



THE UNIVERSITY OF
SYDNEY

The University of Sydney Law School

Legal Studies Research Paper Series

No. 20/02

January 2020

Progressive Punitiveness in Queensland

Andrew Dyer

This paper can be downloaded without charge from the
Social Science Research Network Electronic Library
at: <http://ssrn.com/abstract=3522252>

PROGRESSIVE PUNITIVENESS IN QUEENSLAND

Andrew Dyer*

ABSTRACT

Jonathan Crowe and Bri Lee have recently argued that the mistake of fact excuse, for which s 24 of the *Criminal Code Act 1913* (Qld) provides, should be rendered inapplicable to rape and sexual assault proceedings in that State. In this article, I argue that this proposal is objectionable because, however progressive its promoters consider it to be, it is incompatible with human rights – and would probably breach the *Human Rights Act 2019* (Qld). Moreover, the Queensland Law Reform Commission and the Queensland Parliament should reject an alternative proposal of Crowe and Lee’s, which seems to be aimed at achieving indirectly what their primary proposal would achieve directly. Even if Crowe and Lee’s research demonstrated that mistake of fact is causing injustice for rape and sexual assault complainants – and it does not – absolute liability for serious crime is indefensible.

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).¹ About two months later, it provided the QLRC with its terms of reference.² The government has asked the Commission to consider whether there is a need to reform s 348 of the *Criminal Code Act 1899* (Qld) (the *Criminal Code*),³ 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 to reform “the excuse of mistake of fact in section 24 [of the Code] as it applies”⁴ to the rape⁵ and sexual assault offences⁶ in Chapter 32. This article is concerned with this second matter. Are there difficulties with how s 24 operates in rape and sexual assault cases? If so, what reforms are necessary?

*Colin Phegan Senior Lecturer, University of Sydney Law School. Deputy Director, Sydney Institute of Criminology.

¹ 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>>.

² 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>.

³ Ibid.

⁴ Ibid.

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

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

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.⁷ 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.”⁸ 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),⁹ which, among other things, provides that an accused’s belief in the existence of consent is neither honest nor reasonable if he/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”,¹⁰ 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”¹¹ “makes it extremely difficult to secure convictions [in] ... sexual assault or rape cases”¹² 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.¹³ Because of the “serious injustices”¹⁴ produced by s 24, they continue, it should be rendered “inapplicable to the issue of consent in rape and sexual assault cases.”¹⁵ In other words, for Crowe and Lee, the offences created by ss 349 and

⁷ 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 <<https://www.theguardian.com/commentisfree/2019/jan/08/consent-is-not-a-romance-killer-the-mistake-of-fact-defence-for-needs-to-go>>.

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

⁹ *Ibid.*

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

¹¹ 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).

¹² Crowe and Lee, above n 10.

¹³ *Ibid.*

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

¹⁵ *Ibid.*

352, which are punishable by very significant prison sentences,¹⁶ should become 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/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"¹⁷ one. In *Hess v The Queen*,¹⁸ 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"¹⁹ and "conservative",²⁰ such views are patently misconceived. As many scholars have rightly observed, absolute liability for serious crime raises "acute human rights concerns."²¹ Accordingly, while Crowe and Lee assert that, in such circumstances, there is no breach of the accused's right to be presumed innocent,²² the Supreme Court of Canada has expressed a different view.²³ And even if it has been wrong so to hold,²⁴ there are substantial arguments

¹⁶ 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.

¹⁷ See, for example, Lee, above n 7.

¹⁸ [1990] 2 SCR 906, 916.

¹⁹ 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>>.

²⁰ See, for example, Lee, above n 7.

²¹ 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.

²² Crowe and Lee, above n 14. According to them, "[i]t 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."

²³ 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).

²⁴ 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

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)²⁵ and 29(2)²⁶ 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”,²⁷ 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 1100,²⁸ when people were still speaking Latin²⁹ – and when “severe sufferings were inflicted upon the offender in order to placate the outrage deity”³⁰ and in the absence of any culpability on his/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.³¹ Because it has not been adopted elsewhere in Australia, he adds, it is “highly unlikely to be implemented in Queensland.”³² Accordingly, while Crowe and Lee have made it clear that their preferred position is for s 24 not to operate at all in rape and sexual assault cases,³³ Crowe has recently stated that, in their

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].

