

# ‘Special hearings’ under New Zealand’s Criminal Procedure (Mentally Impaired Persons) Act 2003

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## 1 Introduction

In 2003 the New Zealand government passed legislation aimed, *inter alia*, at reforming the law on unfitness to stand trial and making provision for appropriate options for the detention, assessment and care of defendants and offenders with an intellectual disability.<sup>1</sup> The Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR) was novel legislation making express statutory provision for the first time for intellectually disabled offenders.<sup>2</sup> However, that statute is not considered further in the present context. One of the innovations achieved by the Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) (CPMIP) was the creation, in s9 of the Act, of a new procedure for testing ‘evidential sufficiency’ prior to a determination of unfitness to stand trial. The ‘evidential sufficiency’ hearing, referred to as a ‘special hearing’ in the Act, and sometimes referred to as an ‘involvement hearing’, was designed to determine whether the offender had ‘caused’ the acts or omissions constituting the *actus reus* elements of the offence he or she was charged with before they were at risk of a finding of unfitness to stand trial. The procedure is broadly modelled after the English ‘trial of the facts’ procedure although, unlike its English counterpart, it occurs *prior* to a determination of unfitness. If a negative finding was made by the court, the offender would be immediately discharged, although a discharge did not amount to an acquittal,<sup>3</sup> a matter I will refer to later in this article. If a positive finding was made, the matter would proceed to a fitness to plead hearing, as specified in the Act.<sup>4</sup>

The apparent statutory purpose of the s9 hearing was to divert mentally impaired offenders from the criminal justice system where the evidence was insufficient to sustain a criminal charge. In practice, however, the wording of the section and its interpretation and application by the courts have rendered it a contentious and intensely litigated provision.

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1 See the Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) and the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (NZ).

2 For a detailed history of this legislation and some of the problems that have emerged since its enactment, see Warren Brookbanks, ‘New Zealand’s Intellectual Disability (Compulsory Care) Legislation’ in K Diesfeld and I Freckelton (eds), *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate 2003); Warren Brookbanks, ‘Managing the Challenges and Protecting the Rights of Intellectually Disabled Offenders’ in B McSherry and I Freckelton (eds), *Coercive Care Rights, Law and Policy* (Routledge 2013).

3 See CPMIP, s 13(3).

4 See CPMIP, s 14.

This has not, in my view, fulfilled the expectations of the legislature. Ten years after its enactment, case law devoted substantially to analysing and determining the operation of the section continues to flood from the courts. Yet it would seem that in New Zealand we are no closer to a settled understanding of the purpose and scope of the section than we were when it was first enacted.

In this article I examine some of the more controversial aspects of the ‘evidential sufficiency’ hearing, with a view to highlighting the complexities the section has given rise to, and suggesting directions for possible future reform.

## 2 Evidential sufficiency

Section 9 of the CPMIP states:

A court may not make a finding as to whether a defendant is unfit to stand trial unless the court is satisfied, on the balance of probabilities, that the evidence against the defendant is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence with which the defendant is charged.

The term ‘evidential sufficiency’ was coined by judges to describe the purpose of the s9 hearing. It is concerned with ascertaining whether there is enough evidence to prove the offender *caused* the *actus reus* of the offence(s) charged. However, the statute gives no indication as to what might constitute evidential sufficiency and it has been left to the courts to determine the nature, scope and limits of available evidence for s9 purposes. Essentially, the s9 hearing is designed to determine whether the defendant committed the *actus reus* elements of the ‘offence’.

It is clear that in drafting the provision to refer to ‘offence’ in the singular, the legislature did not anticipate *multiple* offences or differing degrees of complicity in determining the s9 issue. This has raised the question of what must be proved by the prosecution to meet the evidentiary threshold and whether the physical elements of *all* offences charged in a particular prosecution must be proved.

In order to resolve this problem the courts have held that, where multiple offences are alleged, it is only necessary to prove the *actus reus* of the most serious charge(s) in the indictment. It is not necessary for the court to make findings on all counts in the indictment.<sup>5</sup> The legislation has had to be made to work despite inadequate guidance as to types of evidence that may be adduced or the manner of its proof.<sup>6</sup>

At the heart of this inquiry is the issue of whether the defendant ‘caused the act or omission that forms the basis of the offence charged’. The policy intent was that the involvement hearing would be a ‘simple, short process’ in which the prosecution proves that the defendant was responsible for the *physical elements* of the offence charged.<sup>7</sup> The conventional view of the courts was that, because the defendant’s mental capacity was in doubt, it was not appropriate for the court to consider *mens rea* issues at a s9 hearing. It was thought that such an approach would considerably simplify a s9 hearing. Simplicity, however, is a luxury in this domain.

5 See *Barton v Police* DC Palmerston North CRI 2008–054–003750, 14 November 2011 [3] (Garland DCJ).

6 See *R v Komene* HC Auckland CRI-2012–090–002641, 7 June 2013 (Asher J). There the High Court interpreted s 7(1) of the CPMIP, which defines when a finding of unfitness to stand trial may be made, as applying when, after the commencement of proceedings, the option is to enter a guilty plea. It held that such an approach is consistent with the ‘robust’ approach to jurisdiction adopted by the Court of Appeal in *McKay v R* [2010] 1 NZLR 441 [92] where it was stated that the courts will fill a gap to make the legislation work.

