

[76] I am satisfied that RV's consent was vitiated either under s 128(7) or otherwise under s 128A(8) of the Crimes Act.

[77] I find the circumstances here support an act that falls within the description of a Schedule 3 offence, either sexual violation or indecent assault.

Mental injury

[78] Having found RV was the victim of an act falling within the description of an offence in Schedule 3, the next question is whether a mental injury was caused by the act.

[79] Ms Roff submits the case should be remitted to the Corporation to make a decision because no decision has been made by the Corporation regarding the diagnosis of RV's mental injury. Since the Corporation declined the claim on the first threshold question under s 21, it had no need to then consider the second threshold question.

[80] The Court was informed that Dr Porter's report was filed with the appellant's submissions in February 2022. The submissions were filed without challenge by the Corporation. Not only did the Corporation not object to the filing of the report, but also it did not seek leave to adduce evidence in reply.

[81] Ms Brown explained that s 54 of the Act requires the Corporation to investigate all aspects of the claim.[34] An assessment had not been undertaken. Counsel for the appellant was concerned that considerable time had already passed since the appellant learned of the uploading of the recordings in 2020. More time was passing with the claims process and more time would pass before an assessment could be undertaken, so evidence was required to fill the gap.

[82] Ms Roff was only recently appointed counsel for the Corporation. She submitted there are issues with some of the questions put to Dr Porter and his opinion whether or not a sexual offence has occurred. However, Ms Roff did not object to the report adduced into the appeal.

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33 *Holmes v R* [2022] NZCA 340.

34 *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.

[83] I take these factors into account and turn to consider Dr Porter's opinion on diagnosis and causation.

[84] Ms Brown made two points. First, she submitted the Act does not require the mental injury constitute a DSM Axis 1 diagnosis, so long as the condition suffered is within s 27 being "a clinically significant behavioural, cognitive or psychological dysfunction".[35] The Court observes this submission was made on the basis of the report from Ms Woolhouse. However, since the report of a psychiatrist is now before me, I do not need to determine the issue arising in this submission.

[85] Second, Ms Brown submitted Dr Porter's report on causation is comprehensive and provides reasoning for his Axis 1 diagnosis.

[86] Dr Porter's report includes RV's account of the facts, that before sexual intercourse, ED said he wanted to make a "sex tape." RV was reluctant and initially said no. ED repeated his request and assured her the recording would be kept private between them. Given the assurance, RV consented to the recorded sexual intercourse. The only distinguishing feature between the core facts as found, with the narrative recorded by Dr Porter, is that RV elaborated the fact of her reluctance to providing consent to recording of the sexual act which she did on the assurance the recording would remain private. Otherwise, the facts reported to Dr Porter and in her affidavit evidence and statement to the Police are consistent.

[87] Dr Porter had access to GP records and other documents relevant to the proceeding under the Harmful Digital Communications Act 2015, referred to earlier in the agreed statement of facts. The report refers to the mental impact the events had on her, including anxiety, struggling to function during the day, withdrawing from typical social supports and having distressing dreams with the enduring theme of death. She reported symptoms of dissociation and depersonalization. Dr Porter diagnosed Axis 1 Post Traumatic Stress Disorder secondary to the combined effects of the sexual encounter and the dissemination of this becoming public".

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35 *W v Accident Compensation Corporation* [2018] 3 NZLR 859.

[88] Dr Porter stated:

> **Post-traumatic Stress Disorder** – [The appellant] suffers from Post-Traumatic Stress Disorder secondary to the events of September 2019/August 2020. The intrusive memories and flashbacks relate both to being recorded during sexual contact and to her later discovery of this recording online. The symptoms are very significantly improved but still sufficient to meet criteria for a diagnosis of Post-traumatic Stress Disorder and certainly to meet criteria for a mental injury. Factors which have been particularly material in causing the mental injury are the fact that consent to the recording, even without distribution was of doubtful validity since [the appellant] was persuaded over a period of time to undertake this. Secondly, the video was posted soon after the sexual act, suggesting that the intention was always to post this video. This has led to an overall sense for [the appellant] that in fact, she was sexually violated by being persuaded to commit a sexual act under false pretences and it is both the discovery of the videos and the act of intimacy with the male involved which have given rise to the post-traumatic stress disorder. She has flashbacks of the face of the male involved, despite the fact that this was not visible in the videos and she has recurrent thoughts about the whole sequence of events.