²⁵ 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.

²⁶ 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.

²⁷ See, for example, Lee, above n 7.

²⁸ See *Hess v The Queen* [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.

²⁹ 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*.”

³⁰ *Hess v The Queen* [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, 19th ed) 7.

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

³² *Ibid* 32.

³³ Crowe and Lee, above n 14.

submission to the QLRC, he and Lee will be advocating a “more moderate and feasible”³⁴ 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 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.”³⁵

The main difficulty with this proposal is that it 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”³⁶ to ascertain whether the complainant was consenting, before he/she 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.³⁷ 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”,³⁸ 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/she should not be convicted of a serious, stigmatic offence.

³⁴ Crowe, above n 31, 32.

³⁵ Crowe and Lee, n 14. See also *ibid*.

³⁶ Crowe and Lee, n 14. See also Crowe, n 31, 32.

³⁷ I say this partly 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.

³⁸ Crowe and Lee, above n 14. See also Crowe, above n 31, 32.

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 extent³⁹ a female's genitalia, or another person's anus, he has performed the elements of the crime of rape.⁴⁰ The same is true if he penetrates to any extent, with his penis, the mouth of a non-consenting person.⁴¹ 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/her body that is not a penis, also falls within the scope of the offence created by s 349(1) of the *Criminal Code*.⁴²

This article 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.⁴³ If the Crown can prove that the accused unlawfully⁴⁴ touched a non-consenting person sexually, or caused that person to apprehend the imminent application of such force,⁴⁵ and that the accused's conduct was "contrary to the ordinary standards of morality of respectable people within the community",⁴⁶ it will have established that he/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.⁴⁷ To secure a conviction for this offence, the Crown need

³⁹ See *Criminal Code Act 1899* (Qld) s 6(1).

⁴⁰ 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.

⁴¹ *Criminal Code Act 1899* (Qld) s 349(2)(b).

⁴² *Criminal Code Act 1899* (Qld) s 349(2)(c).

⁴³ *Criminal Code Act 1899* (Qld) s 352(1)(a).

⁴⁴ See *Criminal Code Act 1899* (Qld) s 246.

⁴⁵ 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).

⁴⁶ *Harkin v R* (1989) 38 A Crim R 296, 299-301.

⁴⁷ *Criminal Code Act 1899* (Qld) s 352(1)(b).

not prove an assault. Rather, the accused will have performed the relevant conduct if he/she has induced the complainant to perform, or has caused her/him to witness, a sexually connotative act that is “unbecoming or offensive to common propriety.”⁴⁸ For example, in the well-known case of *Fairclough v Whipp*,⁴⁹ the appellant, after urinating near a canal, and with his penis exposed, asked a passing girl to “touch it.” She did so.⁵⁰ If directed at a person over the age of 16, such conduct would clearly fall within the ambit of s 352(1)(b) of the *Criminal Code*.⁵¹ So too would conduct of the type at issue in *R v Barrass*,⁵² where the appellant masturbated in public in full view of other persons.⁵³

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”⁵⁴ to participate in that activity, including because s/he lacks the cognitive capacity to do so.⁵⁵ 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/she was acting under an honest and reasonable but mistaken belief that the complainant was consenting.⁵⁶ 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.

⁴⁸ *Drago v The Queen* (1992) 8 WAR 488, 497 (Nicholson J), 500 (Wallwork J).

⁴⁹ (1951) 35 Cr App R 188, 189.

⁵⁰ *Fairclough v Whipp* (1951) 35 Cr App R 188, 189.

⁵¹ If directed at a person under that age, this conduct would fall within the scope of *Criminal Code 1899* (Qld) s 210.

⁵² [2005] NSWCCA 131, [4].

⁵³ 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.

⁵⁴ 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.”

⁵⁵ *Criminal Code Act 1899* (Qld) s 348(1).

⁵⁶ See, for example, *Brimblecombe v Duncan* [1958] Qd R 8, 12 (Philp J), 16 (Matthews J) 23 (Stanley J); *The Queen v Hopper* [1993] QCA 561.