7 Ministries of Justice and Health, *Improving the Criminal Justice Process for Mentally Impaired Offenders* (Issues Paper, CJS-16–07–05, 2011) 11.

Whatever elements *must* be proved, creating a burden of proof on a balance of probabilities suggests that the legislature's concern was that trial judge only needed to be satisfied that the offender *probably* did the act. There was no requirement, on face of the statute, for strict evidential proof. Hence, my characterisation of the s9 hearing as a 'relaxed evidential enquiry in which any evidence (in any form) which assists the court in making a determination on the core issue ought to be admissible, subject to the requirements of natural justice and the ability to test any evidence which may be inherently unreliable'.<sup>8</sup> This analysis of the nature of the s9 inquiry was described by the New Zealand Court of Appeal as 'probably right' in *R v McKay*.<sup>9</sup>

However, experience has since shown that s9 inquiry has been anything but relaxed. Furthermore, while the apparent intention of the legislature was to eliminate any inquiry into *mens rea* issues, in practice it has proven impossible to exclude *mens rea* completely. This is an aspect of the legislation that will be explored more fully as this article proceeds.

### 3 Elements of offence to be proved in determining whether accused caused the act or omission

A continuing area of controversy with s9 concerns the scope of the expression 'caused the act or omission' in the section. Because of the inherent ambiguity in this expression, a number of other issues have arisen, requiring clarification by the courts. These include: the scope of *mens rea* in s9 hearings; the availability of defences; and the meaning of 'objective evidence'.

The *mens rea* issue constitutes one of the major testing grounds for the operation of s9 hearing. It has shown that s9 is more difficult to apply in practice than was first envisaged. A question that the courts were forced to address at an early stage was whether it is possible to separate *actus reus* elements from the mental element in those crimes where the *actus reus* includes a *mens rea* element. Various solutions have been proposed, including excluding *mens rea* altogether from the inquiry, requiring proof of *all elements* (including *mens rea*) and a hybrid approach, which allows the introduction of evidence negating the unlawfulness of an act but not requiring proof of the full mental element. These approaches are reflected in various common law decisions and in statutory models adopted in different jurisdictions.<sup>10</sup>

The issue was considered at length by the New Zealand High Court in *R v Cumming*.<sup>11</sup> Counsel for the prosecution in *Cumming* argued that the s9 inquiry was limited to the *actus reus* of the offences charged, on the basis that s9 was a 'filter' to remove cases where it was not necessary to consider fitness to stand trial because there was insufficient evidence that the accused was responsible for the offence at the outset. On this view the proper place for consideration of the mental element was later in the trial if the accused was found fit to stand trial. Furthermore, it was argued that, if proof of *mens rea* were to be required at the s9 stage, the court would have no choice but to discharge the accused even though he had committed the necessary act, something, it is claimed, Parliament did not intend. Alternatively, if the court were to find at the s9 hearing that the accused did have the necessary *mens rea*, that finding could be compromised if the accused were later found unfit to stand trial.<sup>12</sup>

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8 See Warren Brookbanks, 'Special Hearings under CPMIPA' [2009] New Zealand Law Journal 30, 40. [2009] NZCA 378 [48].

10 See discussion in Brookbanks (n 8), 33.

11 17/07/09, HC Christchurch, CRI 2001 009 0835552 (French J).

12 Ibid [60].

The court noted that support for the prosecution's approach was to be found in earlier decisions of the High Court<sup>13</sup> and in a Ministry of Justice publication.<sup>14</sup> In the light of these authorities and arguments by the Crown, French J concluded that s9 does *not* require proof of all the ingredients of the offence, an intention which the legislature could readily have indicated by substituting the words 'committed the offence' for those currently in contention. However, a more difficult issue for determination was whether Parliament intended to exclude *any* inquiry into the defendant's mental state at the time of the alleged offending.

In contrast to the Crown position, the defence in *Cumming* sought to persuade the court that s9 allows consideration of some aspects of *mens rea*, a position affirmed by overseas authority, in particular *R v Antoine*<sup>15</sup> and *R v Ardler*.<sup>16</sup> The court's treatment of these decisions in *Cumming* illustrates how they have come to impact the development of New Zealand law around s9 hearings.

*Antoine* was concerned with the interpretation of the phrase 'did the act or made the omission charged' in s 4A (2) Criminal Procedure (Insanity) Act 1964 (UK). The similarity of the phrase to s9's 'caused the act or omission that form the basis of the offence' is noted. In England, determination of the question is a jury matter and the standard of proof is beyond a reasonable doubt. Section 9, in contrast, only requires the court to be satisfied 'on a balance of probabilities'. The issue in *Antoine* was whether the offender, charged with murder, could rely on the defence of diminished responsibility in determining whether he 'did the act or made the omission charged'. The House of Lords held that diminished responsibility was not available and overruled earlier authority suggesting the statute required proof of all the ingredients of the offence. Lord Hutton noted that the purpose of the English provision<sup>17</sup> was to strike a 'fair balance' between protecting a person who has, in fact, done nothing wrong, but is unfit to plead, and protecting the public from a defendant who has actually done an injurious act which would have been a crime if committed with *mens rea*. His Honour went on to say that the section achieves the necessary balance by distinguishing between a person who has not carried out the *actus reus* of the crime charged against him and a person who has committed an act or omission which would be a crime if accompanied by *mens rea*.<sup>18</sup>