[89] Dr Porter also went on to consider major depression and social anxiety disorder. He was candid in his view that the Major Depression had largely resolved and any social anxiety was related to consequences of the videos being posted. He stated:

> It is clear that the general practitioner treating [the appellant] believed at the time (following the discovery of the online videos) that [the appellant] had developed a depressive illness. Several months after this, [the appellant] still had low mood despite treatment with antidepressants. It is very difficult to distinguish her depression from post-traumatic stress disorder but in this case, it appears that the general practitioner had made a diagnosis of **Major Depression** and I certainly cannot contradict this in retrospect. There is a family history of depressive disorder and [the appellant] had been treated with an antidepressant previously although told by her general practitioner that he did not think that depression was the issue. However, in my opinion, the events of September 2019/August 202 are a material cause of a **Major Depression** which is now largely resolved.
>
> I considered a separate diagnosis of social anxiety disorder in aftermath of the incident. However, in my opinion, symptoms of social anxiety were largely related to a sense that others may have recognised her in the online posts.

[90] Specific questions were put to him by counsel for RV. I accept Ms Roff's submission that there are aspects of his answers where he appears drawn to opine on the legal issues. However, reviewing Dr Porter's report in the round, I am satisfied he has taken a thoughtful, reasoned and candid approach to the issues of causation. Importantly, he has drawn his conclusions from the facts inextricably linked as found by this Court. If he had not done so, then I would have found it difficult to accept his assessment on causation.

[91] For these reasons and taking into account all the circumstances regarding the filing of Dr Porter's report, and the absence of a response from the Corporation when there was time to do so, it is fair and just this Court makes the determination on cover. There is the evidence to do so. In the circumstances, I consider it is unnecessary and not appropriate to remit this case back for further investigation.

[92] I am satisfied Dr Porter has provided a thorough and well-reasoned report to enable this Court to find that cover for a mental injury should be granted.

Decision

[93] In summary:

a) The accident compensation scheme is fundamentally different from the criminal law. It is victim focused rather than offender focused. Sanctions under the criminal law are not required for cover to be granted.

b) On the facts, RV's consent to the recorded sexual intercourse is inextricably linked to the assurance from ED that the recording would stay private.

c) Consent to private recorded intercourse is vitiated by a mistake as to the nature and quality of the act. It was not a private recorded sexual intercourse. Instead, it was sexual intercourse for public consumption. Accordingly, RV's consent was vitiated under either s 128(7) or otherwise under s 128A(8).

d) *KSB* is different on the facts. However, there are points of principle that are analogous.

e) ED's breach of his assurance that the videos would be kept private evidenced a deception that goes to the nature and quality of the sexual act. This deception vitiates consent.

f) RV was exposed to serious harm when the deception came to light. This is the same time that the harm to KSB was realised. Extensive damage had already occurred because of the images being accessible on the world wide web.

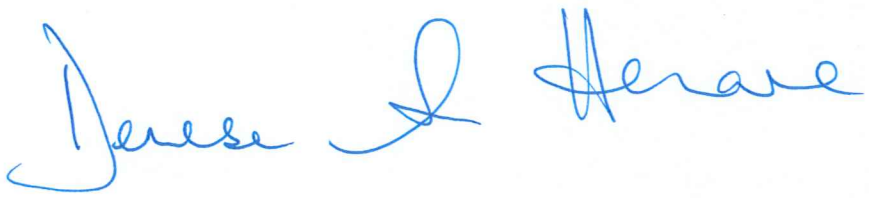
g) RV's mental injury was caused by an act that falls within the description of an offence in Schedule 3. Dr Porter diagnosed RV with Post Traumatic Stress Disorder caused by the circumstances of the Schedule 3 act.

Result

[94] The appeal is allowed on the grounds the act falls within the description of an offence listed in Schedule 3 of the Accident Compensation Act 2001.

[95] The Court also finds the appellant is entitled to cover for a mental injury, that is Post Traumatic Stress Disorder, diagnosed by Dr Porter.

[96] The appellant is entitled to costs which I am confident the parties can agree. If not, then directions are that separate memoranda will be filed by the parties within 14 days of this judgment.



Judge Denese Henare
District Court Judge

Solicitor: John Miller Law, Wellington for the appellant
Michael Mercier, Wellington for the respondent
Counsel: R Roff, Clifton Chambers, Wellington for the respondent