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.”⁵⁷ They point to two cases here: *R v Mrzljak*⁵⁸ and *R v Dunrobin*.⁵⁹ 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/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/her* to hold, then, as Kirby J suggested in *Lavender v The Queen*, “no one would regard [him/her] as culpable.”⁶⁰ He/she might have fallen short of the standard to be expected of those who lack his/her disability. But because he/she was incapable of reaching that standard, “it would not be rational to impute blame to [such] a person.”⁶¹ If we were nevertheless to censure him/her, we would be punishing an innocent person,⁶² thus using him/her to achieve some other end that the State considered to be worthwhile.⁶³

Crowe and Lee appear implicitly to accept that their proposal would facilitate the punishment of blameless actors. For them, however:⁶⁴

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

⁵⁷ Jonathan Crowe and Bri Lee, “Cases: Mental Incapacity”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/mental-incapacity>>.

⁵⁸ [2005] 1 Qd R 307.

⁵⁹ [2008] QCA 116.

⁶⁰ (2005) 222 CLR 67, 108 [128].

⁶¹ *Ibid.*

⁶² See Ashworth, above n 21, 6.

⁶³ See *Hess v The Queen* [1990] 2 SCR 906, 924 (Wilson J). Presumably this desirable end 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 v The Queen* [1990] 2 SCR 906, 922-4 (Wilson J).

⁶⁴ Crowe and Lee, above n 57.

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. 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 unfitness⁶⁵

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*⁶⁶ the appellant had a “significant intellectual disability.” Even so, experienced counsel never suggested that he was unfit to plead.⁶⁷

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*,⁶⁸ 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 considered⁶⁹ that the consequent breach of the right not to be deprived of one’s liberty “except in accordance with the principles of fundamental justice”⁷⁰ was “reasonable” and “demonstrably justified in a free and democratic society.”⁷¹ Of some importance to her Ladyship’s conclusion was her contention that a truly blameless defendant

⁶⁵ *R v Mrzljak* [2005] 1 Qd R 307.

⁶⁶ [2013] WASCA 242, [130] (Buss JA); see also [7] (McLure P), [157] (Hall J).

⁶⁷ *Ibid* [106] (Buss JA).

⁶⁸ See *Hess v The Queen* [1990] 2 SCR 906, 954.

⁶⁹ *Hess v The Queen* [1990] 2 SCR 906, 956.

⁷⁰ *Canadian Charter of Rights and Freedoms*, s 7.

⁷¹ *Canadian Charter of Rights and Freedoms*, s 1.

might not even be imprisoned.⁷² 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.⁷³ And, as Hardiman J observed when delivering the judgment of the Court in *CC v Ireland*,⁷⁴ 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.⁷⁵ 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.⁷⁶ It was uncontested that, once the complainant entered the car, the accused drove her to a location where kissing and touching took place.⁷⁷ 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.⁷⁸ According to Crowe and Lee, “*the* evidence suggests that the complainant ... physically and vocally”⁷⁹ 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.”⁸⁰ 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”⁸¹ – though it seems that she was not sure exactly when she had done and said this.⁸² The complainant also said that, when the accused kissed her, she did not kiss him back.⁸³ 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.⁸⁴ He also said that she had kissed him twice after the sexual intercourse.⁸⁵ Further, on the accused’s account, the complainant never said

⁷² *Hess v The Queen* [1990] 2 SCR 906, 955.

⁷³ *Ibid* 924.

⁷⁴ [2006] 4 IR 1, 76 [34].

⁷⁵ *R v Mrzljak* [2005] 1 Qd R 307, 311 [4].

⁷⁶ *Ibid* 322 [60].

⁷⁷ *Ibid* 322 [60], 323 [63].

⁷⁸ *Ibid* 322 [60]-[61], 323 [63].

⁷⁹ Crowe and Lee, above n 57.

⁸⁰ *Ibid*.

⁸¹ *R v Mrzljak* [2005] 1 Qd R 307, 311 [3].

⁸² *Ibid* 322 [61].

⁸³ *Ibid* 311 [3].

⁸⁴ *Ibid* 312 [5], 323 [63].

⁸⁵ *Ibid* 323 [63].