However, Lord Hutton also acknowledged that offences do not always divide neatly into separate *actus reus* and *mens rea* compartments, since some *actus reus* elements may also imply a mental element (for example, proof of the *actus reus* of possession of an offensive weapon is dependent on the defendant's intention in order to determine if the weapon is defensive).<sup>19</sup> Lord Hutton's approach was to say that the mandate to determine whether the accused did the 'act' did not require consideration of whether the defendant had the requisite *mens rea* for the offence. However, if the defendant had an arguable defence of accident, mistake or self-defence, supported by 'objective' evidence, which he would have raised if the trial had proceeded in the normal way, then the jury should not find the accused

13 See *R v Codd* [2006] 3 NZLR 562 at [38]; *T v Roberts* HC Auckland CRI 2005 092 014492, 22 November 2006 (Fogarty J) and *R v De Wes (Ruling (No 1))* HC Gisborne, CRI 2006 016 003323, 3 November 2008 (Keane J) [14].

14 See *Guide to the Criminal Procedure (Mentally Impaired Persons) Act 2003* (Ministry of Justice 2004).

15 [2001] 1 AC 340.

16 [2004] ACTCA 4.

17 See Criminal Procedure (Insanity) Act 1964, s 4A(2) (UK).

18 *R v Antoine* [2001] 1 AC 340, 375.

19 *R v Cumming* 17/07/09, HC Christchurch, CRI 2001 009 0835552 [73] (French J).

did the 'act', unless satisfied to the requisite standard of proof on all the evidence that the prosecution has negated any defence(s) that may have been raised.<sup>20</sup>

On this basis, mistake, accident and self-defence may properly be characterised as *actus reus* defences since they are concerned not primarily with the accused's particular mental state at the time of the killing, but whether the accused's actions were otherwise lawful. Lord Hutton's point, while conceding that the defences named 'almost invariably' involve some consideration of the accused's mental state,<sup>21</sup> is that only independent evidence pointing to the lawfulness of the accused's actions, as a matter of independent observation, will be sufficient to trigger the nominated defence. Evidence coming from the accused himself or herself or expert evidence as to factors *internal* to the accused's psychological make-up will not suffice, hence the exclusion of mental state defences in determining responsibility for *act* or *omission*.

The case of *Ardler*<sup>22</sup> followed *Antoine* in finding that the inquiry at a 'special hearing' is directed not simply to *actus reus*, nor the full elements of *actus reus* and *mens rea*, but to an 'unlawful' act. In the context of a prosecution for rape, the court held that 'objective evidence' of raising issues, including mistake, accident, self-defence and lack of specific intent necessary to constitute an offence, would be available to negative the physical acts of an offence, but that the prosecution was not required to negative any lack of mental capacity to act intentionally or voluntarily. For this reason, the court held that pleas of mental impairment, provocation, or diminished responsibility were unavailable at a special hearing. An example given in the judgment of a specific intent 'of the particularity necessary to constitute the offence' was the crime of arson, where in the relevant jurisdiction, the specific intent of 'endanger the life of another' had to be established in order that the 'acts' proved constituted arson and not some lesser offence.<sup>23</sup>

In *Cumming* the prosecution contended that both *Ardler* and *Antoine* could be distinguished because of the different wording in the overseas statutes. However, French J observed that while the wording was not identical, it was very similar and it was difficult to see how wording disparity would lead to a different interpretation.<sup>24</sup> The principal distinction, the court found, was the fact that in New Zealand the s9 inquiry *preceded* the fitness to stand trial hearing, contrary to the practice in other jurisdictions where it *followed* an unfitness finding and a finding of mental impairment.

French J considered that the differences in the order of the 'facts' hearing and burden of proof requirements were independent of the reasoning of the courts in interpreting the words 'the act' and expressed the correct position (at least for the purposes of New Zealand law) as an adaptation and extension of the formula adopted by the English Court of Appeal in *R (on the application of Young) v Central Criminal Court*.<sup>25</sup> There Rose LJ approved the ruling of the trial judge as to the relevant principles emerging from Lord Hutton's speech in *Antoine*, namely:

- (1) so far as possible, the inquiry should focus on an accused's actions as opposed to his state of mind;
- (2) this distinction is dictated by the language [of s9] and the social purpose it serves;

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20 *Antoine* (n 18).

21 *Ibid* (n 18) 376.

22 *Ardler* (n 16)

23 *Ibid* [77].

24 *R v Cumming* (n 19) [86].

25 [2002] 2 Cr App R 12.

- (3) but the distinction cannot be rigidly adhered to in every case because of the diverse nature of criminal offences and criminal activity. In particular, it cannot be adhered to when *mens rea* is a composite element of the *actus reus*.

In addition, French J approved two further criteria arising from a consideration of the overseas case law:

- (4) if there is objective evidence which raises the issues of mistake, self defence and accident, then the Court should not find the accused caused the act or omission unless satisfied on the balance of probabilities that the prosecution has negated that defence;
- (5) it is not open to an accused to argue absence of *mens rea* by reason of mental impairment. To the extent that passages in *Ardler* suggest otherwise, they are contrary to *Antoine* and the underlying legislative policy and should not be followed.

