

# SUBMISSION TO THE QUEENSLAND LAW REFORM COMMISSION'S CONSENT AND MISTAKE OF FACT REVIEW

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## 1. INTRODUCTION

On 9 July 2019, the Queensland government announced that it had decided to “refer the matter of consent in rape and sexual assault cases to the Queensland Law Reform Commission” (QLRC).<sup>1</sup> About two months later, it provided the QLRC with its terms of reference.<sup>2</sup> The government has asked the Commission to consider whether there is a need for reform of s 348 of the *Criminal Code Act 1899* (Qld) (the *Criminal Code*),<sup>3</sup> which deals with the meaning of “consent” for the purposes of the sexual offences for which Chapter 32 of the Code provides. The government has also asked the QLRC whether there is a need for reform of “the excuse of mistake of fact in section 24 [of the Code] as it applies”<sup>4</sup> to the rape<sup>5</sup> and sexual assault offences<sup>6</sup> in Chapter 32. This submission is concerned with this second matter (though I have attached as an Appendix to it an article of mine that considers the question of when an accused should be criminally liable in a case where the complainant has participated in sexual activity because of her or his mistaken belief about some matter). Are there difficulties with how s 24 operates in rape and sexual assault cases? If so, what reforms are necessary?

To an extent at least, the current QLRC reference has resulted from a sustained and well-organised campaign by the academic, Jonathan Crowe, and the author and lawyer, Bri Lee.<sup>7</sup>

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<sup>1</sup> Yvette D’Ath and Di Farmer, “Palaszczuk Government to Refer Consent Laws to Queensland Law Reform Commission” (Media Release, 9 July 2019) <<http://statements.qld.gov.au/Statement/2019/7/9/palaszczuk-government-to-refer-consent-laws-to-queensland-law-reform-commission>>.

<sup>2</sup> Yvette D’Ath, “Terms of Reference: Queensland’s Laws Relating to Consent and the Excuse of Mistake of Fact” (2 September 2019) <[https://www qlrc.qld.gov.au/\\_data/assets/pdf\\_file/0009/624465/consent-and-mistake-of-fact-tor-2-sep-2019-.pdf](https://www qlrc.qld.gov.au/_data/assets/pdf_file/0009/624465/consent-and-mistake-of-fact-tor-2-sep-2019-.pdf)>.

<sup>3</sup> D’Ath, n 2.

<sup>4</sup> D’Ath, n 2.

<sup>5</sup> The offence of rape is created by *Criminal Code Act 1899* (Qld) s 349(1) and defined by s 349(2).

<sup>6</sup> These offences are created by *Criminal Code Act 1899* (Qld) s 352(1), (2) and (3).

<sup>7</sup> See, for example, Bri Lee, “Time to Reform Queensland Consent Laws”, *The Saturday Paper*, 25 May 2019 <<https://www.thesaturdaypaper.com.au/opinion/topic/2019/05/25/time-reform-queensland-consent-laws/15587064008200>>; Jonathan Crowe, “Consent Is Not a ‘Romance Killer’. The Mistake of Fact Defence for Rape Needs to Go”, *The Guardian*, 8 January 2019

In 2011, Crowe reported that “[i]n a number of recent Court of Appeal cases appellants have successfully invoked s 24 despite showing clear disrespect for the sexual autonomy of complainants.”<sup>8</sup> At that stage, his proposed solution was to insert into the Code a provision along the same lines as s 14A(1) of the *Criminal Code Act 1924* (Tas),<sup>9</sup> which, among other things, provides that an accused’s belief in the existence of consent is neither honest nor reasonable if he or she fails to take “reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant [is] ... consenting.” But Crowe no longer thinks that a provision of that nature is enough. Together with Lee, he has created a website entitled “Consent Law in Queensland”,<sup>10</sup> on which various decisions of the Queensland Court of Appeal (QCA) concerning s 24 have been analysed. According to Crowe and Lee, these cases demonstrate that the s 24 “defence”<sup>11</sup> “makes it extremely difficult to secure convictions [in] ... sexual assault or rape cases”<sup>12</sup> where: the accused and/or the complainant were intoxicated at the time of the alleged conduct; the complainant failed physically to resist the accused; the accused and/or the complainant had a mental illness, intellectual disability or some other cognitive impairment; or the accused and complainant spoke no common language.<sup>13</sup> Because of the “serious injustices”<sup>14</sup> produced by s 24, they continue, it should be rendered “inapplicable to the issue of consent in rape and sexual assault cases.”<sup>15</sup> In other words, for Crowe and Lee, the offences created by ss 349 and 352, which are punishable by very significant prison sentences,<sup>16</sup> should become

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<<https://www.theguardian.com/commentisfree/2019/jan/08/consent-is-not-a-romance-killer-the-mistake-of-fact-defence-for-needs-to-go>>.

<sup>8</sup> Jonathan Crowe, “Consent, Power and Mistake of Fact in Queensland Rape Law” (2011) 23(1) *Bond Law Review* 21, 40.

<sup>9</sup> Crowe, above n 8, 40.

<sup>10</sup> Jonathan Crowe and Bri Lee, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com>>.

<sup>11</sup> I place the word “defence” inside inverted commas because, as with the common law “defence” of honest and reasonable mistake of fact (*CTM v The Queen* (2008) 236 CLR 440, 446 [6] (Gleeson CJ, Gummow, Crennan and Kiefel JJ)), it is for the Crown to negate the s 24 ground of exculpation once the accused has discharged an evidential burden concerning this issue: *Loveday v Ayre* [1955] St R Qd 264, 267-8 (Philp J), 276 (Hanger J); *Brimblecombe v Duncan* [1958] Qd R 8, 12 (Philp J), 16 (Matthews J) 22-3 (Stanley J); *The Queen v Hopper* [1993] QCA 561 (de Jersey CJ, McPherson and Pincus JJA).

<sup>12</sup> Jonathan Crowe and Bri Lee, “Consent Law in Queensland”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/about>>.

<sup>13</sup> *Ibid.*

<sup>14</sup> Jonathan Crowe and Bri Lee, “Reform”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/reform>>.

<sup>15</sup> *Ibid.*

<sup>16</sup> The offence of rape is punishable by life imprisonment: *Criminal Code Act 1899* (Qld) s 349(1). The sexual assault offences created by ss 352(1), (2) and (3) are punishable by, respectively, 10 years’ imprisonment, 14 years’ imprisonment and life imprisonment.

absolute liability offences. To secure a conviction for rape, they think, the Crown should merely have to prove that the complainant was in fact not consenting to the sexual intercourse that took place. It should not be required additionally to prove that the accused possessed a blameworthy state of mind at the time that he or she engaged in the non-consensual intercourse.

This is a truly startling proposal. It is draconian, indiscriminately punitive and lacking in any sense of proportion or balance. Perhaps even more startling, however, is Crowe and Lee's apparent belief that their stance is a "progressive"<sup>17</sup> one. In *Hess v The Queen*,<sup>18</sup> Wilson J, writing for herself and three other Justices of the Supreme Court of Canada, noted that, for centuries, "our system of law [has] had a profound commitment to the principle that the innocent should not be punished." And while the very antiquity of this commitment has led Crowe and Lee and some members of the press recently to cast it as "outdated"<sup>19</sup> and "conservative",<sup>20</sup> such views are patently misconceived. As many scholars have rightly observed, absolute liability for serious crime raises "acute human rights concerns."<sup>21</sup> Accordingly, while Crowe and Lee assert that, in such circumstances, there is no breach of the accused's right to be presumed innocent,<sup>22</sup> the Supreme Court of Canada has expressed a different view.<sup>23</sup> And even if it has been wrong so to hold,<sup>24</sup> there are substantial arguments

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<sup>17</sup> See, for example, Lee, above n 7.

<sup>18</sup> [1990] 2 SCR 906, 916.

<sup>19</sup> See, for example, Josh Robertson, "Queensland Will Abolish Rape Defence "Loophole" If Law Reform Experts Recommend It", *ABC*, 10 July 2019 <<https://www.abc.net.au/news/2019-07-09/mistake-of-fact-defence-review-queensland/11291856>>.

<sup>20</sup> See, for example, Lee, above n 7.

<sup>21</sup> To use the words of GR Sullivan, "Strict Liability for Criminal Offences in England and Wales Following Incorporation into English Law of the European Convention on Human Rights" in AP Simester (ed), *Appraising Strict Liability* (OUP, 2005) 202. See also, for example, Andrew Ashworth, "Should Strict Criminal Liability Be Removed from All Imprisonable Offences?" (2010) 45 *Irish Jurist* 1, 7-8, 16-20.

<sup>22</sup> Jonathan Crowe and Bri Lee, "Reform", *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/reform>>. "It is still the prosecution's responsibility to prove that there was no consent. The jury still need (sic) to be convinced beyond reasonable doubt. It's all fair."

<sup>23</sup> This is the effect of the reasoning in *R v Vaillancourt* [1987] 2 SCR 642, 655-6 (Lamer J, with whom Dickson CJ, Estey and Wilson JJ agreed), 661 (Beetz J).

<sup>24</sup> Both the English courts and the European Court of Human Rights (ECtHR) have held that the right to be presumed innocent, guaranteed by Article 6(2) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (ECHR), merely requires the prosecution to prove the elements of any particular offence beyond reasonable doubt – whatever those elements might be. In other words, it remains for contracting states to determine whether the prosecution must prove that the accused had a blameworthy state of mind when s/he performed the actus reus of an offence. See in this regard *R v G (Secretary of State for the Home Department intervening)* [2009] 1 AC 92, 97 [4] (Lord Hoffmann), 103 [27] (Lord Hope of Craighead), 107 [41] (Baroness Hale of Richmond), 111 [63] (Lord Mance); and *G v United Kingdom* (European Court of Human Rights, Chamber, Application No 37334/08, 30 August 2011) [27].

that, if the Queensland Parliament were to provide for the imprisonment of persons upon proof merely that they performed an offence's actus reus, it would breach ss 17(b)<sup>25</sup> and 29(2)<sup>26</sup> of the *Human Rights Act 2019* (Qld). We should be no more tolerant of attacks on human rights when they are made by those who “struggle to muster the requisite courage to reach outside of [their] ... leftie progressive bubble”,<sup>27</sup> than we are when they emanate from reactionary elements motivated by a desire further to entrench the inequality and unfairness in our society. Moreover, we should resist Crowe and Lee's attempts to return us to the position we were in, before 1100,<sup>28</sup> when people were still speaking Latin<sup>29</sup> – and when “severe sufferings were inflicted upon the offender in order to placate the outrage deity”<sup>30</sup> and in the absence of any culpability on his or her part.

For broadly the same reasons, the QLRC and the Queensland Parliament should reject Crowe and Lee's alternative proposal to reform the *Criminal Code*. Crowe has recently conceded that his and Lee's primary proposal is a “strong” one.<sup>31</sup> Because it has not been adopted elsewhere in Australia, he adds, it is “highly unlikely to be implemented in Queensland.”<sup>32</sup> Accordingly, while Crowe and Lee have made it clear that their preferred position is for s 24

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<sup>25</sup> Section 17(b) provides, relevantly, that a person must not be “punished in a cruel, inhuman or degrading way.” Ashworth has argued that imprisonment without proof of fault is a grossly disproportionate punishment, and is therefore contrary to protections such as the one created by s 17(b): Ashworth, above n 21, 17-20.

<sup>26</sup> Section 29(2) provides, relevantly, that a person must not be subjected to “arbitrary detention.” The Supreme Court of Canada has held that the combination of absolute liability and imprisonment will always infringe a similar guarantee in *Canada Act 1982* (UK) c 11, sch B pt 1, s 7 (*Canadian Charter of Rights and Freedoms*) – which relevantly provides that everyone has the right not to be deprived of liberty “except in accordance with the principles of fundamental justice”: *Re BC Motor Vehicle Act* [1985] 2 SCR 486, 515-6 (Lamer J, writing for himself, Dickson CJ, Beetz, Chouinard and Le Dain JJ). It has further held that such a breach will rarely be saved by *Canadian Charter of Rights and Freedoms*, s 1, which allows for Charter rights to be subjected to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”: *Re BC Motor Vehicle Act* [1985] 2 SCR 486, 518 (Lamer J, writing for himself, Dickson CJ, Beetz, Chouinard and Le Dain JJ). There is a similarly worded savings clause in the Queensland charter: *Human Rights Act 2019* (Qld) s 13.

<sup>27</sup> See, for example, Lee, above n 7.

<sup>28</sup> See *Hess* [1990] 2 SCR 906, 916-17 (Wilson J, writing for herself, Lamer CJ, La Forest and L'Heureux-Dube JJ) quoting Paul E Raymond, “The Origin and Rise of Moral Liability in Anglo-Saxon Criminal Law” (1936) 15(2) *Oregon Law Review* 93, 117.

<sup>29</sup> In *Re BC Motor Vehicle Act* [1985] 2 SCR 486, 513, Lamer J, writing for himself, Dickson CJ, Beetz, Chouinard and Le Dain JJ, observed that the principle that the innocent not be punished is “so old that its first enunciation was in Latin *actus non facit reum nisi mens sit rea*.”

<sup>30</sup> *Hess* [1990] 2 SCR 906, 916-17 (Wilson J, writing for herself, Lamer CJ, La Forest and L'Heureux-Dube JJ) quoting Courtney Stanhope Kenny, *Kenny's Outlines of Criminal Law* (1966, 19<sup>th</sup> ed) 7.

<sup>31</sup> Jonathan Crowe, “Evidence Proves It's Time for Change” (2019) 39(8) *Proctor* 32, 32.

<sup>32</sup> *Ibid*.

not to operate at all in rape and sexual assault cases,<sup>33</sup> Crowe has recently stated that, in their submission to the QLRC, he and Lee will be advocating a “more moderate and feasible”<sup>34</sup> reform. Under this proposal, s 24A would be added to the *Criminal Code*. That new section would be similar to, though more stringent than, s 14A of the *Criminal Code Act 1924* (Tas). It would provide that, in rape and sexual assault proceedings, an accused’s mistaken belief in consent “is not honest and reasonable” if, among other things: “the accused was reckless as to consent”; “the accused did not take positive and reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to each act”; or “the complainant was in a state of intoxication and did not clearly and positively express her [or his] consent to each act.”<sup>35</sup>

As I shall argue, there are two main difficulties with such a proposal. First, the paragraph about recklessness is unnecessary and would be redundant. The accused who exhibits advertent recklessness lacks a positive belief that the complainant is consenting.<sup>36</sup> So does the accused who is inadvertently reckless.<sup>37</sup> Therefore, it is already clear that he or she could not successfully rely on the s 24 ground of exculpation.<sup>38</sup> Secondly, and more importantly, this proposal is *not* more moderate than Crowe and Lee’s preferred position in cases where the complainant is in a “state of intoxication” (whatever that means); and it is only because of an apparent drafting error on Crowe and Lee’s part that it might operate slightly less harshly where the complainant is *not* intoxicated. By requiring an accused to have taken “positive and reasonable steps”<sup>39</sup> to ascertain whether the complainant was consenting, before he or she

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<sup>33</sup> Jonathan Crowe and Bri Lee, “Reform”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/reform>>.

<sup>34</sup> Crowe, above n 31, 32.

<sup>35</sup> Jonathan Crowe and Bri Lee, “Reform”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/reform>>. See also Crowe, above n 31, 32.

<sup>36</sup> A person who realises that there is a real possibility that the complainant is not consenting (*Banditt v R* (2004) 151 A Crim R 215, 232 [91]), and who thus displays advertent recklessness, of course does not positively believe that s/he *is* consenting.

<sup>37</sup> The accused who does not consider the matter of consent at all, in circumstances where the risk of non-consent would have been obvious to a person of his/her mental capacity had s/he turned his/her mind to the relevant question (*R v Tolmie* (1995) 37 NSWLR 660, 672 (Kirby P)) – and who is thus inadvertently reckless – clearly lacks any positive belief that the complainant is consenting.

<sup>38</sup> It is well established that an accused person can successfully raise honest and reasonable mistake of fact only if, leaving the onus of proof to one side, s/he has a positive belief in the existence of an innocent state of affairs. See, for example, *R v Makary* [2018] QCA 258, [59] (Sopronoff P), [94] (Bond J); *G J Coles & Co Ltd v Goldsworthy* [1985] WAR 183, 188 (Burt J, with whom Brinsden and Smith JJ agreed); *Larsen v G J Coles and Co Ltd* (1984) 13 A Crim R 109, 111 (Connolly J, with whom Campbell CJ and Demark J agreed); *Ibrahim v R* [2014] NSWCCA 160, [56], [58], [61] (Simpson J), [86] (Hamill J).

<sup>39</sup> Jonathan Crowe and Bri Lee, “Reform”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/reform>>. See also Crowe, above n 31, 32.

may rely on honest and reasonable mistake of fact, Crowe and Lee’s intention seems, in truth, to be to prevent that ground of exculpation from operating at all in rape and sexual assault cases.<sup>40</sup> The fact that, because of poor drafting, the “positive and reasonable steps” requirement would probably fail to give effect to that intention, should not blind us to that. Furthermore, because a non-consenting person cannot “clearly and positively express her [or his] consent to each act”,<sup>41</sup> the s 24 ground of exculpation *would* never succeed where the accused performed the actus reus of the offences provided for by s 349 or s 352 of the Code with an intoxicated complainant. The problem with this is that, as suggested above, an accused who performs the actus reus of these offences – whether with someone who is intoxicated or not – is in some instances morally innocent. Where that is so, he or she should not be convicted of a serious, stigmatic offence.

## **2. THE ALLEGED DIFFICULTIES WITH HOW SECTION 24 OPERATES IN RAPE AND SEXUAL ASSAULT CASES**

### **A. The relevant law**

It is first necessary briefly to note some relevant aspects of Queensland law concerning sexual assault and rape. If a male, without the complainant’s consent, uses his penis to penetrate to any extent<sup>42</sup> a female’s genitalia, or another person’s anus, he has performed the elements of the crime of rape.<sup>43</sup> The same is true if he penetrates to any extent, with his penis, the mouth of a non-consenting person.<sup>44</sup> And the person who non-consensually penetrates to any extent the vulva, vagina or anus of another person, with a thing, or with a part of his or

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<sup>40</sup> I say this because, as I proceed to note in the text, their proposed provision would prevent honest and reasonable mistake of fact from operating at all in cases where the complainant is in a “state of intoxication.” Unless there is some reason for distinguishing between such cases and those where the complainant is sober – and Crowe and Lee provide no such reason – it is hard to see why the s 24 excuse should be capable of operating only in the latter type of case.

<sup>41</sup> Jonathan Crowe and Bri Lee, “Reform”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/reform>>. See also Crowe, above n 31, 32.

<sup>42</sup> See *Criminal Code Act 1899* (Qld) s 6(1).

<sup>43</sup> See *Criminal Code Act 1899* (Qld) s 349(2)(a), which provides that “[a] person rapes another person if ... the person has carnal knowledge with or of the other person without the person’s consent.” While the Code is not entirely specific about what acts amount to “carnal knowledge” (see *Criminal Code Act 1899* (Qld) s 6), it is clear that penile penetration of the anus (see *Criminal Code Act 1899* (Qld) s 6(2)) or of female genitalia (see, for example, *The Queen v Cook* [2012] QCA 251) is necessary.