As the discussion so far has illustrated, the question of the availability of defences at a s9 hearing has become a matter of some significance. The essential argument is that if the purpose of such hearings is to determine responsibility for the physical elements of offences only, then there would seem to be little scope for evidence of defences, especially those that go to denial of the *mens rea*. Yet, as has already been established, there is dispute as to whether *any* defences wholly lack a *mens rea* component, even defences like mistake and accident which, it is claimed, are usually simple denials of *mens rea*, not the *actus reus*. Similarly, it might be argued that self-defence, which is a justification rendering what would otherwise be an unlawful assault a lawful act, is also dependent on *mens rea* notions, since the defendant's subjective belief in the circumstances prevailing is an essential element of the statutory defence.<sup>26</sup> It is hard to escape this analysis in respect of any defence we might choose to nominate, since most defences, as doctrines of the criminal law, concern unusual or abnormal states of mind.<sup>27</sup> Indeed the only 'defence' which it might be claimed is a 'pure' *actus reus* defence is the defence of involuntariness, since it amounts to a denial that the *actus reus* was produced with conscious volition – a notion independent of the requirements for *mens rea*.<sup>28</sup> Since on this view most defences contain a *mens rea* component in their conceptual structure, the question becomes: which defences are apt to establish *actus reus* elements when advanced via *objective evidence* given independently of the accused own subjective account? The examples given by Lord Hutton in *Antoine* are illustrative.

His Lordship gives as one example the case of a defendant who has struck another person with his fist, the blow causing death. In such a case, Lord Hutton suggests, it would be open to the jury at a special hearing (trial of the facts) to acquit the defendant charged with manslaughter *if a witness gave evidence* that the victim had attacked the defendant with a knife before the defendant struck him.

Lord Hutton's second example is where a woman has been charged with the theft of a handbag but a witness gives evidence that on sitting down at a table in a restaurant the defendant had placed her own handbag on the floor and, on getting up to leave, picked up the handbag placed beside her by a woman at the next table. In such a case it would be open to the jury to acquit.<sup>29</sup>

<sup>26</sup> Crimes Act 1961, s 48 'in the circumstances as he believes them to be'.

<sup>27</sup> Jerome Hall, *General Principles of Criminal Law* 2nd edn (Bobbs-Merrill 1960) 19.

<sup>28</sup> *Kilbride v Lake* [1962] 590, 592 (Woodhouse J): 'This elementary principle obviously involves proof of something which goes behind any subsequent and additional inquiry that might become necessary as to whether *mens rea* must be proved as well'.

<sup>29</sup> *Antoine* (n 18) 377.

'The expression 'objective evidence' arises in this context in the judgment of Lord Hutton in *Antoine*.<sup>30</sup> The objective evidence Lord Hutton has in mind specifically is evidence of the nature discussed in the examples above. Clearly, his Honour has in mind independent eyewitness evidence able to offer testimony as to the presence, or absence, of an *actus reus* element. The organising principle in these examples would appear to be that, where *independent testimony* points to evidence that the defendant acted in a manner that was inconsistent with the essential external element of the offence charged (for example, an unlawful assault in the case of manslaughter or an *unlawful taking* in the case of theft), such evidence is available, together with any other evidence led at the hearing, from which a tribunal of fact may find that the *actus reus* of the offence has not been proven.

Occasionally, such independent evidence may be supplied through expert testimony pointing to the fact that the accused suffered from a condition which had impaired his/her capacity to act voluntarily. This is implicit in another example given by Lord Hutton. His Honour envisions a situation in which the defendant kicks out and strikes another person in the course of an uncontrollable fit brought about by a medical condition. In this case the defence counsel advances the defence that the defendant, in law, did not do the 'act' because his action was involuntary. But in that case there would have to be evidence that the defendant suffered from the condition.<sup>31</sup>

In each of these examples, what is determinative is the presence of independent testimony that tends to negate the accused's responsibility for an *external element* of the offence charged. The critical issue is not, it would seem, whether the particular defence is characterised as a *mens rea* or *actus reus* defence, but whether the particular defence advanced is capable of negating an *actus reus* element. Defences including self-defence, mistake, accident, act of a stranger, involuntariness,<sup>32</sup> automatism, impossibility of compliance, causal necessity, and alibi may serve this purpose. Others, including intoxication, provocation, diminished responsibility, insanity, compulsion, teleological necessity, generally serve to negate responsibility for the *mens rea* of crime and, as such, are irrelevant to the s 9 type of inquiry.

Cases where the *actus reus* includes a mental element which must be proved as part of the *actus reus* fall to be determined on a case-by-case basis and depend on the specificity of the elements in the offence charged. In such cases it will usually be a matter of statutory interpretation as to whether a particular mental element is a true *mens rea* element, or whether it is properly categorised as a material fact relevant to determination of the *actus reus*.<sup>33</sup>

However, in New Zealand, judicial opinion remains divided on whether evidence as to *mens rea* elements can ever be adduced at a s9 hearing; or whether s9 should be interpreted as meaning that only the commission of the physical act or acts need be proved.<sup>34</sup> The New Zealand Court of Appeal has observed that the 'objective evidence' model contended for in cases like *Antoine* and *Ardler* requires 'difficult distinctions' to be made.<sup>35</sup> The court found that such distinctions between defences supported by objective evidence and mental state defences that cannot be relied upon at a special hearing would be unnecessary if the s 9 hearing were limited to proof that the defendant committed physical acts that form the

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30 *Antoine* (n 18) 377.

31 *Ibid.*

32 See *Police v Espanto* 1/05/09, Morris DCJ, DC North Shore, CRI 2008 044 009415 where the court held that while *mens rea* need not be proved in terms of intention, or knowledge of indecency, it must still be established that the accused's act was voluntary, or deliberate.

33 See *R (Young) v Central Criminal Court* [2002] 2 Cr App R 12.

34 As in *R v Lytleton* HC Auckland CRI 2008-04466, 4 November 2009 (Wylie J).

35 See *R v Te Moni* [2009] NZCA 560 [79] (CA).

basis of the offence, as opposed to the *actus reus*. Yet the court concluded that such an approach did not appear to set ‘a sufficiently high threshold to meet the objective of s9, which is to ensure that the court has made a *finding of criminal culpability* before the sanctions which can apply to a person who is unfit to stand trial can be imposed on that person’.<sup>36</sup> It is difficult to imagine how a finding of ‘criminal culpability’ might be made in the absence of some inquiry into *mens rea*. Thus the current law is in a state of some uncertainty. Nevertheless, there seems to be a general acceptance that the principal focus of a s9 inquiry should be on an accused’s actions as opposed to state of mind, although such a distinction cannot be insisted upon where mental elements like consent (or its absence) are axiomatic to the definition of a particular offence.<sup>37</sup>

Two recent cases illustrate the way in which the provision has been applied in the case law with regard to the mental element in the definition of the offence. In *WH v Police*,<sup>38</sup> the accused faced a charge of possession of an offensive weapon under s 202(4)(b) of the Crimes Act 1961 (NZ). After a s9 hearing, the District Court found that the appellant had caused the act that formed the basis of the offence charged. The appeal against that finding was based on the ground that the evidence was insufficient to establish, on the balance of probabilities, that the appellant ‘had in his possession an offensive weapon in circumstances that prima facie showed an intention to use it to commit an offence involving bodily injury or the threat or fear of violence’.

The appellant lived with his elderly parents. On the occasion in question, after an argument over money, he had taken a kitchen knife and, in anger, stuck it into the kitchen wall. Neither parent was in the room when this occurred. Neither experienced any fear as a result of his actions. When the appellant continued banging on the wall of the caravan in which he slept, and into which he had moved after his actions in the kitchen, making a very loud noise and showing no intention of stopping, his father called the police.

The offence of possession of an offensive weapon is defined as having possession ‘of any offensive weapon . . . in circumstances that prima facie show an intention to use it to commit an offence involving bodily injury or the threat or fear of violence’.<sup>39</sup> Thus, the ‘circumstance’ element of the *actus reus* included a mental element that was indivisible from the *actus reus* itself and, therefore, part of the *actus reus* that had to be proved in order to establish evidential sufficiency.

The issue on appeal was whether the judge was entitled to find, on the balance of probabilities, that the evidence established objectively a *prima facie* intention on the part of the appellant to use the knife to commit an offence involving the threat or fear of violence. The District Court judge found that putting a knife in the wall was an act that could be indicative of a situation where there would be a fear or threat of violence and found the test in s9 was made out.

However, on appeal, Venning J found that the father’s expressed concern was with the appellant’s continual banging on the caravan, which led him to call the police. He held that, since the threat or fear of violence, which the prosecution relied on, must arise out of the act of sticking the knife into the wall, without it being done in the presence of the complainant meant that the appellant’s conduct was as consistent with other actions involving property damage and banging on his caravan as showing an intent to commit an act involving the threat or fear of violence. Because, from the evidence, it appeared that the

36 *R v Te Moni* (n 35) [author’s emphasis added].

37 See *R v Cummings* (n 19) (French J).

38 HC Auckland CRI-2012-404-000371, 28 November 2012 (Venning J).

39 Crimes Act 1961, s 202A(4)(b) (NZ).

appellant's father did not perceive the knife or the appellant's act of sticking it into the wall as a threat, nor was he frightened by the act, the evidence could not support a finding, even on the balance of probabilities, that the appellant had possession of the knife in circumstances that showed an intention to use it to commit an offence involving threat or fear of violence. The appeal was allowed and the finding of 'evidential sufficiency' was quashed and the appellant discharged in terms of s 17(1) of the CPMIP.

The decision was, in effect, a finding that the appellant lacked the mental element contained within the *actus reus* of the offence charged. It is clear that the court on appeal could not have determined the appellant's liability for 'caus[ing] the act . . . that forms the basis of the offence with which the defendant is charged' without an investigation into that mental element.

In *Police v MH*,<sup>40</sup> after the defendant was charged with 10 counts of sexual violation and other related charges, the question of his fitness to plead arose. The court observed that the 'mental element' of an offence does not have to be proved at a s9 hearing. However, proof of a mental element was not wholly excluded since the court found that for the sexual violation charges the prosecution had to prove on the balance of probabilities (a) penetration of the complainant's vagina or anus, and (b) that this occurred without her consent. Thus, the only mental element required to be proven for the purposes of s9 was that of consent by the complainant.