<sup>44</sup> *Criminal Code Act 1899* (Qld) s 349(2)(b).

her body that is not a penis, also falls within the scope of the offence created by s 349(1) of the *Criminal Code*.<sup>45</sup>

This submission is mainly concerned with the crime of rape. Nevertheless, because the QLRC's review also concerns the sexual assault offences for which s 352 of the *Criminal Code* provides, and because Crowe and Lee's proposed s 24A would apply to those offences too, it is necessary to note the conduct that those offences catch. The first offence created by s 352(1) is the offence of unlawfully and indecently assaulting another person.<sup>46</sup> If the Crown can prove that the accused unlawfully<sup>47</sup> touched a non-consenting person sexually, or caused that person to apprehend the imminent application of such force,<sup>48</sup> and that the accused's conduct was "contrary to the ordinary standards of morality of respectable people within the community",<sup>49</sup> it will have established that he or she has performed the conduct that this offence covers. The second offence created by s 352(1) is the offence of procuring a non-consenting person either to commit an act of gross indecency or to witness an act of gross indecency by the accused or any other person.<sup>50</sup> To secure a conviction for this offence, the Crown need not prove an assault. Rather, the accused will have performed the relevant conduct if he or she has induced the complainant to perform, or has caused him or her to witness, a sexually connotative act that is "unbecoming or offensive to common propriety."<sup>51</sup> For example, in the well-known case of *Fairclough v Whipp*,<sup>52</sup> the appellant, after urinating near a canal, and with his penis exposed, asked a passing girl to "touch it." She did so.<sup>53</sup> If directed at a person over the age of 16, such conduct would clearly fall within the ambit of s

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<sup>45</sup> *Criminal Code Act 1899* (Qld) s 349(2)(c).

<sup>46</sup> *Criminal Code Act 1899* (Qld) s 352(1)(a).

<sup>47</sup> See *Criminal Code Act 1899* (Qld) s 246.

<sup>48</sup> If so, it will have proved that the accused committed an assault (*Criminal Code Act 1899* (Qld) s 245(1)) and that that assault had a sexual connotation: *Harkin v R* (1989) 38 A Crim R 296, 301 (Lee CJ at CL, with whom Wood and Matthews JJ agreed); *Drago v The Queen* (1992) 8 WAR 488, 492 (Nicholson J), 500 (Wallwork J).

<sup>49</sup> *Harkin* (1989) 38 A Crim R 296, 299-301.

<sup>50</sup> *Criminal Code Act 1899* (Qld) s 352(1)(b).

<sup>51</sup> *Drago* (1992) 8 WAR 488, 497 (Nicholson J), 500 (Wallwork J).

<sup>52</sup> (1951) 35 Cr App R 188, 189.

<sup>53</sup> *Ibid.*

352(1)(b) of the *Criminal Code*.<sup>54</sup> So too would conduct of the type at issue in *R v Barrass*,<sup>55</sup> where the appellant masturbated in public in full view of other persons.<sup>56</sup>

If we come to the provisions that are at the heart of the QLRC's review, it will be noted that non-consent is an element of the three offences just discussed. When will a person not be consenting to the relevant activity? The answer to this question is that consent will be absent if the complainant has failed "freely and voluntarily"<sup>57</sup> to participate in that activity, including because s/he lacks the cognitive capacity to do so.<sup>58</sup> However, even if the Crown proves that to have been the case, the accused will be acquitted if, once the accused produces or points to evidence of honest and reasonable mistake, the trier of fact thinks it reasonably possible that he or she was acting under an honest and reasonable but mistaken belief that the complainant *was* consenting.<sup>59</sup> That is the effect of s 24 of the *Criminal Code*; and we can now consider the criticisms that Crowe and Lee have made of the way in which that section operates.

## **B. Crowe and Lee's criticisms of the way in which the s 24 excuse operates**

### **(i) Cases where the accused has an intellectual disability, mental illness or another cognitive impairment**

According to Crowe and Lee, it is "really concerning" that "the defendant's mental capacity can lower the bar for [the s 24 excuse] by making his [or her] mistake more likely to be considered honest and reasonable."<sup>60</sup> They point to two cases here: *R v Mrzljak*<sup>61</sup> and *R v*

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<sup>54</sup> If directed at a person under that age, this conduct would fall within the scope of *Criminal Code 1899* (Qld) s 210.

<sup>55</sup> [2005] NSWCCA 131, [4].

<sup>56</sup> As noted above, the maximum penalty for the s 352(1) offences is ten years' imprisonment. That penalty rises to a maximum of: (a) 14 years if the Crown can additionally prove that the "indecent assault or act of indecency include[d] bringing into contact any part of the genitalia or the anus of a person with any part of the mouth of a person": *Criminal Code Act 1899* (Qld) s 352(2); or (b) life imprisonment if the Crown can prove one of the circumstances for which *Criminal Code Act 1899* (Qld) s 352(3) provides.

<sup>57</sup> In turn, *Criminal Code Act 1899* (Qld) s 348(2) provides for a non-exhaustive list of circumstances in which a person's consent is not "freely and voluntarily given." Those circumstances are when the consent is obtained "(a) by force; or (b) by threat or intimidation; or (c) by fear of bodily harm; or (d) by exercise of authority; or (e) by false and fraudulent representations about the nature or purpose of the act; or (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner."

<sup>58</sup> *Criminal Code Act 1899* (Qld) s 348(1).

<sup>59</sup> See, for example, *Brimblecombe v Duncan* [1958] Qd R 8, 12 (Philp J), 16 (Matthews J) 23 (Stanley J); *Hopper* [1993] QCA 561.

<sup>60</sup> Jonathan Crowe and Bri Lee, "Reform", *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/mental-incapacity>>.

<sup>61</sup> [2005] 1 Qd R 307.



*Dunrobin*.<sup>62</sup> Crowe and Lee deal carelessly with these cases. Moreover, their insistence that a person's intellectual disability, mental illness or other cognitive impairment should not be taken into account when assessing whether his or her belief in the existence in consent might have been reasonable, is offensively consequentialist. Leaving the onus of proof to one side, if such a person has a belief in consent that it is reasonable *for him or her* to hold, then, as Kirby J suggested in *Lavender v The Queen*, "no one would regard [him or her] as culpable."<sup>63</sup> He or she might have fallen short of the standard to be expected of those who lack his or her disability. But because he or she was incapable of reaching that standard, "it would not be rational to impute blame to [such] a person."<sup>64</sup> If we were nevertheless to censure him or her, we would be punishing an innocent person,<sup>65</sup> thus using him or her to achieve some other end that the State considered to be worthwhile.<sup>66</sup>

Crowe and Lee appear implicitly to accept that their proposal would facilitate the punishment of blameless actors. For them, however:<sup>67</sup>

There are special provisions in our legal system so that defendants who do not have the cognitive capacity of an adult are not tried like other adults. Judges also have a large amount of discretion for when (sic) sentencing someone with a different mental capacity, so they are not punished excessively given their difference. The 'mistake of fact' defence is not the right way to try to accommodate people's differences in doing justice.

This is wholly unpersuasive.

The limitations of Crowe and Lee's first argument is demonstrated by the very cases that they proceed to summarise. In neither *Mrzljak* nor *Dunrobin* was the accused unfit to stand trial.

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<sup>62</sup> [2008] QCA 116.

<sup>63</sup> (2005) 222 CLR 67, 108 [128].

<sup>64</sup> (2005) 222 CLR 67, 108 [128].

<sup>65</sup> See Ashworth, above n 21, 6.

<sup>66</sup> See *Hess* [1990] 2 SCR 906, 924 (Wilson J). Presumably this would be the punishment of all those who can be proved to have had sexual intercourse with a non-consenting person, and who are *in fact* culpable, but who might currently escape conviction because the Crown is unable to disprove the s 24 excuse beyond reasonable doubt. In this regard, it can be noted that States have often imposed reverse burdens to facilitate law enforcement: David Hamer, "The Presumption of Innocence and Reverse Burdens: A Balancing Act" (2007) 66(1) *Cambridge Law Journal* 142, 148. Perhaps also the State might argue that a harsh rule of this nature might have a deterrent effect: see *Hess* [1990] 2 SCR 906, 922-4 (Wilson J).

<sup>67</sup> Jonathan Crowe and Bri Lee, "Reform", *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/mental-incapacity>>.

Indeed, in the former case, Holmes J thought it “unsurprising” that counsel for the appellant had ultimately declined to argue any point about his client’s unfitness<sup>68</sup>

given what seems from the transcript of the trial to have been the appellant’s ability to give instructions for the cross-examination of [the complainant] ... and to give evidence himself and be cross-examined without apparent difficulty in comprehension of what was going on.

There are other cases, too, where individuals with cognitive difficulties have nevertheless stood trial for rape. For example, in *Butler v Western Australia*<sup>69</sup> the appellant had a “significant intellectual disability.” Even so, experienced counsel never suggested that he was unfit to plead.<sup>70</sup>

It is in fact because of the shortcomings of Crowe and Lee’s first argument that it is necessary for them to resort to their second, sentencing, argument. Even though rape defendants with cognitive difficulties *are* sometimes “tried like other adults”, they seem to concede, such defendants’ lack of culpability can be reflected in the sentences that they receive. The Supreme Court of Ireland and the majority of the Supreme Court of Canada have rightly rejected such reasoning. In her dissent in the Canadian case of *Hess*,<sup>71</sup> McLachlin J accepted that a morally innocent man might be convicted of the absolute liability offence before the Court, namely, having sexual intercourse with a female person who is under the age of fourteen. But she nevertheless considered<sup>72</sup> that the consequent breach of the right not to be deprived of one’s liberty “except in accordance with the principles of fundamental justice”<sup>73</sup> was “reasonable” and “demonstrably justified in a free and democratic society.”<sup>74</sup> Of some importance to her Ladyship’s conclusion was her contention that a truly blameless defendant might not even be imprisoned.<sup>75</sup> As Wilson J pointed out for the majority, however, this is to place undue faith in the capacity of sentencing judges to remove legislative harshness and injustice.<sup>76</sup> And, as Hardiman J observed when delivering the judgment of the Court in *CC v*

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<sup>68</sup> *Mrzljak* [2005] 1 Qd R 307.

<sup>69</sup> [2013] WASCA 242, [130] (Buss JA); see also [7] (McLure P), [157] (Hall J).

<sup>70</sup> *Ibid* [106] (Buss JA).

<sup>71</sup> See *Hess* [1990] 2 SCR 906, 954.

<sup>72</sup> *Ibid* 956.

<sup>73</sup> *Canadian Charter of Rights and Freedoms*, s 7.

<sup>74</sup> *Canadian Charter of Rights and Freedoms*, s 1.

<sup>75</sup> *Hess* [1990] 2 SCR 906, 955.

<sup>76</sup> *Ibid* 924.

*Ireland*,<sup>77</sup> the “mere conviction” of a serious sexual offence “apart from any sentence ... carries a social stigma ... [, which] is compounded by the consequential enrolment of the person convicted on the Sex Offender’s Register.”

We can now return to *Mrzljak*. In that case, the complainant, like the accused, had an intellectual disability.<sup>78</sup> She gave evidence that, while she was walking home after having been at the accused’s house, the accused pulled up beside her in his car and offered her a lift home, which she accepted.<sup>79</sup> It was uncontested that, once the complainant entered the car, the accused drove her to a location where kissing and touching took place.<sup>80</sup> It was also uncontested that the complainant took her clothes off – possibly with the accused’s assistance – and that two acts of sexual intercourse then occurred.<sup>81</sup> According to Crowe and Lee, “*the* evidence suggests that the complainant ... physically and vocally”<sup>82</sup> resisted the accused’s advances. They also state that “[t]he defence position at trial was that the defendant’s mental capacity rendered him unable to recognise the complainant’s protests as a lack of consent.”<sup>83</sup> This is seriously to misrepresent what occurred at trial. Certainly, the complainant gave evidence that she had pushed the accused away and told him to stop and said “No”<sup>84</sup> – though it seems that she was not sure exactly when she had done and said this.<sup>85</sup> The complainant also said that, when the accused kissed her, she did not kiss him back.<sup>86</sup> But, contrary to Crowe and Lee’s assertion, that was not *the* evidence. That is because the accused gave evidence that differed in significant respects from the account of the complainant. According to him, the complainant *had* kissed him back.<sup>87</sup> He also said that she had kissed him twice after the sexual intercourse.<sup>88</sup> Further, on the accused’s account, the complainant never said “stop” or “no”; and nor did she ever push him away.<sup>89</sup> It is simply false, therefore, for Crowe

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<sup>77</sup> [2006] 4 IR 1.

<sup>78</sup> *Mrzljak* [2005] 1 Qd R 307, 311 [4].

<sup>79</sup> *Ibid* 322 [60].

<sup>80</sup> *Ibid* 322 [60], 323 [63].

<sup>81</sup> *Ibid* 322 [60]-[61], 323 [63].

<sup>82</sup> Jonathan Crowe and Bri Lee, “Reform”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/mental-incapacity>>.

<sup>83</sup> *Ibid*.

<sup>84</sup> *Mrzljak* [2005] 1 Qd R 307, 311 [3].

<sup>85</sup> *Ibid* 322 [61].

<sup>86</sup> *Ibid* 311 [3].

<sup>87</sup> *Ibid* 312 [5], 323 [63].

<sup>88</sup> *Ibid* 323 [63].

<sup>89</sup> *Ibid* 312 [5], 323 [63].

and Lee to claim that the defence's position was that, though the complainant was in fact protesting, the accused's disability prevented him from recognising this. In fact, the defence contended that the complainant had consented and that, even if this was not the case, her silence and failure to resist the accused's non-violent advances caused the accused to believe on reasonable grounds – having regard to his disability – that she *had*.<sup>90</sup>

It is submitted that, if the trier of fact were to accept that the accused's account was possibly accurate, *Mrzljak* is a very strong case of honest and reasonable mistake of fact. *Mrzljak* also shows the dangers of rendering that excuse inapplicable to the crime of rape, or, alternatively, limiting it in such a way as to prevent a person such as the accused in that case from raising it.<sup>91</sup> Assuming that the complainant in fact did not say “stop” or “no” or push the accused away, and that she really did seem to be “responsive to his physical advances”<sup>92</sup> and to have voluntarily engaged in the relevant activity,<sup>93</sup> it is clearly reasonably possible that the accused believed on reasonable grounds that she was consenting. Of course, if the accused believed in the existence of consent, this might have been only because his intellectual disability prevented him from realising that the complainant was a less enthusiastic participant than he thought she was. But, as stated above, that would not make him culpable. He would have exercised all the care that it is reasonable to expect *him* to exercise. He would have proceeded with sexual intercourse only once he had formed a positive belief that his/her partner had provided him with an unequivocal indication that s/he was an enthusiastic participant.

When discussing the well-known case of *R v Stone and Dobinson*,<sup>94</sup> Lois Bibbings argues that the defendants did “not deserve the censure of the law”<sup>95</sup> for their role in the deceased's death and “should not be judged too harshly.”<sup>96</sup> Though their attempts to care for the deceased were “ineffectual”, they had “limited physical and intellectual abilities”– and

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<sup>90</sup> Ibid 311 [2]; see also 323 [63].

<sup>91</sup> As argued below, whether Crowe and Lee's proposed new s 24A of the *Criminal Code* would in fact have prevented Mr Mrzljak from raising the s 24 excuse depends on the precise meaning of the phrase “reasonable and positive steps” in that proposed provision. See text accompanying nn 424-430.

<sup>92</sup> Ibid 312 [5].

<sup>93</sup> Ibid.

<sup>94</sup> [1977] QB 354.

<sup>95</sup> Lois Bibbings, “*Regina v Stone; Regina v Dobinson – Judgment*” in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010) 234.

<sup>96</sup> Ibid 235.

“themselves seemed to have required support in their day-to-day living.”<sup>97</sup> If it is unjust to convict of manslaughter those who fail to reach a standard that they were incapable of reaching, then it is no less unjust to convict such persons of rape.

The same comments apply to defendants with mental illnesses, as was the case in *Dunrobin*. There was medical evidence in that case that the accused had chronic paranoid schizophrenia,<sup>98</sup> and that this caused him to have difficulty with interpreting other people’s behaviour – especially where that behaviour was ambiguous.<sup>99</sup> The complainant gave evidence that, when the accused made sexual advances to her and then started touching her sexually, she said “no” and “stop” and tried to push him off her.<sup>100</sup> However, once the accused had pulled off the complainant’s jeans, the complainant said that she “froze”.<sup>101</sup> She also appears to have conceded, under cross-examination, that she stopped speaking to him at this stage,<sup>102</sup> though she said that she did still try to “get him off me.”<sup>103</sup> In his police interview, the appellant appears to have accepted that the complainant at first said “no” to his advances.<sup>104</sup> He seems also to have said that he knew that “no” meant “no.”<sup>105</sup> But his account appears to have been that the complainant then stopped saying anything and stopped resisting him, and that he “continued to ask until he [felt] that there was a yes response.”<sup>106</sup> Accordingly, Crowe and Lee appear to err when they state that “[t]he evidence states the complainant’s ‘freezing’ response only took place after the defendant had commenced having intercourse with her against her protests, at which point a rape had already occurred.”<sup>107</sup> It is unclear whether even the complainant said that.<sup>108</sup> Certainly, this seems inconsistent with the accused’s out of court statement.

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<sup>97</sup> Ibid.

<sup>98</sup> *Dunrobin* [2008] QCA 116, [82].

<sup>99</sup> Ibid [85].

<sup>100</sup> Ibid [4]-[5].

<sup>101</sup> Ibid [5], [11].

<sup>102</sup> Ibid [11]. She had said in her evidence-in-chief that she did continue to say “no” to him at this stage: at [5].

<sup>103</sup> Ibid [11]; see also [21].

<sup>104</sup> Ibid [23].

<sup>105</sup> Ibid.

<sup>106</sup> Ibid. The quoted words are those of the defence counsel at trial.

<sup>107</sup> Jonathan Crowe and Bri Lee, “Reform”, *Consent Law in Queensland* (Web Page)

<<https://www.consentlawqld.com/the-freeze>>.

<sup>108</sup> Ibid [5], [11].

Nevertheless, it must be said at once that, if the accused in *Dunrobin* had not had a serious mental illness, it is hard to accept that there would have been evidence of honest and reasonable mistake. Indeed, depending on precisely what his account was, and assuming that it was accepted, it is difficult to see how his alleged belief that the complainant was consenting might have been a reasonable one even for a person with his illness. Nevertheless, the devastating effects of schizophrenia cannot be underestimated.<sup>109</sup> Nor should we underestimate the capacity of that disease to affect one's perceptions of events with which one is confronted. No doubt, that was why it was accepted at trial that, taken at its highest in the accused's favour, the evidence left it open to the jury to experience a reasonable doubt as to whether the accused believed on reasonable grounds that the complainant was consenting.<sup>110</sup> And that was also undoubtedly why the Court of Appeal considered that the judge's failure properly to relate the law regarding mistake of fact to the evidence might have affected the result of the trial.<sup>111</sup> The jury at the re-trial would not be obliged to acquit the accused. But, when deciding the s 24 issue, it *would* be required to consider the medical evidence about the accused's severely compromised mental functioning.

In any case – and this is the important point – where an accused with a mental illness mistakenly believes that consent has been granted, and that belief might have been a reasonable one for a person with his or her cognitive difficulties, he or she has not been proved to have had a blameworthy state of mind. It is submitted that the Courts, not just in Queensland,<sup>112</sup> have been right to hold that such actors must not be convicted of a serious offence such as rape simply because a reasonable person who lacked their disability would not have made the same mistake.