The complainant and the defendant had been in an 'on again/off again' relationship for about 10 years prior to the alleged events. At the time of the alleged offending they had been living in the defendant's mother's home. The prosecution evidence consisted mainly of the testimony of the complainant, principally from DVD recordings of interviews. The one defence witness was a consulting psychiatrist who was of the opinion that the complainant suffered from factitious disorder, a psychiatric disorder where people repeatedly present themselves to medical authorities with complaints or histories that cannot be reconciled with the evidence. They do this because of a deep-seated need to be cared for and so that health professionals will believe them and care for them. Importantly, for the purposes of this case, was the fact that false claims of rape are associated with factitious disorder.

The court concluded that there was strong evidence that the complainant suffered from factitious disorder and did so at the time of making the complaints. There were serious problems with the reliability of her claims regarding illness and a strong possibility this could have escalated to complaints of rape as another way of getting attention. In addition, there was no credible independent evidence supporting her claims of sexual violation. In the circumstances, the court found that the evidence against the defendant was not sufficient to establish, on the balance of probabilities, that he caused the act which formed the basis of the offence charged and that the finding applied to each of the 18 charges against him.

In concluding the court made an important observation about the burden of proof suggesting, in the judge's view, a need for reform. This was the fact that s 13(3) CPMIP states that a discharge does not amount to an acquittal. Noting that the logic of that proposition 'entirely escapes me', the judge asked: if the prosecution was unable to prove the matter on the balance of probabilities, what possible chance would it have of proving it beyond reasonable doubt, as would clearly have been required had the matter proceeded to a full criminal trial? His Honour said:

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40 DC Auckland CRI-2012-092-007682, 17 May 2013 (McElrea DCJ).

I would have thought that a person who has been discharged as a result of a s9 hearing under this Act is entitled to be treated as if he had been acquitted and I trust that the defendant in this case will be so treated.<sup>41</sup>

This issue has not yet been addressed as a matter of law reform. However, the view that the matter should be proved beyond a reasonable doubt is supported by strong authority.<sup>42</sup> It remains to be seen if the idea is adopted as part of an ongoing review of the CPMIP.

#### 4 Reflections on the meaning of 'act' in s9

What seems reasonably clear is that, when the legislature formulated the terms of s9, it had in mind a simple procedure to determine whether an offender had committed acts or omissions that would have amounted to the *physical ingredients* of the alleged crimes. It was not considered appropriate for the courts to investigate *mens rea* issues, given that the accused's mental capacity was in contention.<sup>43</sup> As has already been observed, the intention seems to have been to provide a filter whereby a person who was presumptively innocent of the alleged offence(s) could be diverted from the criminal justice system before they were at risk of being found unfit to stand trial. Unfortunately, the words chosen were not apt to effect the intended purpose of the provision and have led to considerable litigation, centring on the phrase 'caused the *act* or *omission*'. The essential difficulty is that the word 'act' is not sufficiently austere as to exclude the possibility of the mind also intruding. The issue might have been resolved had the legislation simply referred to the 'physical ingredients' of the offence in place of the expression 'act or omission'.<sup>44</sup> For many ordinary *conduct* offences the *actus reus* may be fully expressed in a simple form of conduct. So it is possible to say, for example, that the 'act' of D striking V on the nose, constituted the *actus reus* of assault. Or, to take another simple example, the 'act' of D in lighting a fire under V's house damaging it constituted the *actus reus* of criminal damage. In such cases, there may be little difficulty in determining whether D did the act constituting the basis of the offence he or she is charged with. Certainly, no inquiry needs to be made about the accused's mental state to determine whether he or she did the act. The difficulties arise, however, firstly, where the offence charged contains an ulterior intent element, proof of which is necessary to determine the character of the alleged 'act',<sup>45</sup> or, secondly, where the alleged 'act' is not an act at all, because it was performed unconsciously.

#### A. ULTERIOR INTENT CRIMES

Dealing with the first area of difficulty take, for example, the crime of 'wounding *with intent to cause grievous bodily harm*'.<sup>46</sup> If we place the emphasis on the words in s9 'the *offence . . . charged*', the *actus reus* of the offence of wounding with intent is not proved simply upon evidence that D punched V on the nose. While that may well be enough for a simple assault, for the aggravated 'act' 'that forms the basis of the *offence . . . charged*' something more is required. To determine that, it is necessary to inquire as to what was in D's mind when D struck V, to determine whether the act forms the basis of the particular alleged offence. However, even if the emphasis is placed on the words 'the basis', then a simple assault may not be sufficient to establish the *basis* for a charge of wounding with intent, regardless of

41 *Police v MH* DC Auckland CRI-2012-092-007682, 17 May 2013 [35] (DC)

42 See R Chambers, 'Trial Rights for the Mentally Impaired' (2011) 24 *New Zealand Universities Law Review* 478, 483.

43 See Ministry of Justice, *Report to the Health Committee* (Ministry of Justice 2000).

44 See *R v Te Momi* (n 35) [79].

45 For an illuminating discussion on this issue, see Chambers (n 42) 483.

46 Crimes Act 1961, s 188 (NZ).

the differing *mens rea* elements. For a wounding, there must at least be a flow of blood following a break in the continuity of the skin.<sup>47</sup> Therefore, evidence of a mere assault would not do the work necessary to establish the 'basis' of the offence charged.

Thus, it would seem that many offences defined in criminal legislation that bear an ulterior intent element may not be susceptible to a simple analysis in terms of whether the accused performed an 'act' that constituted their 'basis'. The hoped-for simplicity of the evidential sufficiency hearing evaporates in the face of a concerted investigation into the *actus reus* elements of a crime and the evidence necessary to meet the statutory burden of proof. For this reason it is suggested that s9 may need to be redrafted in order to clarify what elements must be proved at the inquiry and the nature of evidence that will be sufficient for that purpose.