### **(ii) Cases where the complainant has “frozen”**

According to Crowe and Lee, the Queensland case law also shows that “juries are much more likely to acquit a defendant for ‘mistake of fact’ if the complainant did not clearly resist his

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<sup>109</sup> There was evidence that, at the time of the relevant events, the appellant “might have been suffering an acute relapse of a condition of chronic paranoid schizophrenia”: Ibid [75] (Fryberg J)

<sup>110</sup> *Braysich v The Queen* (2011) 243 CLR 434, 454 [36] (French CJ, Crennan and Kiefel JJ) makes it clear that this is what the trial judge must be satisfied of before he or she leaves an issue such as honest and reasonable mistake of fact with the jury.

<sup>111</sup> *Dunrobin* [2008] QCA 116, [66] (Muir JA), [68] (Fryberg J), [94] (Lyons J).

<sup>112</sup> *Aubertin v Western Australia* (2006) 33 WAR 87, 96 [43]. Cf., however, *R v B* [2013] 1 Cr App R 481, 491-2 [41].

advances.”<sup>113</sup> In truth, it is perfectly rational for juries to take such an approach. Certainly, to use the words of Davies and McPherson JJA in *R v IA Shaw*,<sup>114</sup> because consent essentially “refers to a subjective state of mind on the part of the complainant”, “it is not in law necessary that [s/he] ... should manifest her dissent” before a jury is able to find that s/he was not consenting.<sup>115</sup> But for so long as the complainant’s state of mind is not determinative of whether the accused is criminally liable – that is, for as long as the law considers *the accused’s* state of mind also to be relevant to that question – it must logically be the case that:<sup>116</sup>

Failing to [manifest dissent] ... *may* furnish some ground for a reasonable belief on the part of the accused that the complainant was in fact consenting to sexual intercourse.

To be clear, if the complainant *has* made her or his dissent clear to the accused, there is no evidence of mistake of fact.<sup>117</sup> So, for example, in *R v Elomari*,<sup>118</sup> because the jury convicted the accused, it must have rejected his evidence that the complainant was an obviously enthusiastic participant in the sexual activity at issue.<sup>119</sup> Further, and importantly, it must have accepted the complainant’s evidence that, just before the accused forced her to perform fellatio on him, she repeatedly told him to stop, tried to push him away and stated to cry.<sup>120</sup>

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<sup>113</sup> Jonathan Crowe and Bri Lee, “Reform”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/the-freeze>>.

<sup>114</sup> [1996] 1 Qd R 641, 646.

<sup>115</sup> However, if s/he is to consent, it is necessary that, as well as possessing a willing state of mind, s/he has also represented in some way that s/he is willing. This is because *Criminal Code 1899* (Qld) s 348(1), which makes it clear that consent must be “freely and voluntarily given” [emphasis added]: *Makary* [2018] QCA 258, [49]-[50] (Sopronoff P), [94] (Bond J). That said, a representation might be made by actions as well as words, and might even be made by remaining silent in some circumstances: *Makary* [2018] QCA 258, [50] (Sopronoff P), [94] (Bond J).

<sup>116</sup> *IA Shaw* [1996] 1 Qd R 641, 646. [Emphasis added]

<sup>117</sup> To this, it might be said “but what about *Dunrobin*? Surely the complainant there made it clear to the accused that she was not consenting? And yet it was suggested above that there was evidence of honest and reasonable mistake of fact in that case.” The answer to this is that my acceptance that there might have been a s 24 issue fit to go to the jury in that case was predicated on the assumption that the accused’s account was that the complainant failed to make it clear to *him*, taking into account his mental illness, that she was not consenting. As stated above, the effect of the accused’s out of court statement seems to have been that, while the complainant originally said “no”, he thought that, by her later conduct, she had said “yes.” In the special circumstances of that case, and depending on the psychiatric evidence about the effect that the accused’s mental illness had on his perceptions, I maintain that honest and reasonable mistake of fact might have been a real issue. However, again, that is not to say that that issue should have been resolved in the accused’s favour.

<sup>118</sup> [2012] QCA 37.

<sup>119</sup> His account was that the complainant was the initiator of that activity and that he was “merely a willing recipient of what occurred”: *Elomari* [2012] QCA 37, [26].

<sup>120</sup> *Ibid* [15].

When he witnessed that behaviour, the accused could not have believed on reasonable grounds that the complainant was consenting. Accordingly, the majority of the QCA was, with respect, right to dismiss the accused's appeal against conviction.<sup>121</sup> There was no need for there to be a new trial at which the jury would be directed about mistake of fact. The first jury's findings were inconsistent with the accused's having made a mistake.<sup>122</sup>

Where the complainant has not clearly manifested her or his dissent, however, things become more complex. Certainly, there are cases such as *CV v R*,<sup>123</sup> where the complainant's apparent lack of resistance was due to the accused's violence and threats. In that case, the jury, by convicting the accused, demonstrated that it had rejected his evidence that the complainant made it abundantly clear that she was a willing participant in the relevant acts of sexual intercourse.<sup>124</sup> The jury's verdict also made it clear that it accepted the complainant's evidence<sup>125</sup> that the accused: had forced himself upon her;<sup>126</sup> told her during the first act of intercourse "to keep her fucking mouth shut";<sup>127</sup> and threatened to kill her if she told anyone what had happened.<sup>128</sup> In such circumstances, the Court of Appeal correctly dismissed the accused's submission that the complainant's failure verbally to indicate non-consent, or physically to resist the accused, laid a foundation for the s 24 issue. A person who issues the sorts of threats that the accused issued clearly does not believe that his or her partner is consenting.

Indeed, even in a case where the accused has not issued such threats and the complainant has remained silent, there might be no evidence of mistake of fact. As Sopronoff P explained recently in *R v Makary*, because a person consents within the meaning of s 348 of the *Criminal Code* only when s/he in some way represents to the accused that she is a willing

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<sup>121</sup> Ibid [9] (White JA), [49]-[51] (Atkinson J).

<sup>122</sup> Similarly, it was right to conclude that the trial judge correctly refrained from directing the jury about the s 24 issue. The only finding open to the jury, other than the one that it arrived at, was that the complainant initiated the activity, as the accused said she did. *That* view of the facts, too, excluded the possibility that the accused had made a mistake. It was consistent only with his having *correctly* believed that the complainant was consenting.

<sup>123</sup> [2004] QCA 411.

<sup>124</sup> As to which, see Ibid [22]-[23].

<sup>125</sup> Ibid [41].

<sup>126</sup> Ibid [13], [15], [17].

<sup>127</sup> Ibid [13].

<sup>128</sup> Ibid [14], [17].



participant,<sup>129</sup> the accused must provide or point to some evidence that he or she mistakenly thought that there had been such a representation, if the s 24 issue is to be left with the jury.<sup>130</sup> If the complainant fails to manifest dissent, and the evidence, taken at its highest in favour of the accused, is that he or she knows that the complainant's conduct is ambiguous, *Makary* makes it clear that honest and reasonable mistake of fact does not arise. But what about a case such as *Mrzljak*? As suggested above, if a jury thought it possible that the accused was telling the truth in that case, it would surely have to acquit him. That is because, on his account: he had not deliberately intimidated the complainant; she had not said "no"; and she seemed to him to be participating willingly in the relevant activity. The same seems true of *R v Lennox*,<sup>131</sup> another case that Crowe and Lee misrepresent.

In *Lennox*, the complainant's evidence was that, when the accused leant over to kiss her, she told him that she did not want this and tried to "pull him back".<sup>132</sup> According to her, he kissed her anyway, and then started touching her breasts and sucking her nipples.<sup>133</sup> She said that, as he did so, she continued verbally to object to what he was doing.<sup>134</sup> When the accused started touching the complainant's genital area, the complainant said that she was crying;<sup>135</sup> and, as he digitally penetrated her and then had penile-vaginal intercourse with her, she said that she repeatedly told him that she was unwilling.<sup>136</sup> If the evidence stopped there, as Crowe and Lee suggest it did, there would be much force in their observation that, given the jury's decision to acquit the accused of four of the five charges that he faced:<sup>137</sup>

[t]he case illustrates the confusion juries often experience when applying the 'mistake of fact' defence (sic). It shows how a supposed lack of 'emphatic' resistance by the complainant can lead to acquittals based on 'mistake of fact', even where it is otherwise clear that the complainant was not consenting. It also shows how linguistic and cultural differences can work to the complainant's disadvantage, creating doubt as to whether she expressed her lack of consent clearly enough.

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<sup>129</sup> *R v Makary* [2018] QCA 258, [49]-[50] (Sopronoff P); see also [94] (Bond J). On this point, see the discussion in n 115.

<sup>130</sup> *Makary* [2018] QCA 258, [60] (Sopronoff P), [94] (Bond J).

<sup>131</sup> [2018] QCA 311.

<sup>132</sup> *Ibid* [17].

<sup>133</sup> *Ibid* [17]-[21].

<sup>134</sup> *Ibid* [17]-[19], [21].

<sup>135</sup> *Ibid* [22].

<sup>136</sup> *Ibid* [22]-[23].

<sup>137</sup> Jonathan Crowe and Bri Lee, "Reform", *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/the-freeze>>.

But the evidence did *not* stop there. For, according to the appellant, the complainant seemed physically responsive to all of the sexual activity just described, never said “no” or “stop” or verbally objected in any other way, and appeared to him to have been a willing participant in the penile-vaginal intercourse.<sup>138</sup> If a jury were to accept that this account was possibly accurate, then it is submitted that it was entitled to experience a reasonable doubt as to whether the accused believed on reasonable grounds that the complainant was consenting.<sup>139</sup> Accordingly, when the jury at the accused’s trial *did* acquit him on the counts relating to the kissing and breast touching, there is no evidence that it did so because it thought that, while the complainant had repeatedly said “no”, she might not have conveyed this message as clearly as she would have had English been her first language.<sup>140</sup> Rather, the jury’s verdict showed that it had some doubt about the credibility of the complainant’s account that “she repeatedly and unambiguously told the appellant that she was not consenting to that behaviour.”<sup>141</sup> It must have thought that it was possible that, as the applicant deposed, the complainant “said no such thing.”<sup>142</sup>

Consider, finally, the facts of *Lyons v R*.<sup>143</sup> In that case, the complainant was a police officer who was investigating “homosexual activity carried on in or around [certain] toilet blocks.”<sup>144</sup> Wearing “clothing of a type not inconsistent with what a homosexual might wear in such circumstances”,<sup>145</sup> he entered the relevant toilet block, washed his hands<sup>146</sup> and

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<sup>138</sup> Ibid [40]-[43].

<sup>139</sup> This conclusion is subject to one matter. The accused’s evidence relating to the penile-vaginal intercourse might have been that the complainant made it clear beyond any doubt that she was consenting. According to him, during this intercourse, the complainant was “really going for it”: *Lennox* [2018] QCA 311, [43]. As suggested above when discussing *R v Elomari* [2012] QCA 37, and as argued more fully below, where: (i) the accused’s evidence is that there could be no doubt as to the complainant’s willingness, and (ii) the complainant’s evidence is that she made her dissent plain, there will usually be no evidence of mistake of fact. For, if the jury accepts the complainant’s account, there can be no room for it to find that the accused made a mistake. And if the jury thinks that the accused’s account might be true, the same would be true. If a person is obviously consenting, then it is impossible for her/his sexual partner mistakenly to think that s/he is.

<sup>140</sup> The complainant, who came from Hong Kong, did not speak English particularly well: *Lennox* [2018] QCA 311, [59].

<sup>141</sup> Ibid [110] (Henry J).

<sup>142</sup> Ibid. Moreover, the majority of the QCA seems right to have found that, in those circumstances, the appellant’s conviction for rape could not stand. Given that it was the jury’s doubts as to the complainant’s credibility that led it to acquit the appellant on the counts relating to conduct that had occurred just before the penile-vaginal intercourse, it was logically required to have the same doubts about the complainant’s evidence that she had stated that she was unwilling to engage in that slightly later conduct. See *Lennox* [2018] QCA 311, [76] (McMurdo JA), [112] (Henry J).

<sup>143</sup> (1987) 24 A Crim R 298.

<sup>144</sup> Ibid 301.

<sup>145</sup> Ibid 300.

<sup>146</sup> Ibid 301.

“loitered there.”<sup>147</sup> Meanwhile, the appellant had entered the toilet. Upon joining the complainant at the washbasin, the appellant said to him “Hello”, to which he received the response “G’day.”<sup>148</sup> The appellant then asked the complainant “what are you here for?” The complainant responded “what are you here for?”<sup>149</sup> The complainant said “I’m here for this” and touched the complainant’s groin over his shorts.<sup>150</sup> While the Queensland Court of Criminal Appeal found that, to use Williams J’s words, “there was no foundation at all for an honest and reasonable, but mistaken, belief that the complainant was consenting to homosexual contact”,<sup>151</sup> one wonders whether irrelevant considerations might have motivated their Honours. Surely, the question that the accused directed at the complainant was aimed at helping him to establish whether the complainant was consenting. Presumably, the answer that the accused received led him to form an honest belief that the complainant was consenting. When it is recalled that there were obvious dangers for gay men in such locations at that time,<sup>152</sup> it is hard to believe that he would have done what he did unless he had formed the view that the complainant was willing to engage in sexual activity with him. Furthermore, depending on how convincing the police officer’s costume was, and on the tone that accompanied his utterances, it seems that it was open to a trier of fact to regard such a belief as possibly being reasonable.

This is not to say that, when a jury deals with mistake of fact, it should focus only on the conduct of the complainant. As *CV* shows, the accused’s conduct is also clearly relevant. Indeed, as proposed below,<sup>153</sup> the Queensland Parliament should insert into the *Criminal Code* a provision along the lines of s 61HE(4)(a) of the *Crimes Act 1900* (NSW), to ensure that there is more focus on the accused’s behaviour than is currently the case. However, in my view, Crowe and Lee are clearly wrong to suggest that “the absence of overt objection or resistance [from the complainant, her] ... failure to alert bystanders and the lack of violence on the part of the [accused]” should be irrelevant when assessing the accused’s guilt of the offences created by ss 349 and 352 of the *Criminal Code*.<sup>154</sup> Such matters are of course

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<sup>147</sup> Ibid 300.

<sup>148</sup> Ibid 301.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid 300.

<sup>152</sup> See, for example, *R v Howard* (1992) 29 NSWLR 242, 244.

<sup>153</sup> See Part 4.

<sup>154</sup> Jonathan Crowe and Bri Lee, “Reform”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/the-freeze>>.

irrelevant to whether the complainant was consenting. But to make them irrelevant to the s 24 excuse, too, would be to ensure that that excuse could never succeed. As Duff has argued, a rape accused's claim of honest and reasonable mistake is only plausible if the complainant has failed to manifest her or his dissent and the accused has done nothing deliberately to intimidate her or him.<sup>155</sup> For, again, as soon as the accused has perpetrated or threatened violence, or as soon as the complainant does make her or his dissent clear, any belief that the accused has in the existence of consent is clearly unreasonable. Of course, Crowe and Lee believe that the s 24 excuse *should* never succeed in a rape or sexual assault matter. For the reasons given above and below, I do not.

Crowe and Lee cite four more cases in which the complainant failed physically to resist, or verbally to object to, the accused's advances.

The first is *R v Cutts*,<sup>156</sup> which, they say, "shows that the acts of a complainant who eventually complies through fear and intimidation may potentially be used as a basis for arguing that a mistake of fact occurred."<sup>157</sup> The difficulty with this statement is that the trial judge did not leave honest and reasonable mistake with the jury in that case,<sup>158</sup> and the majority of the QCA upheld this decision.<sup>159</sup> With respect, the majority was right to do so. As pointed out by McMurdo P, because the evidence<sup>160</sup> was that the complainant said "no" immediately before the accused kissed her and touched her breasts in various ways, there was no evidence that he reasonably believed that she was consenting to that conduct.<sup>161</sup> When the accused shortly afterwards asked her for a cuddle, the complainant, who had cerebral palsy, did move herself in her wheelchair to where the accused was.<sup>162</sup> But such conduct had to be viewed alongside her very recent refusal to be intimate with the accused.<sup>163</sup> Accordingly,

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<sup>155</sup> RA Duff, "Recklessness and Rape" (1981) 3(2) *Liverpool Law Review* 49, 62.

<sup>156</sup> [2005] QCA 306.

<sup>157</sup> Jonathan Crowe and Bri Lee, "Cases", *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/the-freeze>>.

<sup>158</sup> *Cutts* [2005] QCA 306, [30].

<sup>159</sup> *Ibid* [18]-[19] (McMurdo P), [48] (Williams JA).

<sup>160</sup> It was 'the' evidence here, because the accused's account was that the sexual activity did not occur: *Cutts* [2005] QCA 306, [2]. In other words, he failed to dispute in any way the complainant's account that, assuming that the sexual activity *did* occur, she said "no" immediately before it.

<sup>161</sup> *Cutts* [2005] QCA 306, [18].

<sup>162</sup> *Ibid* [60] (Jerrard JA).

<sup>163</sup> *Ibid* [19].

there was no evidence that the accused believed on reasonable grounds that the complainant was consenting to the further sexual activity that then took place.

The second case that Crowe and Lee rely upon is *R v Phillips*.<sup>164</sup> In that case, the evidence<sup>165</sup> was that the appellant on four occasions entered the 13 year-old complainant's bedroom and had non-consensual sexual intercourse with her. In my view, it is not entirely clear that the s 24 "defence" caused any problems in that case. On the first and second occasions, the evidence was that the complainant physically resisted the accused.<sup>166</sup> The trial judge held that there was no evidence of mistake of fact.<sup>167</sup> On the third and fourth occasions, there was no evidence of physical resistance.<sup>168</sup> The trial judge left mistake of fact with the jury on the counts that related to this conduct.<sup>169</sup> Nevertheless, the rape conviction that the jury returned concerned one of the two incidents where the complainant did *not* resist.<sup>170</sup> It seems open to us to regard this case as showing more about the occasional irrationality of jury decision-making than it does about the deficiencies of the s 24 excuse. After all, because the jury only convicted on a count on which mistake of fact *was* in issue, and because it acquitted on both counts where it was *not*, it was seemingly not that "defence's" availability that frustrated proof.<sup>171</sup> That said, it must be conceded that, despite the complainant's failure to resist on the third and fourth occasions, it is hard to see what evidential basis there truly was for mistake of fact in the circumstances of this case. The evidence was that, after having intercourse with the complainant twice despite her obvious resistance, the accused: (i) came into her room again, while drunk and belligerent, and, without the slightest encouragement from the

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<sup>164</sup> [2009] 2 Qd R 263.

<sup>165</sup> Because the appellant denied that there had been any sexual activity between the complainant and him (*Phillips* [2009] 2 Qd R 263, 266 [10]), the only evidence relating to that sexual activity came from the complainant.

<sup>166</sup> *Phillips* [2009] 2 Qd R 263, [3]-[4].

<sup>167</sup> *Ibid* [29].

<sup>168</sup> *Ibid* [5]-[6].

<sup>169</sup> *Ibid* [29].

<sup>170</sup> *Ibid* [29].