## B. UNCONSCIOUS CONDUCT

A second area of difficulty concerning the meaning of 'act' is whether it accommodates unconscious conduct. At this stage, this is a purely theoretical question because there has not been a case in New Zealand where the alleged 'act or omission' was committed while the offender was in a state of impaired consciousness. 'Act' is not defined in the statute. According to one definition, an act is an 'intentional bodily movement performed by an agent whose consciousness is reasonably intact'.<sup>48</sup> By implication, a person whose consciousness is *not* 'reasonably intact' cannot, by this definition, commit an 'act'. If a person does something that looks criminal in a state of diabetic automatism or while suffering from a rapid eye movement sleep disorder, this might look like 'acting' but, in reality, their conduct is a mere event in which the law, properly, should have no interest in assigning criminal culpability. They have not 'acted'.<sup>49</sup> What other risks may be associated with their conduct may well involve other agencies, but should not be the province of the criminal law.

On this basis it could be argued that a person who lacks the present capacity to commit a criminal 'act' for reasons of lack of consciousness or overbearing physical compulsion, must necessarily be excluded from a finding that their 'act' formed the basis of the offence charged against him or her. Whatever they may be, they are not 'actors' in a legal sense and must be discharged at a s9 hearing. This would include all sleepwalkers, concussive automatons, those compelled by external forces and anyone else whose 'act' was not the product of a conscious, deliberate choice. The problem, however, is that, as the law presently stands, the courts have only allowed *objective evidence* of accident, mistake and self-defence to be advanced as defences at s9 hearings. This appears to exclude all mental state defences and involuntariness-based defences, including automatism.<sup>50</sup>

This is another area requiring further clarification. There would appear to be no reason in principle why the nominated defences should be sufficient to exclude liability at a s9 hearing, but not defences based on involuntariness or lack of conscious awareness. There is clear potential for injustice if an offender is deemed to have 'acted' because certain physical events are evidentially attributable to him or her, when he or she was either unconscious at the time of the alleged act or physically incapable of resisting the pressure to 'act'.

47 See Andrew Simester and Warren Brookbanks, *Principles of Criminal Law* 4th edn (Thomson Reuters 2012) para 17.3.2.

48 See Stephen Morse, 'Symposium: The Mind of a Child: The Relationship Between Brain Development, Cognitive Functioning, and Accountability under the Law: Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note' (2006) 3 Ohio State Journal of Criminal Law 397, 399.

49 See *R v Lueddecke* [2008] ONCA 716 [53] (Dougherty J) (ONCA).

50 See discussion in *R v UPYC* Auckland, CRI2010-204-000314, 17 March 2011, Judge A J Fitzgerald [16] (DC).

### C. PROOF OF OTHER ACTUS REUS ELEMENTS

The discussion so far has tended to focus on the scope of defences available to negate responsibility for the external elements of an offence charged. But this does not exhaust the possibilities for exculpation at a s9 hearing. Since the *actus reus* of an offence includes both circumstances and consequences, in addition to the conduct element, evidence that a relevant circumstance or consequence had not been proved to the requisite standard should, in principle, negate responsibility for the *actus reus*. Similarly, a failure to establish causation in an offence requiring proof of particular consequences would equally negate responsibility for the *actus reus* in an appropriate case. It should also be said that proof of causation is an explicit requirement of the statutory provision, in that the prosecution is required to establish through evidence that the defendant ‘caused’ the act or omission etc.<sup>51</sup> For example, in a prosecution for homicide, where death is a specified consequence in the *actus reus* of culpable homicide (whether murder or manslaughter), the prosecution must prove both that the consequence occurred and that the defendant’s behaviour caused that consequence.<sup>52</sup> Such an inquiry may be conducted independently of any investigation as to *mens rea*, which normally would only arise once any outstanding issues of causation had been resolved. Absence of proof of causation would negate responsibility for the act or omission for the purposes of s9.<sup>53</sup>

## 5 Reform

It is clear from the foregoing analysis that the ‘evidential sufficiency’ hearing defined in s9 CPMIP has given rise to a number of unforeseen challenges to trial judges tasked with determining unfitness to stand trial. In September 2011, officials in the New Zealand Ministries of Justice and Health wrote to their respective ministers seeking approval to release an Issues Paper, entitled *Improving the Criminal Justice Process for Mentally Impaired Offenders*, and to invite consultation with stakeholders. The Issues Paper, which initiated a review of the CPMIP and the IDCCR, noted that the legislation had created a number of problems with the practical application of certain provisions, leading to procedural inefficiencies, conflicting case law and uncertainty about some of the processes. To date none of the options for reform presented in the Issues Paper have been adopted by government, and the review is ongoing, albeit stationary at the present time. Some of the reform suggestions identified in the Issues Paper have now been overtaken by case law developments. Others await further consideration.