<sup>171</sup> It is true that Holmes JA noted that, on the two counts relating to conduct that the complainant resisted, the Crown might have failed to prove either non-consent *or* the absence of honest and reasonable mistake: *Phillips* [2009] 2 Qd R 263, [29]. However, because the jury was not directed in relation to honest and reasonable mistake on those counts, it seems that it must have acquitted on the former basis.

complainant, had intercourse with her again;<sup>172</sup> and (ii) a couple of weeks later, woke her up and had intercourse with her, again without encouragement, causing bleeding.<sup>173</sup>

Similar comments can be made about the final two cases that Crowe and Lee deal with: *R v Motlop*<sup>174</sup> and *R v Rope*.<sup>175</sup> In *Motlop*, the accused subjected the complainant to some appalling domestic violence and then asked her for sex.<sup>176</sup> She asked him why he wanted to do that, and she made it clear that she was in pain.<sup>177</sup> He then told her to be quiet and had intercourse with her.<sup>178</sup> He was convicted of rape in relation to this incident.<sup>179</sup> The complainant's evidence was that, five minutes later, the accused again asked her for sex. She said that her response was "why do you want to – isn't the first time good enough?"<sup>180</sup> But she also agreed that she said to the appellant "I love you and I want you for life."<sup>181</sup> She said that the accused then had sexual intercourse with her once more.<sup>182</sup> The accused denied that this second act of sexual intercourse occurred.<sup>183</sup> The jury acquitted him of rape in relation to this alleged incident.<sup>184</sup> It is possible that it did so, not because of honest and reasonable mistake of fact, but because it was in doubt as to whether the conduct took place at all.<sup>185</sup> That said, it is hard to see why the trial judge directed the jury on the s 24 excuse – especially concerning the first count. When it came to that count, the accused's evidence was that the complainant initiated the sexual activity.<sup>186</sup> The complainant's evidence, summarised above, seems to have been that, after the accused seriously assaulted her, she made her non-consent clear. On neither account does there seem to have been any room for a mistake.

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<sup>172</sup> *Phillips* [2009] 2 Qd R 263, [5].

<sup>173</sup> *Ibid* [6].

<sup>174</sup> [2013] QCA 301.

<sup>175</sup> [2010] QCA 194.

<sup>176</sup> *Motlop* [2013] QCA 301, [10]-[17].

<sup>177</sup> *Ibid* [17].

<sup>178</sup> *Ibid* [17].

<sup>179</sup> *Ibid* [32]. The accused's account was that the complainant had initiated the sexual intercourse: at [29]. The jury's verdict on this count demonstrated that it accepted the complainant's evidence.

<sup>180</sup> *Ibid* [18].

<sup>181</sup> *Ibid* [25]; see also [18].

<sup>182</sup> *Ibid* [18].

<sup>183</sup> *Ibid* [29].

<sup>184</sup> *Ibid* [32].

<sup>185</sup> *Ibid* [49].

<sup>186</sup> *Ibid* [29].

The same seems true of *Rope*. In that case, after the accused propositioned the complainant, the complainant gave evidence that she said “I don’t think so. You’re a married man.”<sup>187</sup> This, she said, did not deter him. Instead, he took his shorts off, called her a “bitch” and a “whore” and told her to suck his penis, which she did.<sup>188</sup> He then removed her trousers and underwear.<sup>189</sup> As he did so, she said nothing, and did not struggle.<sup>190</sup> He then inserted his fingers roughly into her vagina.<sup>191</sup> The complainant claimed that, as he did this, he made abusive remarks about his wife and said “you want it, you little whore.”<sup>192</sup> She then said she was going to the toilet, left the room and did not return.<sup>193</sup> The accused’s account, on the other hand, was that he kissed the complainant and she kissed him back.<sup>194</sup> After “playing with each other a bit”, he said, he took off his pants and the complainant sucked his penis.<sup>195</sup> He was “fingering” her at this stage.<sup>196</sup> However, the complainant then said “I can’t do this to your wife” and left the room.<sup>197</sup>

In these circumstances, it is easy to see why the resulting trial was all about consent.<sup>198</sup> The accused’s account seems to have been that the complainant was obviously consenting. The complainant’s account seems to have been that it was obvious that she was not. It is true that she did not claim to have “positively convey[ed] a lack of consent”<sup>199</sup> during the actual sexual activity. But no person who is told “I don’t think so” immediately before such activity, and responds by saying “Stick this in you and start sucking on it, you bitch, you whore” and “Suck on this. You know you’ll enjoy it, you whore and I know you want me”,<sup>200</sup> believes that his partner is a willing participant. If this is right, the QCA erred, with respect, when it found that there was a “small but sufficient basis”<sup>201</sup> for honest and reasonable mistake. As

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<sup>187</sup> *Rope* [2010] QCA 194, [14].

<sup>188</sup> *Ibid* [14]-[15].

<sup>189</sup> *Ibid* [15].

<sup>190</sup> *Ibid* [15].

<sup>191</sup> *Ibid* [15].

<sup>192</sup> *Ibid* [15].

<sup>193</sup> *Ibid* [15].

<sup>194</sup> *Ibid* [20].

<sup>195</sup> *Ibid* [20].

<sup>196</sup> *Ibid* [20].

<sup>197</sup> *Ibid* [20].

<sup>198</sup> See *Ibid* [21], where it is noted that the defence did not request a direction about mistake of fact.

<sup>199</sup> *Ibid* [42].

<sup>200</sup> *Ibid* [14].

<sup>201</sup> *Ibid* [44].

with the first incident in *Motlop*, both the accused's and the complainant's accounts seem inconsistent with the accused's having made a mistake. The suggestion that he might have done so appears to be speculation.

If, in cases such as *Phillips*, *Motlop* and *Rope*, Queensland judges have been excessively cautious when deciding whether honest and reasonable mistake of fact is raised by the evidence, this does not mean that we should adopt the drastic solutions advocated by Crowe and Lee. Apart from anything else, it is not clear that the s 24 excuse succeeded in any of those cases.<sup>202</sup> But, more importantly, the QCA's recent decision in *R v Makary*<sup>203</sup> seems to be capable of going some way to ensuring that, in the future, directions about honest and reasonable mistake are only given where they are truly required. In that case, Sopronoff P made a number of strong –and, with respect, correct – statements about the need for trial and appellate judges to take an appropriately stringent approach to the evidential burden in rape cases where the defence has alleged that there is evidence of mistake of fact.

First, his Honour noted Sir Samuel Griffith's observation in *Webster & Co v The Australiasian United Steam Navigation Co Ltd*<sup>204</sup> that the s 24 rule is one of "common sense as much as ... of law", before contending:<sup>205</sup>

If that is to remain true, it is essential that evidence that is said to raise a requirement for a jury to consider s 24 *does indeed raise the issue*, both as to the defendant's honest belief and as to the facts that reasonably may give rise to that belief.

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<sup>202</sup> As noted above, the accused in *Motlop* might have been acquitted on the second count because the jury was not satisfied that the sexual intercourse occurred: see text accompanying n 185. Further, Crowe and Lee provide no evidence that the accused in *Rope* was acquitted at his second trial (assuming that it took place); and in *Phillips*, it is possible that the jury acquitted on two of the counts because it thought it was possible that the complainant was consenting (see above n 171) and on another count because it thought it possible that the conduct had not occurred. Concerning this latter count, see *Phillips* [2009] 2 Qd R 363, 265 [5]; and note that the accused denied that this activity occurred (at 266 [10]) and that, unlike with the other two counts on which the jury acquitted (see 264-5 [3]-[4]), the jury did not convict the accused of unlawful carnal knowledge. These two facts fortify the inference that the jury might have thought that the Crown had not proved that the intercourse took place. In *Phillips*, the QCA acquitted the accused of the count of rape on which the jury had convicted him; however, this was not necessarily because of honest and reasonable mistake. This acquittal was entered because of inconsistent verdicts that the jury had reached, and such inconsistency might have come about because the jury acquitted the accused on certain counts on the basis that the complainant might have been consenting: at 272 [34] (Holmes JA), 273 [41] (White AJA), 275 [52] (McMurdo JA).

<sup>203</sup> [2018] QCA 258.

<sup>204</sup> [1902] St R Qd 207, 217.

<sup>205</sup> *Makary* [2018] QCA 258, [56]. [Emphasis added]



Secondly, Sopronoff P cited with approval Moffit J's remarks in *R v Taylor*,<sup>206</sup> to the effect that:<sup>207</sup>

[I]t will be a rare case in which, while not sufficient to raise a reasonable doubt in the jury's minds [sic] as to whether the complainant has given consent, the same acts raise such a doubt as to whether the accused actually held a reasonable belief that consent had been given.

Finally, his Honour made it clear that, when assessing whether there is evidence of mistake of facts, judges must ensure not to confuse inference with speculation.<sup>208</sup>

It is submitted that, if Queensland judges apply Sopronoff P's guidance in a suitably rigorous way, they will no longer leave the s 24 issue with juries in cases such as *Phillips*, *Motlop* and *Rope*. Indeed, the case with which his Honour was dealing illustrates the point. In that case, the accused had been convicted of one count of rape at a trial over which Richards DCJ had presided.<sup>209</sup> The Crown's case was that the accused had had sexual intercourse with her while she was so drunk that she lacked cognitive capacity to give consent.<sup>210</sup> At trial, counsel for the accused contended that consensual intercourse had taken place.<sup>211</sup> Alternatively, the defence contended that, if the complainant was not consenting to the sexual intercourse, there was evidence from which it could be inferred that the appellant had an honest and reasonable but mistaken belief that the complainant was consenting.<sup>212</sup> That evidence included the fact that: they had drunk alcohol together; the complainant had not cried out for help when the appellant kept touching her after she had politely rejected his previous sexual advances; and when the complainant touched her, she did not move away.<sup>213</sup> But, as Sopronoff P pointed out, especially in circumstances where, even on the accused's account, the complainant had expressly rejected some of his advances,<sup>214</sup> none of this provided any foundation for honest and reasonable mistake.<sup>215</sup>

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<sup>206</sup> [1967] 2 NSW 278, 282.

<sup>207</sup> *Makary* [2018] QCA 258, [61].

<sup>208</sup> *Ibid* [59].

<sup>209</sup> *Ibid* [1].

<sup>210</sup> *Ibid* [24]-[25].

<sup>211</sup> *Ibid* [26].

<sup>212</sup> *Ibid* [28].

<sup>213</sup> *Ibid*.

<sup>214</sup> *Ibid* [66].

<sup>215</sup> *Ibid* [71]. Richards DCJ had therefore been right not to leave this excuse with the jury.

Of course, just because a trial judge gives an unnecessary direction about the s 24 issue does not mean that that excuse will succeed. In this vein, it can be noted that, at a separate trial for other offences of rape and attempted rape, the accused in *Makary* was convicted<sup>216</sup> despite the fact that the judge had directed the jury about the s 24 issue.<sup>217</sup> Nevertheless, where, as in cases such as *Makary*, *Rope*, *Motlop* and *Phillips*, it is “entirely speculative”<sup>218</sup> to suggest that the accused might have believed on reasonable grounds that the complainant was consenting, mistake of fact clearly should not be left with the jury. For example, where, as in *Rope*, the accused’s account is that there was enthusiastic consent and the complainant’s is that s/he made her or his non-consent obvious, it cannot be *inferred* that the accused might have made a mistake. Any such possibility is not a “deduction from the evidence”;<sup>219</sup> rather, it arises from judicial conjecture.<sup>220</sup>

### (iii) Cases where the accused or the complainant was intoxicated

“The effect of intoxication on the ‘mistake of fact’ defence (sic)”, Lee and Crowe state, “means the defendant can say “Sorry, your Honour, I was so drunk I thought she was consenting.”<sup>221</sup> This is true. When assessing whether an accused might honestly have believed in consent, all of his or her subjective characteristics are relevant.<sup>222</sup> It is difficult to see how it could be otherwise. For, here, we are searching for the accused’s actual state of mind. It would be fictitious to find that the accused did not believe something that he or she in fact did believe, simply because his or her belief was caused by his or her intoxication. It is not just in rape cases that the Courts have accepted such logic. For example, under s 418(2)

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<sup>216</sup> *R v Makary* [2018] QCA 257, [78].

<sup>217</sup> *Makary* [2018] QCA 257, [90]. See also, for example, *R v Lu* [2018] QCA 193.

<sup>218</sup> *Makary* [2018] QCA 257, [89].

<sup>219</sup> See *Lane v The Queen* (2013) 241 A Crim R 321, 348 [109].

<sup>220</sup> Concerning the difference between speculation and inference, see, for example, *The Queen v Baden-Clay* (2016) 258 CLR 308, 325-6 [53]-[55]. With the greatest respect, an example of speculation might be the reasoning of McHugh J in *Stevens v The Queen* (2005) 227 CLR 319, 330-1 [28]-[29]. In that case, it was *possible* that the accused was in charge or control of his rifle at the time of the deceased’s death, which had discharged by accident, killing the deceased: see 322 [5] (Gleeson CJ and Heydon J). But, as Kirby J pointed out, there seemed to be no *evidence* from which such an inference could be drawn: at 348 [87]. The accused’s account was that he found the deceased pointing the gun at his own head, and that he was unable to dispossess him of the weapon before it discharged: at 328 [22]. If the jury disbelieved this, then it could infer from the circumstantial evidence that the accused entered the deceased’s office with the gun and intentionally shot him: see 365 [146] (Callinan J). For instance, the accused had a motive to kill the deceased: at 321 [3] (Gleeson CJ and Heydon J). However, there seemed to be no evidence from which it could have been concluded that the accused discharged the gun without murderous intent: see 365 [146] (Callinan J).

<sup>221</sup> Jonathan Crowe and Bri Lee, “Cases”, *Consent Law in Queensland* (Web Page)

<<https://www.consentlawqld.com/intoxication>.>

<sup>222</sup> *Hopper* [1993] QCA 561.

of the *Crimes Act 1900* (NSW), a person acts in lawful self-defence if, among other requirements, the accused believes that his or her conduct was necessary in self-defence or defence of others (etc). When assessing whether an accused person might have held such a belief, the trier of fact will have “regard to all of the personal characteristics (including intoxication).”<sup>223</sup>

However, this does not mean that the intoxicated accused who, because of such intoxication, believes that the complainant is consenting, is at all likely to be acquitted of rape or sexual assault. For, as Laura Reece has rightly noted,<sup>224</sup> the accused’s self-induced intoxication is not taken into account when assessing whether he or she might have had reasonable grounds for his or her belief.<sup>225</sup> Are there really jurors who will find that, while the accused’s intoxication was the only reason why the accused mistakenly thought that the complainant was consenting, such a belief was nevertheless reasonable for a sober person? Crowe and Lee provide no evidence to suggest that this is so. And, again, they are careless when dealing with the relevant case law.

According to Lee:<sup>226</sup>

On or about December 13, 2003, a man named Basil Adam Soloman consumed approximately “a carton of stubbies of full-strength beer ... a dozen cans of rum and cola, and about five cones of cannabis before initiating intercourse with a woman. Her evidence was that she was asleep and awoke to being raped by Soloman, who said “sorry” and left. ... Applied to the case of *R v Soloman*, the “mistake of fact” defence (sic) does not suggest the complainant consented. Instead, it suggests that Soloman had an honest and reasonable belief that she did. The alcohol and cannabis he had consumed was considered when determining his state of mind. His intoxication assisted him to secure an acquittal.

This is misleading. On appeal, the accused was not granted a verdict of acquittal. The QCA instead ordered a new trial.<sup>227</sup> Furthermore, it did not do so because of any finding that the

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<sup>223</sup> *Doran v Director of Public Prosecutions* [2019] NSWSC 1191, [46] (Simpson AJA).

<sup>224</sup> Laura Reece, “Honest and Reasonable is Enough” (2019) 39(8) *Proctor* 33, 33. See also Rebecca Fogerty, “The Universal Right to Plead One’s Case” (2019) 38(2) *Proctor* 33, 33.

<sup>225</sup> *Hopper* [1993] QCA 561 (de Jersey CJ, McPherson and Pincus JJA); *R v O’Loughlin* [2011] QCA 123, [33]; *Daniels v Western Australia* (1989) 1 WAR 435, 445 (Kennedy J).

<sup>226</sup> Lee, above n 7. See also Bri Lee, “If you’ve been abused as a child, Queensland is the unluckiest state to be in”, *The Guardian*, 13 December 2018 <<https://www.theguardian.com/commentisfree/2018/dec/13/if-youve-been-abused-as-a-child-queensland-is-the-unluckiest-state-to-be-in>>. There, Lee says: “We have the most archaic legislation around consent with the “mistake of gfact” defence (sic) allowing their own drunkenness to secure acquittals.” Lee provides no evidence to support this assertion.

<sup>227</sup> *R v Soloman* [2006] QCA 244, [39] (Jerrard JA), [40] (White J), [41] (Phillippides J).

accused's intoxication might have led him to form an honest and reasonable belief that the complainant was consenting, though she in fact was asleep. In fact, the accused's intoxication had very little to do with the Court of Appeal's decision.

The accused's evidence at trial had been that, when he got into bed with the complainant, she was conscious, kissed him and responded to "everything I was doing."<sup>228</sup> The QCA held that, if the jury accepted neither the complainant's account – that she was asleep – nor the accused's account in its entirety, but rather some "intermediate version of events",<sup>229</sup> honest and reasonable mistake was a real issue. Because it failed to relate the evidence to the terms of s 24, the judge's mistake of fact direction was inadequate.<sup>230</sup> Now, it must be noted that such reasoning might be vulnerable to the criticism that it involves speculation. It is hard to see how ambiguity about consent could be *inferred* from either the complainant's or the accused's evidence.<sup>231</sup> But there seem to be two responses to Crowe and Lee's claim that this case "shows that a defendant who voluntarily consumes large quantities of alcohol and drugs can potentially use the 'mistake of fact' defence (sic) to excuse his actions."<sup>232</sup> First, this was not a case where it was suggested that the accused's intoxication led him to misinterpret the complainant's actions. Secondly, if this had been the accused's claim, then, as just explained, it would have been very difficult for him to persuade a jury that his drunken belief might also have been a reasonable one.

Similar remarks can be made about *The Queen v Hopper*.<sup>233</sup> Crowe and Lee's comment about this case is that it is a "violent gang rape case where 'mistake of fact' was found to be raised by the facts, and it continues to serve as a precedent for voluntary intoxication assisting a defendant's case that he had an honest mistaken belief."<sup>234</sup> In fact, honest and reasonable mistake was only in issue because of the accused's evidence that there had been no gang rape: his account differed from that of the complainant in that respect.<sup>235</sup> And the Court made

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<sup>228</sup> Ibid [11], [32].

<sup>229</sup> Ibid [34].

<sup>230</sup> Ibid [34]-[35].

<sup>231</sup> See text accompanying nn 218-220. It can be noted in this regard that the trial judge said that mistake of fact was "technically open": Ibid [30]. [Emphasis added]

<sup>232</sup> Jonathan Crowe and Bri Lee, "Cases", *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/intoxication>.>

<sup>233</sup> *Hopper* [1993] QCA 561.

<sup>234</sup> Jonathan Crowe and Bri Lee, "Cases", *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/intoxication>.>

<sup>235</sup> *Hopper* [1993] QCA 561.

it clear that, given that “a mistaken belief that is induced by intoxication is not one that can be considered “reasonable” as distinct from honest”, “the trial judge’s failure to direct the jury on the effect of the appellant’s intoxication is only of the slightest relevance here.”<sup>236</sup> It upheld the appellant’s convictions.<sup>237</sup>

In *Hopper*, the QCA observed that, realistically, the mistake issue “admitted of only one answer.”<sup>238</sup> Consistently with Sopronoff P’s approach in *Makary*, and with what I have argued above, it seems that this issue should therefore not have been left with the jury. The same seems true of the two other cases that Crowe and Lee deal with, in which the accused was intoxicated. Those cases are *R v Duckworth*<sup>239</sup> and *R v Cook*.<sup>240</sup> In both cases, the complainant’s evidence was that she woke to find the accused having penile-vaginal intercourse with her.<sup>241</sup> In both, the accused denied that sexual intercourse occurred at all.<sup>242</sup> But Mr Duckworth’s counsel argued that, even if the jury disbelieved his account, honest and reasonable mistake was in issue. This was said to be because there was evidence that, at one stage in the bed, the complainant had “reached over and grabbed [the accused’s] ... arm and draped it over the top of her.”<sup>243</sup> The judge thought that the evidence of honest and reasonable mistake was “pretty tenuous.”<sup>244</sup> Her Honour only left this issue with the jury “out of caution.”<sup>245</sup> Accordingly, this seems just the sort of case to which Sopronoff P was referring when he stated that, in the future, judges should give directions about the s 24 excuse only when the evidence really does raise that issue.<sup>246</sup>

The same comments seem applicable also to *Cook*. In that case, McMurdo P said:<sup>247</sup>

In my opinion, the mistake of fact, under s 24 *Criminal Code*, was raised by the evidence of the complainant, that she ran her hand up the appellant’s body when she woke up and found him having

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<sup>236</sup> Ibid.

<sup>237</sup> Ibid.

<sup>238</sup> Ibid.

<sup>239</sup> [2017] 1 Qd R 297.

<sup>240</sup> [2012] QCA 251.

<sup>241</sup> *Duckworth* [2017] 1 Qd R 297, 313 [42]; *Cook* [2012] QCA 251.

<sup>242</sup> *Duckworth* [2017] 1 Qd R 297, 317 [59]; *Cook* [2012] QCA 251.

<sup>243</sup> *Duckworth* [2017] 1 Qd R 297, 319 [68].

<sup>244</sup> Ibid 319-320 [68] (Bond J); see also 309 [22] (Philippides JA).

<sup>245</sup> Ibid 319-320 [68] (Bond J); see also 309 [22] (Philippides JA).

<sup>246</sup> But, again, the jury’s decision to convict in *Duckworth* shows that, just because a jury is directed about the s 24 issue does not mean that it will resolve that issue in the accused’s favour.

<sup>247</sup> *Cook* [2012] QCA 251.

sex with her; that he told her his name when she asked him; and that after he withdrew she became upset, and said, “I thought you want me.”

The problem with this seems to be that the accused could only have honestly and reasonably but mistakenly believed that the complainant was consenting if he thought that she was awake when he climbed into bed and began having intercourse with her. He gave no evidence to this effect. The complainant said that she was asleep at that time and when the accused started penetrating her.<sup>248</sup> Furthermore, earlier in her Honour’s judgment, McMurdo P stated that, on the complainant’s account, it was *the accused* who said “I thought you want me.”<sup>249</sup> He said this, the complainant alleged, only after he withdrew his penis from her vagina and at a time when the complainant was saying “no, no, no”.<sup>250</sup> Maybe there is more to this case than meets the eye. After all, before the QCA, the Crown conceded that the judge had erred when he failed to direct the jury about mistake of fact.<sup>251</sup> But, on the face of it, it is hard to see why a direction about s 24 was necessary. Because the case against Mr Cook was “certainly strong”,<sup>252</sup> it seems unlikely that a jury would find it reasonably possible that he did reasonably believe that the complainant was consenting. Nevertheless, it is highly desirable that, in cases such as this, trial and appellate judges take seriously Sopronoff P’s remarks.

Crowe and Lee also note four cases where, according to them, the *complainant’s* intoxication has “lower[ed] the bar”<sup>253</sup> for the s 24 excuse. I have already sufficiently dealt with one of these, *R v Elomari*.<sup>254</sup> By majority, the QCA held that the trial judge had been right not to direct the jury about mistake of fact. As noted above,<sup>255</sup> in my opinion, their Honours were right to conclude that there was no evidence from which it could be inferred that the accused made a mistake. To be sure, McMurdo P’s insistence, in dissent, that “a jury could have considered that [the complainant] may not have communicated her lack of consent effectively

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<sup>248</sup> Ibid.

<sup>249</sup> Ibid.

<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid (McMurdo P).

<sup>253</sup> Jonathan Crowe and Bri Lee, “Cases”, *Consent Law in Queensland* (Web Page)

<<https://www.consentlawqld.com/intoxication>.>

<sup>254</sup> *Cook* [2012] QCA 27.

<sup>255</sup> See text accompanying nn 118-122.

to the appellant because she was heavily affected by marijuana”<sup>256</sup> seems to amount to speculation. But it had no effect on the outcome of that case.

Two of the other cases with which Crowe and Lee deal, *R v Awang*<sup>257</sup> and *R v Cannell*,<sup>258</sup> have absolutely nothing to do with mistake of fact. In *Awang*, the accused did not allege that the complainant’s intoxication caused him mistakenly to think that she was consenting to sexual activity with him. Accordingly, there was no s 24 issue in play in that case. Rather, the trial judge told the jury that the complainant’s very high level of intoxication at the time that the appellant tied her up was one of a number of reasons why it should scrutinise very carefully her evidence that, at the time that he performed the relevant conduct, the accused had touched her sexually and then announced that he had an intent to rape her.<sup>259</sup> One of those reasons was that she had convictions for offences of dishonesty.<sup>260</sup> Another was that her sworn evidence differed markedly from her previous accounts of the relevant events.<sup>261</sup> The trial judge was obviously correct so to direct the jury. Further, it is wrong for Crowe and Lee to suggest, as they do,<sup>262</sup> that the QCA erred when it stated that the complainant’s “evidence as to the sexual offences was unsupported.”<sup>263</sup> Certainly, there was a good deal of evidence that supported the complainant’s account that the accused had deprived her of her liberty. For instance, when the police arrived at the premises, they found the complainant with her hands were tied tightly together in front of her body.<sup>264</sup> Thus, the QCA found that, contrary to the appellant’s submission, his deprivation of liberty conviction was safe.<sup>265</sup> But Crowe and Lee are wrong to argue that the injuries to the complainant’s wrists supported her account that the appellant had touched her sexually when he tied her up or told her that he “wanted to fuck” her.<sup>266</sup> This evidence showed that she had been forcefully tied up. It did not show what the motivations of the person who tied her up were, or that he had touched her breasts and/or genital area. Nor did “other witness testimony about her immediate complaint

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<sup>256</sup> *Elomari* [2012] QCA 27, [5].

<sup>257</sup> [2004] 2 Qd R 672.

<sup>258</sup> [2009] QCA 94.

<sup>259</sup> *Awang* [2004] 2 Qd R 672, 676-7 [15].

<sup>260</sup> *Ibid* 676 [15].

<sup>261</sup> *Ibid* 676-7 [15].

<sup>262</sup> Jonathan Crowe and Bri Lee, “Cases”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/intoxication>.>

<sup>263</sup> *Awang* [2004] 2 Qd R 672, [4] (McMurdo P); see also 679 [26] (Williams JA).

<sup>264</sup> *Ibid* 675 [9].

<sup>265</sup> *Ibid* 674 [4] (McMurdo P), 674 [5] (McPherson JA), 679 [27] (Williams JA),

<sup>266</sup> See *Ibid* 674 [7] (Williams JA).

and distressed state”<sup>267</sup> amount to corroboration of her allegations. The distress might just have been caused by the fact that the appellant had tied her up. As for the “witness testimony”, Crowe and Lee seem to be referring to the evidence of a man named Land, who said that the complainant had told him over the telephone that her hands were tied and that the appellant was going to rape her.<sup>268</sup> This was evidence that the complainant *said* that the appellant had told her this was his intention. Because Land did not hear the appellant utter these words, this was not evidence that corroborated her account.

In *Cannell*, the complainant’s evidence was that she could not remember leaving the tavern where she had been drinking immediately before the incident.<sup>269</sup> This was presumably because she had a blood alcohol concentration of between 0.202 and 0.442 at that time.<sup>270</sup> She said that the next thing that she remembered was waking up in a darkened room, where the accused then assaulted her and had penile-vaginal intercourse with her.<sup>271</sup> As he did so, the complainant testified, he whispered in her ear that he was going to shoot her.<sup>272</sup> On the other hand, the appellant’s account was that, just after he and the complainant left the tavern, they had consensual sexual intercourse under a tree near a Caltex service station.<sup>273</sup> Crowe and Lee are clearly wrong to state that:<sup>274</sup>

At trial, the jury sent a note to the trial judge asking for “clarification of the legal definition of consent”, which indicated that they were wondering what role intoxication played in satisfying the requirements of a mistake of fact defence (sic).

The jury could not have been concerned about mistake of fact. That is because it was not in issue.<sup>275</sup> Rather, as McMurdo P explained, the jury “may have been troubled about the complainant’s cognitive capacity to consent[,] because of her intoxication.”<sup>276</sup> In other words, the jury might have been asking: if it was possible that the accused was telling the

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<sup>267</sup> Jonathan Crowe and Bri Lee, “Cases”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/intoxication>.>

<sup>268</sup> *Awang* [2004] 2 Qd R 672, 674 [8].

<sup>269</sup> *Cannell* [2009] QCA 94, [3].

<sup>270</sup> *Ibid* [21].

<sup>271</sup> *Ibid* [3].

<sup>272</sup> *Ibid*.

<sup>273</sup> *Ibid* [3], [7].

<sup>274</sup> Jonathan Crowe and Bri Lee, “Cases”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/intoxication>.>

<sup>275</sup> Accordingly, the trial judge’s response to the jury’s request concerned the question of consent, not the s 24 issue: *Cannell* [2009] QCA 94, [47].

<sup>276</sup> *Ibid* [52].



truth, might the complainant have failed to consent to the intercourse in the park even so, because she was so drunk as to lack “cognitive capacity to give ... consent” within the meaning of s 348 of the *Criminal Code*? The problem with this was that the prosecution had never sought to suggest that the complainant did lack cognitive capacity at that time. Accordingly, the judge erred when he suggested, in response to the jury’s enquiry, that it was open to the jury to convict if it was satisfied that “the appellant had sex with the complainant, perhaps somewhere other than the unit, when she was so intoxicated that she lacked cognitive capacity to consent.”<sup>277</sup>

In the final two cases on which Crowe and Lee rely – *R v SAX*<sup>278</sup> and *R v CU*<sup>279</sup> – the s 24 excuse was at least in issue. In the former, the complainant gave evidence that, after consuming a large amount of alcohol, she got into the appellant’s vehicle.<sup>280</sup> She said that she then “blacked out” and that “her next recollection was waking up naked in the appellant’s bedroom with the appellant on top of her having sexual intercourse.”<sup>281</sup> According to the appellant, however, the complainant made sexual advances to him before and after she got into his car and, once at his house, invited him to have a shower with her.<sup>282</sup> They then had sexual intercourse, he said.<sup>283</sup> Two witnesses gave evidence that they saw the complainant walk up the front stairs of the appellant’s house.<sup>284</sup> After retiring, the jury asked the trial judge a question that indicated that it was seriously considering the possibility that the complainant was conscious, but very drunk, at the time that the sexual intercourse occurred.<sup>285</sup> Accordingly, the QCA found that the judge erred by not making it clear to the jury that, if it thought it possible that, despite her drunkenness, the complainant still had the cognitive capacity to consent – and did consent – it must acquit the accused.<sup>286</sup> Moreover, most relevantly to the present discussion, the judge should have told the jury that, even if it was satisfied that the complainant lacked the cognitive capacity to consent – and was therefore not consenting – it needed to consider whether the accused might honestly and

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<sup>277</sup> Ibid [53].

<sup>278</sup> [2006] QCA 397.

<sup>279</sup> [2004] QCA 363.

<sup>280</sup> *SAX* [2006] QCA 397, [10].

<sup>281</sup> Ibid [11].

<sup>282</sup> Ibid [12].

<sup>283</sup> *SAX* [2006] QCA 397, [12].

<sup>284</sup> *SAX* [2006] QCA 397, [12].

<sup>285</sup> *SAX* [2006] QCA 397, [16].

<sup>286</sup> *SAX* [2006] QCA 397, [20] (Keane JA), [30] (Jones JA).

reasonably have believed that she had capacity and *was* consenting.<sup>287</sup> Contrary to what Crowe and Lee argue, *SAX* does not establish that:<sup>288</sup>

A complainant who is extremely drunk, but not completely unconscious, and therefore does not or cannot strenuously resist the defendant's advances, could find her intoxication used as a basis for the defendant's mistake of fact.

As made clear in Jerrard JA's judgment in that case, there was no suggestion that the complainant lacked cognitive capacity *and* the ability to resist the accused. Likewise, there was no suggestion that the accused mistakenly believed that the complainant was consenting because, in her drunken state, she had failed to resist him. Rather, on one view of the facts, the complainant lacked cognitive capacity to consent but had "*acted before and during the sexual intercourse as the appellant claimed she had.*"<sup>289</sup> If a person is so drunk as in fact not to be capable of giving consent, but makes numerous sexual advances to another person, invites that person to have a shower with him or her, and then is responsive during the sex that ensues, it is hard to see why the s 24 excuse should necessarily be excluded. In such circumstances – and depending on the other evidence – it might well be reasonably possible that the accused in such a case believes on reasonable grounds that the complainant (i) has the capacity to consent and (ii) is consenting.

On the other hand, *R v CU* might be a case that we should place in the same category as *Motlop, Phillips, Rope, Hopper, Duckworth* and *Cook*<sup>290</sup> – though their Honours' failure to set out in any detail what the accused's case at trial was makes it impossible for us to draw a firm conclusion on this point. In *CU*, the complainant gave evidence that she woke up to find the accused penetrating her vagina with a vibrator.<sup>291</sup> She told him to leave. He did not do so. Rather, according to the complainant, when she again awoke, the accused was performing cunnilingus on her and had his penis in her mouth.<sup>292</sup> The accused's claim, in a "pretext telephone call" with the complainant later on, that he had "misread [her] ... body language",<sup>293</sup> might have formed the basis for his claim of honest and reasonable mistake.

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<sup>287</sup> *SAX* [2006] QCA 397, [1] (Jerrard JA), [21] (Keane JA), [30] (Jones JA).

<sup>288</sup> Jonathan Crowe and Bri Lee, "Cases", *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/intoxication>>

<sup>289</sup> *SAX* [2006] QCA 397, [1] (Jerrard JA). [Emphasis added]

<sup>290</sup> See text accompanying nn 164-201 and 238-252.

<sup>291</sup> *CU* [2004] QCA 363.

<sup>292</sup> *Ibid.*

<sup>293</sup> *Ibid.*

But we are not told exactly what the accused at trial alleged the complainant had done (though he must have claimed that the complainant was awake – or, at the very least, that he believed she was awake – when he penetrated her). Accordingly, on this view of the case, it is not possible to state with any certainty whether there in fact was a proper basis in the evidence for honest and reasonable mistake.

Alternatively, it appears possible that, as in *SAX*, the s 24 issue arose on the basis that, though the complainant was so drunk as not to be capable of consenting, the accused believed that she had capacity and was consenting. Crowe and Lee are critical of some remarks that they attribute to de Jersey CJ, but in fact were made by Jerrard JA.<sup>294</sup> His Honour noted that the jury had asked the trial judge following question:<sup>295</sup>

If she doesn't have the cognitive ability to give consent as she was drunk, but could he have taken an honest and mistaken belief that she was awake, but she was unaware of her actions as she was so drunk?

While Jerrard JA said that he could “understand what the jury were (sic) asking” (and said that the answer to its question was “yes”),<sup>296</sup> I am not confident that I do. Crowe and Lee, however, express no such diffidence. Their comment is that:<sup>297</sup>

The ‘mistake of fact defence (sic), in other words, can potentially be utilised where the complainant is in fact incapable of giving consent because she is unconscious, provided that the defendant honestly and reasonably believes that the complainant, although so drunk as to be unaware of her actions, is nonetheless awake.

I doubt whether the jury in *CU* was asking what Crowe and Lee think it was. It seems that it might simply have been asking whether, if the complainant lacked capacity to consent, the accused might have reasonably believed that she had capacity. If so, the comments that I have just made about *SAX* seem equally applicable here. If a complainant is so drunk as to be “unaware of her [or his] actions”, but behaves in a responsive manner to the accused’s sexual advances and intercourse ensues, the accused might not have behaved culpably. He or she might have an honest and reasonable belief that the complainant had cognitive capacity and

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<sup>294</sup> Jonathan Crowe and Bri Lee, “Cases”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/intoxication>.>

<sup>295</sup> *CU* [2004] QCA 363.

<sup>296</sup> *Ibid.*

<sup>297</sup> Jonathan Crowe and Bri Lee, “Cases”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/intoxication>.>

was consenting.<sup>298</sup> Assuming, however, that Crowe and Lee are right, what about the accused who honestly and reasonably but mistakenly believes that the complainant is awake – and *also* honestly and reasonably but mistakenly believes that s/he is not so drunk as to lack cognitive capacity? It is submitted that, whether such an accused is culpable, depends upon the precise factual circumstances. If, in such a case, the complainant has initiated sex and is responsive, but then, unbeknownst to the accused, falls asleep while sexual intercourse is still occurring, it might be that the accused has not acted in a blameworthy manner. But because it is unclear what the accused's account in *CU* was, and because the QCA's judgment is hazy about the circumstances in which the s 24 excuse arose for the jury's consideration, we cannot say whether this was a possible view of the facts in that case.

#### **(iv) Cases where the accused and the accused speak no common language**

According to Crowe and Lee:<sup>299</sup>

The current laws put you at a significant disadvantage if you don't speak the same language as the person who is initiating intercourse. Defence counsel are able to paint pictures of "grey areas" and "miscommunications" that might otherwise not seem realistic or likely, and this means women who speak a different language are expected to physically fight back more than others. How is that fair?

Two of the cases that they cite, *R v Lennox*<sup>300</sup> and *R v Kovacs*,<sup>301</sup> in fact did not involve claims that the complainant's inability to speak fluent English caused the accused mistakenly to think that she was consenting. In the other case, *R v Mrzljak*,<sup>302</sup> this *was* (partly) what the accused claimed. That said, the Court's reasoning on this point was clearly correct. Relatedly – and contrary to what Crowe and Lee suggest – a proper assessment of whether the law in this area is fair is not made simply by considering the complainant's interests. Fairness to the accused is also essential.

I have dealt with *Lennox* above.<sup>303</sup> As noted in that discussion, the s 24 issue did not arise in that case because the complainant's poor English might have led the accused to think that,

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<sup>298</sup> That said, it is unclear whether the accused in *CU* alleged that the complainant had been responsive.

<sup>299</sup> Jonathan Crowe and Bri Lee, "Cases", *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/language-barriers>>.

<sup>300</sup> [2018] QCA 311.

<sup>301</sup> [2007] QCA 143.

<sup>302</sup> [2005] 1 Qd R 307.

<sup>303</sup> See text accompanying nn 131-142.

though she in fact repeatedly said “I don’t want to do that”,<sup>304</sup> she had not made her dissent clear. It arose because of the accused’s evidence that she had at no stage uttered these words<sup>305</sup> and had seemed to him to be responsive to his advances.<sup>306</sup> In other words, it was the complainant’s alleged silence, and not anything that she said, that formed (part of) the basis for the accused’s claim to have made a reasonable mistake.