One of the more important recommendations for reform concerned the order of proceedings for determining unfitness. As has been noted, the current s9 inquiry into a defendant’s responsibility for the offence (the ‘evidential sufficiency’ or ‘involvement’ hearing) precedes the inquiry into the offender’s fitness to stand trial. The apparent rationale for this was to ensure that the defendant was not subjected to a fitness to plead inquiry unless it was first determined that he or she had committed the alleged acts. In effect, the procedure acted as a filter to remove a presumptively innocent offender from the trial process before they were at risk of an indeterminate unfitness finding. This order is, as noted earlier, the opposite to what occurs in the UK and in other jurisdictions in respect of the equivalent ‘trial of the facts’, where unfitness is determined *before* there is any inquiry into the accused’s responsibility for the offence. The obvious advantage of this model is

51 CPMIPA, s 9.

52 Andrew Simester and Bob Sullivan, *Criminal Law Theory and Doctrine* (Hart 2003) 86.

53 See e.g. *Police v Palu* 8/06/09, Priestley J, HC Auckland, CRI 2008 404 0083 [11], where Priestley J observed that the trial judge had to be satisfied ‘that there was sufficient evidence that “the respondent had caused the assaults lying at the heart of the four charges . . .”’. See also *R v Akubata* [2013] NZHC 2669.

that where a defendant is found fit, the matter may proceed to trial in the normal way. Where an unfitness determination is made, the involvement hearing (trial of the facts) becomes, in effect, an alternative to a trial.

New Zealand courts have on a number of occasions commented on the problems arising because of the order of the evidential sufficiency hearing. In particular, in the case of *Te Moni*,<sup>54</sup> an appeal against conviction on a charge of sexual violation by rape, the trial court failed to make a finding in terms of s9 as mandated by the statute, which prompted the Court of Appeal to question whether the s9 hearing ought to come after the fitness assessment has been made. In that event, the hearing would occur only where there is to be no trial. This would avoid the procedural inefficiency and resource implications of a court having to hear the same evidence and witness testimony twice. The concern expressed by the Court of Appeal was that the current practice requires an accused person whose fitness to stand trial is in doubt to undergo a form of trial as part of a process to determine whether he or she is fit to do so.<sup>55</sup> The court observed that, if the s9 hearing happened *after* the assessment of fitness to stand trial, the process could be tailored to deal with the reality that the accused person was unable to properly participate. In the context of *Te Moni*, that would have meant that the requirement for the complainant to give evidence twice would have been avoided. For these reasons the Issues Paper has recommended that the order of the procedure for determining fitness be reversed, so that the fitness hearing would precede the involvement hearing.

Another issue, already noted in this article and addressed in the Issues Paper, concerns the burden of proof in evidential sufficiency hearings. Under s9, the standard of proof for determining evidential sufficiency is the balance of probabilities. In every other jurisdiction with an equivalent procedure, the standard is beyond reasonable doubt. The rationale for the lower standard of proof was the view that criminal liability is not determined at an involvement hearing and therefore the standard should be the civil standard. Professor Mackay and I addressed this issue in our article 'Protecting the Unfit to Plead: A Comparative Analysis of the "Trial of the Facts"',<sup>56</sup> We argued that because the s9 procedure aims to determine elements of criminal responsibility and not simply the issue of trial capacity, the full burden of proof seemed inescapable. We argued that the presumption of innocence established in s 2(c) of the New Zealand Bill of Rights Act 1990 was, in principle, as applicable here as in any other context where the issue of criminal responsibility was to be determined.

As the Issues Paper has noted, raising the standard of proof would provide greater protection for an accused person, although it would make the prosecution's task more difficult. At the time of writing there is no evidence of any official proposal to alter the burden of proof as suggested. Nevertheless, I endorse the view of the late Justice Robert Chambers that the reasons for using a high standard of proof in the ordinary criminal context, namely, reducing the margin of error and properly reflecting the high value placed on individual liberty, apply equally in this context.<sup>57</sup> I would recommend that the change to the burden of proof be effected at the earliest possible date to reflect this reality.

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54 CA 695/2008 [2009] NZCA 560.

55 *Te Moni* (n 35) [96].

56 (2005) *Juridical Review* 173.

57 Chambers (n 42) 484.

## 6 Conclusion

Unfitness to stand trial is now a commonly litigated trial procedure in many common law-based jurisdictions. In most such jurisdictions, including New Zealand and England, the rules are statutory, albeit supplemented by decisions of the higher courts. In New Zealand, while the procedures governing the substantive question of whether an offender is fit to stand trial are now reasonably well settled, the same cannot be said for those procedures which are an adjunct to the fitness determination, in particular the so-called 'trial of the facts' or, in New Zealand, the 'evidential sufficiency' hearing.

This novel procedure, designed to achieve procedural efficiency and to eliminate innocent offenders from the consequences of an unfitness finding, has proven difficult to interpret and complex to administer. While these problems are largely matters for the courts to resolve through the developing jurisprudence in this area of the law, some matters are better left for the legislature to address as a matter of law reform. Firstly, the current location of the hearing *before* a determination of unfitness to stand trial seems misconceived and has created a raft of unnecessary difficulties. These could be largely resolved by placing the hearing *after* the determination of unfitness, as occurs in other jurisdictions. Secondly, the normative requirements of criminal justice would seem to dictate that placing the burden of proof on the prosecution to prove 'evidential sufficiency' beyond a reasonable doubt is unavoidable.

These changes would bring the procedure in New Zealand into line with the approach adopted in other jurisdictions and offer the prospect of rendering the s9 hearing a more rational and comprehensible procedure within the broader framework of determining unfitness to stand trial.