The position was similar in *Kovacs*. The complainant’s evidence was that, as the accused undressed her, she told him to stop.<sup>307</sup> She said that, when he persisted and tried to put his penis in her mouth, she pulled away, but that he then had penile-vaginal intercourse with her.<sup>308</sup> She also said that, that night, when he started to kiss her again, she said that she did not like it and told him to stop, but that he again had sexual intercourse with her.<sup>309</sup> According to the complainant, the accused raped her again the following morning after she had tried to pull away.<sup>310</sup>

All of the judges who heard this appeal held that, to use Jones J’s words, “there was no evidence and no suggestion that the appellant was confused or disadvantaged by any communication deficit.”<sup>311</sup> In other words, the accused never claimed that that “any language difficulty” contributed to the mistake that he said he made.<sup>312</sup> Accordingly, this was not an issue at trial,<sup>313</sup> and the trial judge was right not to direct the jury that it should take into account the language barrier between the accused and the complainant when considering mistake.<sup>314</sup> The accused instead based his claim of mistake on his allegation that the complainant apparently willingly participated in sexual activity with him in exchange for payment.<sup>315</sup> Crowe and Lee’s comment about this is that “[i]t is difficult to imagine how the defendant could have reasonably sustained such a belief had the complainant been able to

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<sup>304</sup> See *Lennox* [2018] QCA 311, [17]-[19].

<sup>305</sup> *Ibid* [43].

<sup>306</sup> *Ibid* [42]-[43].

<sup>307</sup> *Kovacs* [2007] QCA 143, [3].

<sup>308</sup> *Ibid*.

<sup>309</sup> *Ibid*.

<sup>310</sup> *Ibid*

<sup>311</sup> *Ibid* [47].

<sup>312</sup> *Ibid* [19] (Holmes CJ and McMurdo P).

<sup>313</sup> *Ibid*.

<sup>314</sup> *Ibid* [19] (Holmes CJ and McMurdo P), [47] (Jones J).

<sup>315</sup> *Ibid* [6]-[7].

speak fluent English.”<sup>316</sup> But that is clearly wrong. If a person agrees to have sexual intercourse with another person for payment,<sup>317</sup> neither says nor does anything to resist that person before or during the intercourse, and then accepts payment, the other person surely has a strong claim of honest and reasonable mistake if in fact the complainant was always, or became, unwilling. That is so whether or not the complainant speaks fluent English. Crowe and Lee’s further, triple-negative, claim that “[t]he defence’s decision not to highlight the language barrier does not necessarily mean the jury did not consider it a part of the context for the defendant’s claimed ‘mistake of fact’”<sup>318</sup> amounts to pure speculation. Even if the jury at the first trial did consider this, which is very doubtful, this did not help the defendant. That jury convicted him of four counts of rape.<sup>319</sup>

This brings us back to *Mrzljak*. In that case, the evidence was that, as well as having an IQ of 56,<sup>320</sup> the accused knew very little English.<sup>321</sup> According to Holmes J, with whom Williams JA agreed,<sup>322</sup> this evidence:<sup>323</sup>

of intellectual impairment was ... relevant to possible excuse from criminal responsibility under s 24, s indeed was the evidence of the appellant’s language difficulties. If the jury accepted that evidence, both these features had the potential to affect the appellant’s appreciation of the situation in which he found himself, and more particularly to inhibit his capacity to recognise R’s condition and to interpret her responses. In those circumstances, a jury might be prepared to accept that a belief that would not be reasonable if held by a native English speaker of normal IQ was honestly held by the appellant on reasonable grounds.

It is true that, as Crowe and Lee note, this places a burden on the complainant in such a case clearly to communicate her or his non-consent.<sup>324</sup> It is also true that where, as in *Mrzljak*, the complainant has an intellectual disability,<sup>325</sup> the room for misinterpretation might increase

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<sup>316</sup> Jonathan Crowe and Bri Lee, “Cases”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/language-barriers>>.

<sup>317</sup> *Kovacs* [2007] QCA 143, [7].

<sup>318</sup> Jonathan Crowe and Bri Lee, “Cases”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/language-barriers>>.

<sup>319</sup> *Kovacs* [2007] QCA 143, [1].

<sup>320</sup> *Mrzljak* [2005] 1 Qd R 307, 325 [71].

<sup>321</sup> *Ibid* 323 [62].

<sup>322</sup> *Ibid* 321 [53].

<sup>323</sup> *Ibid* 330 [92].

<sup>324</sup> Jonathan Crowe and Bri Lee, “Cases”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/language-barriers>>.

<sup>325</sup> *Mrzljak* [2005] 1 Qd R 307, 322 [58].

still further.<sup>326</sup> But, as argued above,<sup>327</sup> it is essential that those who act without a blameworthy mental state escape criminal punishment. The person who proceeds with sexual activity while holding a belief in consent is reasonable *for him or her* – taking into account those characteristics of his or hers that are capable of affecting his or her perceptions – has not behaved culpably. Nor is it correct to suggest, as Crowe and Lee do, that, “typically”, the accused’s personal characteristics are relevant only to whether he or she honestly believed X, and not to reasonableness.<sup>328</sup> For example, in *R v Julian*,<sup>329</sup> the QCA held that, when assessing whether a person “believes on reasonable grounds ... that the person cannot otherwise preserve the person defended from death or grievous bodily harm” within the meaning of s 271(2) of the *Criminal Code*, the focus must be on the belief of *the accused*. In other words, the question is not whether a reasonable person would have held the relevant belief.<sup>330</sup> It is instead whether it was reasonable for *the accused* to think what he or she did.<sup>331</sup> Similarly, in *R v Conlon*,<sup>332</sup> Hunt CJ at CL observed that, for the purposes of the common law “defence” of self-defence, many of the accused’s personal characteristics will be relevant when the Court assesses whether he or she might have had reasonable grounds for his or her belief that it was necessary in self-defence to act as s/he did.

### 3. CROWE AND LEE’S REFORM SUGGESTIONS

#### A. Introductory remarks

Crowe has recently argued that “the evidence is in,”<sup>333</sup> and that that evidence demonstrates that reform of “the mistake of fact excuse for rape” is “badly needed.”<sup>334</sup> As just argued, the evidence that he and Lee have provided on their website demonstrates no such thing. Crowe claims to have “conducted more detailed research on the mistake of fact excuse in rape law

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<sup>326</sup> Jonathan Crowe and Bri Lee, “Cases”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/language-barriers>>.

<sup>327</sup> See text accompanying nn 63-6.

<sup>328</sup> Jonathan Crowe and Bri Lee, “Cases”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/language-barriers>>.

<sup>329</sup> (1998) 100 A Crim R 430.

<sup>330</sup> *Ibid* 438-9 (Thomas J), 448 (Dowsett J).

<sup>331</sup> *Ibid* 434 (Pincus JA), 438-9 (Thomas J), 448 (Dowsett J).

<sup>332</sup> *R v Conlon* (1993) 69 A Crim R 92, 99.

<sup>333</sup> Crowe, above n 31, 32.

<sup>334</sup> *Ibid*.

than anyone else in Australia (and quite possibly the world).”<sup>335</sup> In truth, his and Lee’s treatment of the relevant case law is frequently careless, misleading and inaccurate.

There is only one problem with “mistake of fact” that Crowe and Lee’s research reveals. There seem to be cases where the s 24 excuse is being left with juries “out of an abundance of caution”<sup>336</sup> and not because there really is evidence that, taken at its highest in favour of the accused, leaves it open to the jury to acquit on this basis. *Motlop, Phillips, Rope, Duckworth, Cook and Hopper* appear to be in this category – and the same can possibly be said of *CU* and *Soloman*. As I have argued above, one solution to this problem is for trial and appellate judges to take seriously, and follow, the – with respect – practical and sound approach of Sopronoff P in *Makary*. That said, it must be acknowledged that there is no clear boundary between cases where honest and reasonable mistake is a real issue and those where it is not. Reasonable minds might differ about whether, in particular circumstances, the evidence, taken at its highest in favour of the accused, leaves it open to the jury to acquit on this basis. It follows that it is understandable that trial judges have taken a cautious approach when dealing with this issue in the past. If they had acted differently, they would have risked falling into appellable error. Furthermore, given the uncertain boundary between cases where the evidence raises the s 24 excuse and those where it does not, it is perfectly conceivable that judges will continue sometimes to leave honest and reasonable mistake with the jury in cases where, in truth, the basis for it is questionable.

If this does happen, there is a risk of juries granting underserved acquittals in rape and sexual assault matters on the basis of s 24. But it is unclear how great this risk is. Justice Bell has recently noted that, in her considerable experience, when a judge directs about a matter that has been “barely raised by the evidence ... jurors’ eyes are apt to glaze over.”<sup>337</sup> And Crowe and Lee provide no evidence to suggest that jurors in rape and sexual assault cases are liable unwarrantably to acquit on the basis of honest and reasonable mistake. It is unclear that this happened in any of the cases that I have mentioned in the paragraph directly above. Despite being instructed about the s 24 excuse in *Rope, Hopper, CU, Soloman* and *Duckworth* – albeit erroneously – the jury at the appellants’ respective first trials had convicted them.

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<sup>335</sup> Ibid.

<sup>336</sup> *Duckworth* [2017] 1 Qd R 297, 309 [22] (Philippides JA).

<sup>337</sup> Virginia Bell, “Jury Directions: The Struggle for Simplicity and Clarity” (Banco Court Lecture, Supreme Court of Queensland, 20 September 2018) 16.



Likewise, the appellant in *Motlop* was convicted of one count of rape despite the fact that the judge had given a s 24 direction. As explained above, his acquittal on the other count might well have had nothing to do with mistake of fact; and the same is true of the verdicts of acquittal that the jury in *Phillips* granted.<sup>338</sup>

### **B. The proposal to remove honest and reasonable mistake entirely**

In these circumstances especially, there is no justification whatsoever for Crowe's claim that "[t]he mistake of fact defence (sic) for rape needs to go",<sup>339</sup> or for Lee's assertion that a rape or sexual assault accused should be unable to rely on mistake of fact<sup>340</sup>

because it gives juries an easy reason to acquit. They can say, 'Sorry, love, you didn't ask for this', but simultaneously, 'He's not responsible for his actions.'

As argued above, the basic problem with Crowe and Lee's approach is that it takes into account only the complainant's perspective and interests. The remarks of Lee that I have just quoted make this clear. For her, all that matters is that the complainant has engaged in non-consensual sexual activity. The accused's perceptions and state of mind are irrelevant. If the accused had a reasonable belief that the complainant was consenting, he or she should nonetheless be convicted because of the injury that he or she has caused the complainant to sustain. It is submitted that, because of the capacity of Crowe and Lee's proposal to cause the conviction of morally innocent actors, it would be a singularly unattractive one even if there were evidence that honest and reasonable mistake has been causing accused persons in some cases to evade justice. The absence of any such evidence makes its undesirability even more obvious.

Simon Bronitt and Patricia Easteal have recently argued that, when it comes to rape law.<sup>341</sup>

In lieu of balancing or trading rights, we should direct our focus through a normative lens of the paramount right to human dignity. ... The rights of a rape victim not to be subjected to unwarranted intrusions to privacy, or inhuman or degrading treatment, must be seriously considered.

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<sup>338</sup> See n 202.

<sup>339</sup> Crowe, above n 7.

<sup>340</sup> Hayley Gleeson, "Mistake of fact defence: The legal loophole stopping Queensland rape complainants from getting justice", *ABC*, 13 May 2019 <<https://www.abc.net.au/news/2019-05-13/bri-lee-mistake-of-fact-campaign-queensland-sexual-consent/11095306>>.

<sup>341</sup> Simon Bronitt and Patricia Easteal, *Rape Law in Context: Contesting the Scales of Injustice* (The Federation Press, 2018) 8.

It is true that the law must give “serious consideration” to the human dignity and human rights of rape complainants. Indeed, more than that, it should ensure that such persons’ human rights are not violated. But persons accused of rape, or any other crime, have human dignity and human rights, too.<sup>342</sup> Therefore, it is necessary to be specific about the circumstances in which the human rights of rape complainants *will be* violated. And it is not *just* necessary to ensure that the law violates these rights. It must not violate the human rights of accused persons either.

It is crystal clear that the law of rape and sexual assault in Queensland as it currently stands constitutes no affront to the human dignity of rape or sexual assault complainants. Or, to put the same point in a different way, if Chapter 32 of the *Criminal Code* (read with s 24), were ever challenged on human rights grounds,<sup>343</sup> that challenge would be manifestly ill-founded. If the law failed to proscribe rape or sexual assault at all, the position would be different. This is because, as the European Court of Human Rights (ECtHR) has noted, the state can breach its citizens’ human rights not just by acting in certain ways, but, in certain circumstances, by failing to do so. If a contracting state were not to proscribe murder, it would breach the right to life, which is protected by Article 2 of the *European Convention*.<sup>344</sup> If it were not to outlaw rape, it would breach the right not to be subjected to “inhuman or degrading treatment”, which is protected by Article 3.<sup>345</sup> Such a state would have failed to take reasonable measures to protect its citizens from criminal acts of third parties that caused harm of the type with which those Articles are concerned.<sup>346</sup> But once a state *does* take reasonable measures to prevent such harms, it is not in breach of any Convention Article. And, crucially, the Strasbourg Court has emphasised that a state’s obligation to protect its citizens from criminal activity provides no licence for those states to breach the Convention rights of convicted offenders or criminal suspects.<sup>347</sup>

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<sup>342</sup> As Bronitt and Easteal recognise: *ibid*, 170. The same is of course true of persons who have been *convicted* of serious criminal offences, as the European Court of Human Rights, for example, has frequently emphasised. See, for example, *Vinter v United Kingdom* [2013] III Eur Court HR 317, where the ECtHR’s Grand Chamber held that, when the state imposes an irreducible life sentence on a convicted offender it violates *ECHR*, Article 3, which prohibits, among other things, “inhuman or degrading punishments.” The Court found that such a punishment constituted an attack on an offender’s human dignity (at [113]-[114]), as will all other punishments that are incompatible with Article 3: see, for example, *Tyrer v United Kingdom* (1980) 2 EHRR 1, [33].

<sup>343</sup> In this respect, see *Human Rights Act 2019* (Qld), which has not yet entered into force.

<sup>344</sup> *Osman v United Kingdom* (2000) 29 EHRR 245, [115].

<sup>345</sup> See, for example, *Jendrowiak v Germany* (2015) 61 EHRR 32, [37].

<sup>346</sup> *Ibid*.

<sup>347</sup> *Ibid*.

The Queensland state has clearly “put ... in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.”<sup>348</sup> In many jurisdictions, murder is, or is to an extent,<sup>349</sup> a crime of subjective fault. Yet it has never been, and nor could it be, suggested that this amounts to a breach of the right to life in those jurisdictions that have adopted a human rights charter. On the contrary, it has been held in certain jurisdictions that, if the state provides that objective fault is sufficient for murder liability to attach, it has thus breached the human rights of *the accused*.<sup>350</sup> It would therefore be foolish to suggest that the “objective culpability”<sup>351</sup> threshold for rape and sexual assault in Queensland amounts to a breach of a complainant’s right not to be subjected to inhuman or degrading treatment.<sup>352</sup>

The real question is whether, if the Queensland Parliament were to turn rape and sexual assault into absolute liability offences, it would subject *the accused* to inhuman or degrading treatment. Alternatively, would it breach one of the other rights for which the *Human Rights Act 2019 (Qld)* provides? If it would, it would not avail the government to point to the protective purpose of such a law.

In my view, there is a very strong argument that, if it were ever enacted, Crowe and Lee’s primary proposal would breach human rights. But before considering specific rights, it is helpful to consider why, as a more general matter, absolute liability for serious crime is considered to be so morally objectionable. Andrew Ashworth has dealt with this question in clear and persuasive terms.<sup>353</sup> For him, absolute – or what the English courts and commentators call “strict”<sup>354</sup> – liability should be removed from all offences for which the maximum sentence is a term of imprisonment. This is because, to use his words:<sup>355</sup>

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<sup>348</sup> *Osman v United Kingdom* (2000) 29 EHRR 245, [115].

<sup>349</sup> See *Criminal Code Act* (Qld) s 302; *Crimes Act 1900* (NSW) s 18(1)(a).

<sup>350</sup> *The Queen v Martineau* [1990] 2 SCR 633, 644-7 (Lamer CJ, with whom Dickson CJ and Wilson, Gonthier and Cory JJ agreed). Note: Lamer CJ was the Chief Justice at the time that judgment was delivered; Dickson CJ was the Chief Justice at the time of the hearing: at 633.

<sup>351</sup> *Tabbah v The Queen* [2017] NSWCCA 55, [139]. Sexual assault and rape are crimes of objective fault, because a person who unintentionally causes the relevant harms may be convicted of those offences. In other words, the accused who honestly but unreasonably believes that the complainant is consenting does not intentionally injure the complainant.

<sup>352</sup> As to which, see *Human Rights Act 2019 (Qld)*, s 17(b).

<sup>353</sup> Ashworth, above n 21.

<sup>354</sup> See, for example, *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428, 469 (Lord Steyn).

<sup>355</sup> Ashworth, above n 21, 21.

justice demands that a defendant should not be liable to conviction without the possibility of arguing the absence of fault, and ... imprisonment would be monstrously unfair in the absence of proof of fault.

Why does justice demand this? Why would imprisonment be “monstrously unfair” in such circumstances? The answer, for Ashworth, is that such a defendant is being severely punished and exposed to enormous stigma even though he or she has not been proved to have been at all culpable.<sup>356</sup> The Crown has not proved that s/he has chosen to cause the harm that s/he has, or even that s/he ought to have realised that s/he would cause it. Yet the state has “imposed public condemnation”<sup>357</sup> on him or her and subjected him or her to hard treatment even so. Quoting Joel Feinberg, Ashworth says that this is “arbitrary and cruel.”<sup>358</sup>

Such arbitrariness perhaps comes into even sharper focus when we consider a second argument against strict liability for imprisonable offences. Ashworth calls this the “rule of law argument,”<sup>359</sup> and it comprises HLA Hart’s famous contention that it would be wrong to convict and punish any person who had no “fair opportunity” to act differently from how s/he has.<sup>360</sup> This brings us back to human dignity, because, as Ashworth points out, an aspect of human dignity is said to be the ability to act autonomously.<sup>361</sup> When the state creates criminal liability rules that can be breached only by individuals who have chosen to act harmfully, or at least have failed to take reasonable care, it has “guided people away from [the relevant] ... conduct.”<sup>362</sup> It has given them an opportunity to avoid conviction and punishment, thus facilitating autonomous decision-making. When the state creates criminal liability rules that can be breached even by individuals who have exercised all the care they could reasonably be expected to exercise, it has provided no such guidance and no such opportunity. To punish such persons is thus to display contempt for individual freedom. It is to prevent people from being able properly to plan their lives.<sup>363</sup>

Like Ashworth,<sup>364</sup> I believe that the first, censure-based, argument against absolute liability holds even more appeal than the second, rule of law, argument against it. That first argument

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<sup>356</sup> Ibid, 15; see also 6. See also Andrew Ashworth, “Four Threats to the Presumption of Innocence” (2006) 10 *The International Journal of Evidence and Proof* 241, 247.

<sup>357</sup> Ibid 6.

<sup>358</sup> Ibid, quoting Joel Feinberg, *Doing and Deserving* (Princeton University Press, 1970) 111.

<sup>359</sup> Ibid 5.

<sup>360</sup> HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2nd ed, 2008) ch 6, 152.

<sup>361</sup> Ashworth, above n 21, 5.

<sup>362</sup> Ibid.

<sup>363</sup> Ibid.

<sup>364</sup> Ibid 15.

also engages human dignity considerations. For, if we punish the innocent (that is, those who have not been proved to have acted with a blameworthy mental state), we are treating those people as objects. We are using them to achieve some other end. As is made clear by the case law concerning the constitutionality of grossly disproportionate sentences,<sup>365</sup> when we do this we fail to acknowledge the “intrinsic worth”<sup>366</sup> of such persons. Whatever controversy exists over precisely what human dignity entails, there is wide agreement that, in these circumstances, human dignity is breached.<sup>367</sup>

This reference to grossly disproportionate punishments takes us to s 17(b) of the *Human Rights Act 2019* (Qld), which provides, relevantly, that “[a] person must not be ... punished in a cruel, inhuman or degrading way.” Various courts around the world have accepted that, if the state imposes a grossly disproportionate sentence on an offender, it will breach very similarly worded guarantees.<sup>368</sup> Given that that is so, says Ashworth, might it not be argued that imprisonment for an absolute liability offence amounts to a grossly disproportionate sentence<sup>369</sup> – and therefore, if this were to happen in Queensland, a contravention of s 17(b)? In my view, such reasoning is very persuasive. If a person has not been proved to have acted with fault, but is imprisoned even so, surely that punishment bears no relation whatsoever to the seriousness of his or her offending?

Further, s 29(2) of the *Human Rights Act 2019* (Qld) provides, relevantly, that “[a] person must not be subjected to arbitrary ... detention.” In *Re B.C. Motor Vehicle Act*, the Supreme Court of Canada held that a law that allows for the imprisonment of a person “who has not really done anything wrong”<sup>370</sup> will breach a similar guarantee in the *Canadian Charter of Rights and Freedoms* – namely, the s 7 right not to be deprived of liberty “except in accordance with the principles of fundamental justice.”<sup>371</sup> In that case, the Attorney-General of British Columbia had submitted that the term “fundamental justice” simply meant “natural

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<sup>365</sup> Note, for example, Ackermann J’s statement in the South African case of *Dodo v The State* [2001] 3 SA 382 (Constitutional Court), 404 [38] that a disproportionate sentence “tend[s] to treat the offender as a means to an end, thereby denying the offender’s humanity.”

<sup>366</sup> Christopher McCrudden, “Human Dignity and the Judicial Interpretation of Human Rights” (2008) 19 *European Journal of International Law* 655, 679.

<sup>367</sup> *Ibid.*

<sup>368</sup> See, for example, *Vinter v United Kingdom* [2013] III Eur Court HR 317, [102]; *Reyes v The Queen* [2002] 2 AC 235, 248 [30]; *Aubeeluck v Mauritius* [2010] UKPC 13, [22]; *R v Smith* [1987] 1 SCR 1045, 1072-3 (Lamer J, with whom Dickson CJ agreed), 1109 (Wilson J), 1113 (La Forest J); *R v Nur* [2015] 1 SCR 773, 798 [39].

<sup>369</sup> Ashworth, above n 21, 19.

<sup>370</sup> [1985] 2 SCR 486, 492 (Lamer J, writing for himself, Dickson CJ, Beetz, Chouinard and Le Dain JJ).

<sup>371</sup> Or, as Lamer J put it, “absolute liability and imprisonment cannot be combined”: *Ibid.*

justice.”<sup>372</sup> But Lamer J considered that such an interpretation would fail to “secure for persons “the full benefit of the *Charter*’s protection,””<sup>373</sup> and that judicial self-effacement of this sort would also ignore the fact that Parliament had chosen to provide the Courts with the power sometimes to override decisions made by the people’s elected representatives.<sup>374</sup> Instead, he held, the “principles of fundamental justice” “are to be found in the basic tenets of the legal system.”<sup>375</sup> They:<sup>376</sup>

represent principles which have long been recognised by the common law, the international conventions and by the very fact of the entrenchment of the *Charter*, as essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.

One such principle, Lamer J continued, is the requirement that the state prove that an accused possessed a guilty state of mind before it may impose punishment on him or her.<sup>377</sup> Or, to put the matter negatively, to punish without proof of such fault “offends the principles of fundamental justice.”<sup>378</sup> Where imprisonment is involved, it follows that there will be a breach of s 7. That breach will rarely be saved by s 1,<sup>379</sup> which, like s 13(1) of the *Human Rights Act 2019* (Qld), allows for such “reasonable limits” on Charter rights as “can be demonstrably justified in a free and democratic society.”

Might the Queensland courts assign the same sort of meaning to the word “arbitrary” in s 29(2) of the *Human Rights Act* as the Canadian Supreme Court did to the words “in accordance with fundamental justice” in s 7 of the *Canadian Charter*? It is conceivable that they will. To act arbitrarily is to exercise authority in an unrestrained manner, and therefore unpredictably. Accordingly, Feinberg’s description of the combination of absolute liability and imprisonment, as “arbitrary,”<sup>380</sup> was apt. Indeed, it is difficult to think of a better example of unrestrained power than the state’s punishment of the innocent. And as pointed out by those who have objected to absolute liability on rule of law grounds, this lack of restraint leads to unpredictability.<sup>381</sup> The individual citizen is given no proper opportunity to avoid

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<sup>372</sup> Ibid, 501.

<sup>373</sup> Ibid, 499.

<sup>374</sup> Ibid 497.

<sup>375</sup> Ibid 503.

<sup>376</sup> Ibid 512.

<sup>377</sup> Ibid 513-516.

<sup>378</sup> Ibid 514.

<sup>379</sup> Ibid 518.

<sup>380</sup> See text accompanying n 358.

<sup>381</sup> See text accompanying nn 359-363.

criminal liability. S/he may incur such liability even if s/he has exercised all the care that it is reasonable to expect him or her to exercise.

The arbitrariness of punishment without fault leads us to the third reason why absolute liability for sexual assault and rape might breach the *Human Rights Act 2019* (Qld). Section 32(1) of that Act provides that: “A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.” Crowe and Lee are certain that, if s 24 of *Criminal Code* were rendered inapplicable to rape and sexual assault matters, “the defendant’s right to a presumption of innocence” would not be “compromis[ed].”<sup>382</sup> In fact, such a view is controversial. It is true that Paul Roberts has argued that, on its proper construction, Article 6(2) of the ECHR – which is in very similar terms to s 32(1)<sup>383</sup> – requires merely that the Crown prove “each and every constitutive element of a criminal offence, *whatever those elements may be*.”<sup>384</sup> It is also true that, after some equivocation on this point by the Strasbourg Court,<sup>385</sup> the House of Lords<sup>386</sup> and the ECtHR<sup>387</sup> accepted that, to use Lord Hope’s words, Article 6(2) simply:<sup>388</sup>

deal[s] with the burden of proof regarding the elements of the offence and any defences to it. It is not dealing with what those elements are or what defences to the offence ought to be available.

But, while views of this nature have some support,<sup>389</sup> they have also been criticised. As Victor Tadros and Stephen Tierney have pointed out, one major problem with such a reading

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<sup>382</sup> Jonathan Crowe and Bri Lee, “Reform”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/reform>>. See also Crowe, “Consent, Power and Mistake of Fact, above n 8, 38.

<sup>383</sup> Section 6(2) provides that: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

<sup>384</sup> Paul Roberts, “The Presumption of Innocence Brought Home? *Kebilene* Deconstructed” (2002) 118 *Law Quarterly Review* 41, 48-9. [Original emphasis] See also Paul Roberts, “Drug Dealing and the Presumption of Innocence: The Human Rights Act (almost) Bites” (2002) 6 *International Journal of Evidence and Proof* 17, 22.

<sup>385</sup> See *Salabiaku v France* (1988) 13 EHRR 379, [28], where a Strasbourg Chamber stated that, if the words “according to law” in Article 6(2) meant simply “according to *domestic* law”, contracting parties would be “free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance.”

<sup>386</sup> *G* [2009] 1 AC 92, 97 [4] (Lord Hoffmann), 103 [27] (Lord Hope of Craighead), 107 [41] (Baroness Hale of Richmond), 111 [63] (Lord Mance).

<sup>387</sup> *G v United Kingdom* (European Court of Human Rights, Chamber, Application No 37334/08, 30 August 2011) [27].

<sup>388</sup> *G* [2009] 1 AC 92, 103 [27]. It will be noted that this differs from Roberts’ position. According to him, Article 6(2) merely requires the Crown to prove the elements of the offence, however it is defined; it does not touch what he describes as “affirmative defences”: Roberts, “Drug Dealing”, above n 384, 25. But as David Hamer has pointed out, the problem with Roberts’ approach is that it would “exempt a *defence* from Article 6(2) where this designation was merely an accident of drafting without moral significance”: Hamer, above n 66, 144.

<sup>389</sup> See, for example, Sullivan, above n 21, 212; Ashworth, “Four Threats” above n 356, 254-5.

of the right to be presumed innocent is that, under it, that right “fails to provide citizens with any real protection from wrongful conviction.”<sup>390</sup> This can be seen when we consider the question of reverse burdens. According to the English courts’ approach – set out above in the quotation from Lord Hope’s speech in *G* – there might be a breach of Article 6(2) if, once the Crown has proved the elements of an offence, the state requires the accused to prove a defence if he or she is to avoid liability.<sup>391</sup> If such a reverse burden is found to breach Article 6(2), however, it is open to Parliament to avoid that breach simply by removing the defence. The resulting absolute liability offence will not breach Article 6(2) – even though, in fact, it is more offensive to liberty than the arrangement that formerly existed.<sup>392</sup>

It was partly for this reason that, in *Vaillancourt v The Queen*,<sup>393</sup> the majority of the Supreme Court of Canada held that there will be a breach of the presumption of innocence in s 11(d) of the *Canadian Charter* if Parliament provides that a person may be convicted of an imprisonable offence in the absence of fault. According to Lamer J, s 11(d) requires that, “before an accused can be convicted of an offence, the trier of fact must be satisfied beyond reasonable doubt of the existence of all the essential elements of the offence.”<sup>394</sup> Those essential elements, he continued, were not just the elements for which the legislature had actually provided.<sup>395</sup> They also included those that were required by the “principles of fundamental justice” in s 7 of the Charter.<sup>396</sup> As we have seen,<sup>397</sup> if a person is imprisoned without proof of fault, such a deprivation of liberty is *not* in accordance with the “principles of fundamental justice.” It follows that the state has also breached such a person’s s 11(d) right. As Lamer J suggested, if the position were different, the state would generally breach s 11(d) by requiring an accused to prove that he or she acted without fault, but would not breach the section if it were to remove the fault requirement altogether.<sup>398</sup>

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<sup>390</sup> Victor Tadros and Stephen Tierney, “The Presumption of Innocence and the Human Rights Act” (2004) 67(3) *Modern Law Review* 402, 407.

<sup>391</sup> See, for example, *R v Lambert* [2002] 2 AC 545.

<sup>392</sup> See Andrew Paizes, “A Closer Look at the Presumption of Innocence in our Constitution: What is an Accused Presumed to be Innocent of?” (1998) 11 *South African Journal of Criminal Justice* 409, 412, 421.

<sup>393</sup> [1987] 2 SCR 636, 645-6 (Lamer J with whom Dickson CJ, Estey and Wilson JJ agreed), 661 (Beetz J), 665 (La Forest J).

<sup>394</sup> *Ibid* 654.

<sup>395</sup> *Ibid*.

<sup>396</sup> *Ibid* 655.

<sup>397</sup> See text accompanying nn 377-8.

<sup>398</sup> [1987] 2 SCR 636, 655.



Returning to s 32(1) of the *Human Rights Act (Qld) 2019*, if the Queensland Parliament were to provide for an absolute liability standard for rape and sexual assault, it might breach the “right to be presumed innocent until proved guilty according to law.” For, while on the face of it, s 32(1) merely requires the Crown to prove the elements that are required by the relevant Queensland prohibition, there is a good argument that the words “according to law” in s 32(1) should be interpreted more expansively.

The point can be made if we have regard to Article 5(1) of the ECHR, which provides that “[n]o one shall be deprived of his liberty”, save in six circumstances. One of these is the “lawful detention of a person after conviction by a competent court.”<sup>399</sup> Another is the “lawful detention of a person of unsound mind.”<sup>400</sup> The ECtHR has made it clear that, for such detention to be “lawful”, it is not enough that it is in accordance with national law.<sup>401</sup> Rather, there must also “be some relationship between the ground of permitted deprivation of liberty relied upon and the place and conditions of detention.”<sup>402</sup> So, for example, mental illness detention must be “effected in a hospital, clinic or other appropriate institution authorised for that purpose.”<sup>403</sup> And during the preventive part of a sentence of indefinite imprisonment, prisoners must be granted a “real opportunity for rehabilitation.”<sup>404</sup> Importantly, the reason for this is that, if the position were different, the individual would not “protect[ed] ... from arbitrariness.”<sup>405</sup>

Given that: (i) to act “lawfully” within the meaning of provisions such as *ECHR* Art 5 is to act other than “arbitrarily”;<sup>406</sup> (ii) it is well-established that rights must be interpreted “generous[ly]”<sup>407</sup>; and (iii) to interpret the words “according to law” in s 32(1) of the *Human Rights Act 2019 (Qld)* as meaning “according to Queensland law” would be to read that protection in a narrow and formalistic way,<sup>408</sup> it seems to me that there is a strong argument that absolute liability for serious crime does breach the right for which s 32(1) provides.

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<sup>399</sup> ECHR, Article 5(1)(a).

<sup>400</sup> ECHR, Article 5(1)(e).

<sup>401</sup> *Saadi v United Kingdom* [2008] 1 Eur Court HR 31, 61 [67].

<sup>402</sup> *Ibid* 62 [69].

<sup>403</sup> *Ashingdane v United Kingdom* (1985) 7 EHRR 528, 543 [44].

<sup>404</sup> *Brown v Parole Board for Scotland* [2018] AC 1, 11 [8]. See also *James v United Kingdom* (2013) 56 EHRR 12, [218].

<sup>405</sup> *Saadi* [2008] 1 Eur Court HR 31, 61 [67].

<sup>406</sup> *Ibid*.

<sup>407</sup> *Reyes* [2002] 2 AC 235, 246 [26]. Note, too, that this was of course the approach that Lamer J took in *Re B.C. Motor Vehicle Act* [1985] 2 SCR 486: see text accompanying nn 370-9.

<sup>408</sup> To use Lord Bingham’s language in *Reyes*, such an interpretation would involve the courts reading the *Human Rights Act* as one would “a will or a deed or a charterparty”: *Reyes* [2002] 2 AC 235, 246 [26].

Moreover, Roberts' suggestion that such an interpretation would fail to respect parliamentary sovereignty/elected representatives' right to decide upon the substantive content of criminal offences<sup>409</sup> is, to an extent – and with great respect – puzzling. The whole purpose of a human rights charter is to give the courts the power to challenge parliamentary decisions in some circumstances.<sup>410</sup>

### **C. The proposal to insert an “affirmative consent” provision into the *Criminal Code***

Alternatively, Crowe and Lee argue that the Queensland government should insert the following provision into the *Criminal Code*:

Section 24A – Mistake as to consent in certain sexual offences

In proceedings for an offence against s 349 or 352, a mistaken belief by the accused as to the existence of consent is not honest or reasonable if

- (a) the accused was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or
- (b) the accused was reckless as to whether or not the complainant consented; or
- (c) the accused did not take positive and reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to each act; or
- (d) the complainant was in a state of intoxication and did not clearly and positively express her<sup>411</sup> consent to each act; or
- (e) the complainant was unconscious or asleep when any part of the act or sequence of acts occurred.

I can deal briefly with proposed paragraphs (a), (b) and (e).

Paragraph (a) seems unobjectionable, though it might not be necessary. In other words, it seems to be aimed at ensuring that the accused who is caused by his or self-induced intoxication to believe that the complainant is consenting, is unable successfully to raise

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<sup>409</sup> Roberts, “The Presumption of Innocence Brought Home?”, above n 384, 69.

<sup>410</sup> Tadros and Tierney, above n 390, 433-4. That said, because of the “dialogue model” of rights protection for which the *Human Rights Act 2019* (Qld) provides, that particular charter arguably leaves parliamentary sovereignty intact. For, even if the courts were to declare an absolute liability standard for rape to amount to a breach of s 32(1) (which could not be saved by s 13), this would have no effect on the validity of the relevant legislation: *Human Rights Act 2019* (Qld) s 54. It would be for Parliament to decide whether to remove the incompatibility thus identified.

<sup>411</sup> Or his? After all, it has long been the case that a female or a male can be a victim of the rape and the sexual assault offences.

mistake of fact. But he or she would already probably not be able to do so. As argued above, once a jury finds that the accused held the belief to which s 24 refers because he or she was voluntarily intoxicated, it would seem very unlikely to find that such a belief might have been a reasonable one for a sober person to have held.<sup>412</sup> The QCA recognised as much in *Hopper*.<sup>413</sup>

Paragraph (b) is clearly unnecessary. There are two categories of recklessness: advertent recklessness and inadvertent recklessness. The former involves the accused who actually realises that there is a risk that the relevant circumstance (in the case of rape and sexual assault, non-consent) exists, but proceeds with the relevant conduct anyway.<sup>414</sup> The latter involves the accused who gives no thought to whether the relevant circumstance exists. If the risk of the existence of the relevant circumstance would have been obvious to him or her if s/he had turned her mind to the relevant question, s/he will have the requisite state of mind for the offence with which s/he has been charged (supposing that inadvertent recklessness is a sufficient mens rea for that offence).<sup>415</sup> Neither of these states of mind can be held by an accused who has a positive belief that the complainant was consenting. The accused who realises that the complainant might not be consenting clearly does not believe that s/he is. The accused who gives no thought whatsoever to the question of consent is obviously in the same position.<sup>416</sup> Because an accused can rely on the s 24 excuse only if s/he has a positive belief in the existence of the relevant circumstance,<sup>417</sup> it is already clear that the “reckless” accused would not be able successfully to rely upon that ground of exculpation.<sup>418</sup>

Paragraph (e) would probably cause little or no injustice in practice, though its potential to do so means that such a provision is undesirable. For example, if a drunken complainant initiates sexual activity with an accused, and is obviously an enthusiastic participant in that

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<sup>412</sup> See text accompanying nn 224-5.

<sup>413</sup> [1993] QCA 561. See text accompanying n 436.

<sup>414</sup> *R v Hemsley* (1988) 36 A Crim R 334, 336-8; *R v Mitton* (2002) 132 A Crim R 123, 129 [28]. The Tasmanian Court of Criminal Appeal made it clear in *SG v Tasmania* [2017] TASCCA 12, [8], that the word “reckless” in *Criminal Code Act 1924* (Tas), s 14A(1)(b), which is in the same terms as Crowe and Lee’s proposed s 24A(b), covers the person who “foresaw (sic: realised) that the complainant may not consent (sic: that s/he might not be consenting) and acted regardless of the risk that she did (sic: was) not.”

<sup>415</sup> *R v Tolmie* (1995) 37 NSWLR 660, 672; *Mitton* (2002) 132 A Crim R 123, 129 [28].

<sup>416</sup> See *Proudman v Dayman* (1941) 67 CLR 426, 433 (Dixon J).

<sup>417</sup> *Makary* [2018] QCA 258, [59] (Sopronoff P), [94] (Bond J); *G J Coles & Co Ltd v Goldsworthy* [1985] WAR 183, 188 (Burt J, with whom Brinsden and Smith JJ agreed); *Larsen v G J Coles and Co Ltd* (1984) 13 A Crim R 109, 111 (Connolly J, with whom Campbell CJ and Demark J agreed); *Ibrahim v R* [2014] NSWCCA 160, [56], [58], [61] (Simpson J), [86] (Hamill J).

<sup>418</sup> Cf. Crowe, “Consent, Power”, above n 8, 39.

intercourse, but then, unbeknownst to the accused, “passes out”, it would seem harsh to convict the accused of rape in respect of any intercourse that occurred between the complainant’s loss of consciousness and the time when the accused realised that this had occurred. Take, for example, the man who drinks twenty beers, initiates sexual activity with his partner in a darkened room, but then loses consciousness. If the partner continues to perform fellatio on him until s/he realises that he is asleep, has s/he acted culpably? In my view, the clear answer is “no.”<sup>419</sup>

This brings us to paragraphs (c) and (d), which I believe are aimed at ensuring that all acts of non-consensual sexual activity between adults in Queensland amount to either rape or sexual assault. In other words, proposed s 24(c) and (d) appear to be intended to ensure that, even if it is retained, s 24 in fact has no room to operate when a person is charged with one of the s 349 or s 352 offences.

Earlier this year, I published some articles in which I criticised the view that the only person who should be acquitted of rape or sexual assault is the person who has obtained an unequivocal indication from the complainant that she is consenting.<sup>420</sup> My argument was that, if this were the law, these offences would become offences of absolute liability. That argument is as follows:<sup>421</sup>

1. A person can only successfully raise honest and reasonable mistake of fact if s/he has made a reasonable mistake about whether the complainant was consenting.
2. A person can only make a reasonable mistake about whether the complainant is consenting if s/he has failed to obtain a clear indication from her/him that s/he is consenting. This is because, as soon as s/he

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<sup>419</sup> Similarly, Ashworth and Temkin point to the man or woman who initiates sexual contact with his or her regular sexual partner while s/he is asleep, in circumstances where he or she has done this many times beforehand and his sexual partner has never objected to this: Jennifer Temkin and Andrew Ashworth, “The Sexual Offences Act 2003: Rape, Sexual Assaults and the Problems of Consent” [2004] *Criminal Law Review* 328, 340-1. See also Kimberley Kessler Ferzan, “Consent, Culpability and the Law of Rape” (2016) 13(2) *Ohio State Journal of Criminal Law* 397, 405. They say that it is arguable that such a person should not be liable to be convicted of sexual assault. That said, s/he of course would already be liable to be convicted of such an offence if such events occurred in Queensland (see *Criminal Code Act 1899* (Qld), s 348(1)), and there is certainly an argument that the improbability of such prosecutions makes the law’s current approach more than justifiable.

<sup>420</sup> Andrew Dyer, “Sexual Assault Law Reform in New South Wales: Why the Lazarus Litigation Demonstrates No Need for s 61HE of the Crimes Act to be Changed (Except in One Minor Respect)” (2019) 43(2) *Criminal Law Journal* 78, 89-90; Andrew Dyer, “Mistakes that Negate Apparent Consent” (2019) 43(3) *Criminal Law Journal* 159, 159-160; Andrew Dyer, “The Mens Rea for Sexual Assault, Sexual Touching in New South Wales: Leave it Alone (Although You Might Consider Imposing an Evidential Burden on the Accused)” (2019, forthcoming) 48 *Australian Bar Review*; and Andrew Dyer, “Yes! to Communication About Consent; No! To Affirmative Consent: A Reply to Anna Kerr” (2019) 7(1) *Griffith Journal of Law and Human Dignity* 17, 25-8.

<sup>421</sup> Dyer, “The Mens Rea for Sexual Assault”, above n 420.

has obtained such a clear indication, she cannot reasonably be under any illusions as to whether the complainant is a willing participant.

3. The effect of a provision that mandates unequivocal communication about consent is that any person who *has* failed to obtain such a clear indication, has the mens rea for the relevant sexual offence (that is, lacks an honest and reasonable but mistaken belief in consent).
4. It follows that, if such a provision were in force, it would be impossible for an accused successfully to raise honest and reasonable mistake of fact.

In other words, provisions that require the accused to *ensure* that his or her partner is consenting before he or she proceeds with sexual activity, make exculpatory mistakes impossible. They are therefore an indirect way of achieving what would be achieved directly if Crowe and Lee’s primary proposal were to be accepted.

If we return to proposed s 24A(c) and (d), the second of these paragraphs seems to make acquittal impossible for any accused who has engaged in sexual activity with a non-consenting person who is intoxicated. Such an accused will only be able to rely on mistake of fact if the complainant has “clearly and positively expressed her [or his] consent to each act.” But the complainant who has done that is consenting. Therefore, all non-consensual sexual activity with an intoxicated complainant would be criminalised. The potential for injustice is obvious. For example, the person with an intellectual disability, a mental illness or Asperger’s syndrome,<sup>422</sup> or a youth,<sup>423</sup> might be caused by his or her disability or inexperience wrongly to think that, the substantially intoxicated, complainant *has* clearly indicated her or his consent to engage in sexual activity. He might therefore not have behaved in blameworthy manner. Under s 24A(d), however, he or she would be convicted of a serious offence.

Does s 24A(c) make it impossible for a person who engages in non-consensual sexual activity with a *sober* person to gain an acquittal? In Tasmania, a person will only be able to rely on mistake of fact in an indecent assault or rape case if he or she has taken “reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.”<sup>424</sup> By insisting that the “steps” taken by the

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<sup>422</sup> See *R v B(MA)* [2013] 1 Cr App R 481, 491-2 [41].

<sup>423</sup> *Aubertin* (2006) 33 WAR 87, 96 [43].

<sup>424</sup> *Criminal Code Act 1924* (Tas) s 14A(1)(c). See also the Canadian *Criminal Code* RSC 1985, c C-46, s 273.2(b), which is in much the same terms and has much the same effect.

accused should not merely have to be “reasonable”,<sup>425</sup> but also “positive”, Crowe and Lee’s intention appears to be to prevent mistake of fact from succeeding in the cases to which s 24A(c) would apply.<sup>426</sup> An obvious example of a “positive step” is a verbal request for permission to engage in sexual activity, or a gesture that is aimed at eliciting from the complainant the same information. Indeed, it occurs to me that Crowe and Lee think that these are the only “steps” that would be capable of being “positive and reasonable steps.” If that were right, it is hard to see how a person who had engaged with a sober complainant in the conduct to which ss 349 and 352 are directed could ever successfully raise the s 24 excuse. The person who asks for permission, whether verbally or by gesture, will be told either “yes” or “no.” If the latter, then any resulting sexual activity is non-consensual and, because of the complainant’s negative response, there is no possibility that the accused believed on reasonable grounds in the existence of consent. If the former, then any resulting sex will be consensual and, again, honest and reasonable mistake cannot arise as an issue.

However, if Crowe and Lee do assume that a person will only take “positive and reasonable steps” within the meaning of proposed s 24A(c) if s/he verbally or by gesture ensures that his or her sexual partner is consenting, they might be wrong to do so. In *R v Lazarus*,<sup>427</sup> the New South Wales Court of Criminal Appeal was called upon to interpret what is now s 61HE(4)(a) of the *Crimes Act 1900* (NSW). That provision states that juries must take into account any “steps” the accused has taken to ascertain whether the complainant was consenting, when those juries determine whether the accused might have believed on reasonable grounds that

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<sup>425</sup> The Canadian Supreme Court has recently considered the question of when a person will take “reasonable steps” to ascertain consent for the purposes of *Criminal Code* RSC 1985, c C-46, s 273.2(b): *Barton v The Queen* [2019] SCC 33. See also *Morrison v The Queen* [2019] SCC 19, where the Court considered a similarly-worded provision elsewhere in the *Criminal Code*. The effect of the Court’s reasoning appears to be that a person can take “reasonable steps in the circumstances known to [him] ... at the time” without gaining a clear indication that the complainant is consenting, though the accused who witnesses conduct of the complainant that he or she *knows* to be ambiguous has not taken such steps: *Barton* [2019] SCC 33, [107]. I have analysed *Barton* and *Morrison* elsewhere: Dyer, “The Mens Rea of Sexual Assault”, above n 420, 14; Dyer, “Yes! To Communication About Consent”, above n 420, 35.

<sup>426</sup> Proposed s 24A(d) provides further evidence that this is their intention. As just argued, such a provision makes it impossible for an accused who has engaged in non-consensual sexual activity with an intoxicated complainant to raise mistake of fact successfully. But what reason could there be for allowing honest and reasonable mistake of fact sometimes to operate where the complainant was sober, but never where s/he was not? It is not as though the person who has engaged in non-consensual sexual activity with an intoxicated person has *always* acted culpably: see text accompanying nn 422-3.

<sup>427</sup> (2017) 270 A Crim R 378.

the complainant was consenting. According to Bellew J (with whom Hoeben CJ at CL and Davies J agreed):<sup>428</sup>

[a] “step” for the purposes of [s 61HE(4)(a)] must involve the taking of some positive act. However, for that purpose a positive act does not have to be a physical one. A positive act, and thus a “step” for the purposes of the section, extends to include a person’s consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives.

If such reasoning were applied to proposed s 24A(c), an accused person might be able to raise the s 24 excuse successfully if he or she merely took the “positive steps” of viewing the complainant’s behaviour and forming a belief that s/he was consenting. It is true that, before the accused’s steps would be “reasonable” in such a case, he or she would also seemingly have to believe that the complainant had clearly indicated that s/he was consenting, even if s/he had not.<sup>429</sup> But that does leave some room for honest and reasonable mistake.<sup>430</sup>

Whatever the proper interpretation of s 24A(c) would be, however, it does seem that Crowe and Lee’s proposed provision is, in reality, an attempt by them to remove the s 24 excuse by stealth. Because that would be the *possible* effect of s 24A(c) and (d) (despite what I have just said), and because s 24A(d) would certainly prevent s 24 from operating in any case where the complainant was intoxicated at the time of the relevant conduct, such provisions are undesirable.

#### 4. A REFORM THAT THE QLRC SHOULD CONSIDER

Nothing that I have said above should be taken as questioning the desirability of encouraging individuals to communicate about consent to sexual activity. The argument is instead that, if the law *mandates* such communication, exculpating only the person who has obtained from the complainant an unequivocal indication of her or his willingness, a number of serious offences would suddenly become crimes of absolute liability. As I have suggested elsewhere, this would not only cause unfairness; it would also be an authoritarian solution.<sup>431</sup> The same

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<sup>428</sup> Ibid 407 [147] (Bellew J). See also 380 [1] (Hoeben CJ at CL), 381 [4] (Davies J).

<sup>429</sup> *Barton* [2019] SCC 33, [107]; see also [109]. See also n 425.

<sup>430</sup> Indeed, it would seem that, thus interpreted, s 24A(c) would operate much as the s 24 excuse does at the moment. For, as Sopronoff P noted in *Makary* [2018] QCA 258, [60] (see also [49]-[50] and [54]), if an accused is successfully to rely on honest and reasonable mistake, it must be reasonably possible that he or she mistakenly believed both that (i) the complainant was consenting and (ii) s/he represented to the accused that this was so. (It must further be reasonably possible, of course, that these beliefs were reasonable - as his Honour noted: at [60]).

<sup>431</sup> Dyer, “Yes! To Communication about Consent”, above n 420, 30-1.

is true of most laws that say “if you do X, Y will happen to you whatever were the circumstances.” Mandatory sentencing laws are a classic example of this. However much despotic regimes, or the Police Association of NSW,<sup>432</sup> might like the idea of punishing the innocent to achieve some other aim, liberal democracies should not stoop to such tactics.

How could the law encourage communication about consent – and place more emphasis than it currently does on the conduct of the accused – without turning rape and like offences into offences of absolute liability? In my opinion, this might best be achieved by inserting a provision along the lines of s 61HE(4)(a) of the *Crimes Act 1900* (NSW) into the *Criminal Code*. As just noted, s 61HE(4)(a) currently provides that, for the purpose of determining whether the accused has the requisite mens rea for the sexual assault, sexual touching and sexual act offences to which s 61HE applies:

the trier of fact must have regard to all the circumstances of the case —

(a) including any steps taken by the person to ascertain whether the alleged victim consents to the sexual activity ...

Its aim seems to be to allow the trial judge to imply to the jury that the accused’s failure to ask the complainant whether s/he was consenting – or, by gesture, to try to obtain the same information – is to count against him or her when the jury decides whether it is reasonably possible that he or she had reasonable grounds for any belief in consent.<sup>433</sup>

However, one thing must be noted. The NSWCCA’s reasoning in *Lazarus*, set out above,<sup>434</sup> seems to undermine this aim.<sup>435</sup> According to such reasoning, an accused takes a “step” within the meaning of s 61HE(4)(a) simply by observing the complainant’s behaviour and forming a positive belief that s/he is a willing participant. The problem with this is that, under such an interpretation, it would seem that a judge can suggest to a jury that, when assessing whether the accused’s belief in consent was reasonable, it must take into account in the accused’s favour the fact that, after observing the complainant’s conduct, he or she might

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<sup>432</sup> See Police Association of NSW, Submission No PC084 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in Relation to Sexual Assault Offences* (29 June 2018).

<sup>433</sup> *Crimes Act 1900* (NSW) s 61HE(3)(c) provides for this mental state.

<sup>434</sup> See text accompanying n 428.

<sup>435</sup> As I have argued elsewhere: Dyer, “Sexual Assault Law Reform in NSW”, above n 420, 97-9; Dyer “Yes! To Communication about Consent”, above n 420, 25-6.



actually have held that belief.<sup>436</sup> The judge does not have to bring the accused's failure to take more active measures to the jury's attention. It follows that no more emphasis is placed on the accused's conduct than is currently the case in a jurisdiction such as Queensland, where no provision along the lines of s 61HE(4)(a) exists.

Accordingly, consistently with what I have argued elsewhere,<sup>437</sup> if the Queensland legislature were to introduce such a provision, that provision should read:

In proceedings for an offence against s 349 or s 352, the trier of fact, when assessing whether an accused's mistaken belief as to the existence of consent was honest and reasonable, must have regard to all the circumstances of the case, including any *physical or verbal* steps taken by the accused to ascertain whether the other person consented to the relevant conduct.

Alternatively, I have no objection to the NSW Law Reform Commission's proposal, which it has just released, to alter the language in what is now s 61HE(4)(a) in a slightly different way.<sup>438</sup> The NSWLRC's words would have the same legal effect as mine. If those words were adopted in Queensland, the relevant provision would read as follows:

In proceedings for an offence against s 349 or s 352, the trier of fact, when assessing whether an accused's mistaken belief as to the existence of consent was honest and reasonable, must have regard to all the circumstances of the case, including whether the accused person said or did anything to ascertain whether the other person consented to the relevant conduct, and if so, what that person said or did.

## 5. CONCLUSION

In *Dunrobin*, Muir JA criticised the trial judge's directions about mistake of fact essentially on the basis that they conveyed that, if the jury found that the complainant was not consenting, it might have little difficulty deciding the s 24 issue adversely to the accused.<sup>439</sup>

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<sup>436</sup> Ibid 98. Other commentators have criticised this reasoning. See, for example, Gail Mason and James Monaghan, "Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus* cases" (2019) 31(1) *Current Issues in Criminal Justice* 24, 33.

<sup>437</sup> See, for example, Andrew Dyer, "Sexual Assault Law Reform in New South Wales: Why the *Lazarus* Litigation Demonstrates No Need for s 61HE of the Crimes Act to be Changed (Except in One Minor Respect)" (2019) 43(2) *Criminal Law Journal* 78, 99.

<sup>438</sup> NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (October 2019) 22 <<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Other-Publications/Draft-proposals/Draft%20proposals.pdf>>.

<sup>439</sup> *Dunrobin v R* [2008] QCA 116, [32].

“A defence (sic) under s 24 of the *Criminal Code* in a matter such as this”, his Honour said, “arises only where there is in fact no consent.”<sup>440</sup> He continued:<sup>441</sup>

The mere fact of touching and digital and penile penetration said nothing about the existence of a Section 24 defence (sic). Relevant to that defence (sic) was the appellant’s state of mind and what was said and done at relevant times which bore on the existence or non-existence of that state of mind.

As argued above, the basic flaw in Crowe and Lee’s approach is that it treats the complainant’s state of mind as being the only relevant consideration when assessing whether the accused is guilty of rape or sexual assault. The accused’s state of mind, they think, should be ignored. That is why they propose that honest and reasonable mistake be rendered inapplicable to rape and sexual assault matters. And that is why they advocate, alternatively, the insertion into the *Criminal Code* an “affirmative consent” provision that seems to be aimed at preventing – and might in fact prevent – the s 24 excuse from operating at all in cases where a person stands accused of one of a s 349 or s 352 offence.

The case law concerning the s 24 excuse to rape and/or sexual assault charges does appear to indicate that, in some cases, judges are leaving that issue with juries even though there is in truth no basis for it in the evidence. Certainly, the QCA thought that this had happened in *Makary*, at the trial over which Clare DCJ had presided.<sup>442</sup> But as the result of that trial might suggest, it is far from clear that juries are acquitting accused persons in such cases on the basis of honest and reasonable mistake. In such circumstances – but by no means *only* in such circumstances – it would be a total over-reaction for the Queensland Parliament to turn the ss 349 and 352 offences into crimes of absolute liability. The s 24 excuse is not a “loophole.”<sup>443</sup> It is an essential protection against the power of the state. Accordingly, even if the problem identified by Crowe and Lee were shown to be causing injustice for certain complainants, the solution would certainly not be to punish the innocent.

This is not to say that the law should be kept exactly as it is. The approach of Sopronoff P in *Makary*<sup>444</sup> does seem to be capable of removing the issue of mistake from juries’ consideration in some trials where the judge might otherwise leave that issue with them. It

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<sup>440</sup> Ibid.

<sup>441</sup> Ibid.

<sup>442</sup> *Makary v R* [2018] QCA 257, [85] (Sopronoff P), [165] (McMurdo JA), [178] (Bond J). As noted above, at a separate trial of the accused in *Makary*, Richards DCJ had declined to leave the s 24 issue with the jury, and he QCA found that he had been right to take this approach: *Makary* [2018] QCA 258, [71] (Sopronoff P), [91] (McMurdo JA), [94] (Bond J).

<sup>443</sup> See, for example, Gleeson, above n 340.

<sup>444</sup> [2018] QCA 258.

also seems capable of causing appellate judges not too readily to allow appeals on the basis that the s 24 excuse should have been, but was not, left with the jury. Nevertheless, this is probably not enough. Certainly, for as long as s 24 applies to rape and sexual assault, there will *necessarily* be some focus on the conduct of complainants at the time of the sexual activity. But there must also be some focus on what the accused has – and has not – done at that time. That is why I support a “steps” provision of the type mooted above.<sup>445</sup> And that is why it might be a good idea for the Queensland Parliament to provide in legislation for jury directions of the type that the NSWLRC has now proposed.<sup>446</sup> But the QLRC and the legislature should resist reactionary, unrealistic and unfair proposals that – however “progressive” their promoters consider them to be – are incompatible with human rights.

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<sup>445</sup> See text accompanying nn 437-8.

<sup>446</sup> NSW Law Reform Commission, above n 438, 25-9.