“stop” or “no”; and nor did she ever push him away.⁸⁶ It is simply false, therefore, for Crowe 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 that she *had*.⁸⁷

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.⁸⁸ 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”⁸⁹ and to have voluntarily engaged in the relevant activity,⁹⁰ 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 partner had provided him with an unequivocal indication that she was an enthusiastic participant.

When discussing the well-known case of *R v Stone and Dobinson*,⁹¹ Lois Bibbings argues that the defendants did “not deserve the censure of the law”⁹² for their role in the deceased’s death and “should not be judged too harshly.”⁹³ Though their attempts to care for the deceased were “ineffectual”, they had “limited physical and intellectual abilities”— and

⁸⁶ Ibid 312 [5], 323 [63].

⁸⁷ Ibid 311 [2]; see also 323 [63].

⁸⁸ 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 415-422.

⁸⁹ *R v Mrzljak* [2005] 1 Qd R 307, 312 [5].

⁹⁰ Ibid.

⁹¹ [1977] QB 354.

⁹² 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.

⁹³ Ibid 235.

“themselves seemed to have required support in their day-to-day living.”⁹⁴ 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,⁹⁵ and that this caused him to have difficulty with interpreting other people’s behaviour – especially where that behaviour was ambiguous.⁹⁶ 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.⁹⁷ However, once the accused had pulled off the complainant’s jeans, the complainant said that she “froze”.⁹⁸ She also appears to have conceded, under cross-examination, that she stopped speaking to him at this stage,⁹⁹ though she said that she did still try to “get him off me.”¹⁰⁰ In his police interview, the appellant appears to have accepted that the complainant at first said “no” to his advances.¹⁰¹ He seems also to have said that he knew that “no” meant “no.”¹⁰² 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.”¹⁰³ 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.”¹⁰⁴ It is unclear whether even the complainant said that.¹⁰⁵ Certainly, this seems inconsistent with the accused’s out of court statement.

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

⁹⁴ Ibid.

⁹⁵ *R v Dunrobin* [2008] QCA 116, [82].

⁹⁶ Ibid [85].

⁹⁷ Ibid [4]-[5].

⁹⁸ Ibid [5], [11].

⁹⁹ Ibid [11]. She had said in her evidence-in-chief that she did continue to say “no” to him at this stage: at [5].

¹⁰⁰ Ibid [11]; see also [21].

¹⁰¹ Ibid [23].

¹⁰² Ibid.

¹⁰³ Ibid. The quoted words are those of the defence counsel at trial.

¹⁰⁴ Jonathan Crowe and Bri Lee, “Cases: The Freeze”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/the-freeze>>.

¹⁰⁵ *R v Dunrobin* [2008] QCA 116, [5], [11].

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.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ 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/her cognitive difficulties, he/she has not been proved to have had a blameworthy state of mind. It is submitted that the Courts, not just in Queensland,¹⁰⁹ 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 advances.”¹¹⁰ 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*,¹¹¹ “it is not in law necessary that [a complainant] ... should manifest her dissent” before a jury is able to find that s/he was

¹⁰⁶ 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)

¹⁰⁷ *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.

¹⁰⁸ *R v Dunrobin* [2008] QCA 116, [66] (Muir JA), [68] (Fryberg J), [94] (Lyons J).

¹⁰⁹ *Aubertin v Western Australia* (2006) 33 WAR 87, 96 [43]. Cf., however, *R v B* [2013] 1 Cr App R 481, 491-2 [41].

¹¹⁰ Crowe and Lee, above n 104.

¹¹¹ [1996] 1 Qd R 641, 646.

not consenting. But for so long as the complainant's unwillingness 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:¹¹²

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/his dissent clear to the accused, there is no evidence of mistake of fact.¹¹³ So, for example, in *R v Elomari*,¹¹⁴ 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.¹¹⁵ 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 started to cry.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸

¹¹² Ibid 646. [Emphasis added]

¹¹³ 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, in fact, 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 medical 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.

¹¹⁴ [2012] QCA 37.

¹¹⁵ His account was that the complainant was the initiator of that activity and that he was "merely a willing recipient of what occurred": *ibid* [26].

¹¹⁶ *Ibid* [15].

¹¹⁷ *Ibid* [9] (White JA), [49]-[51] (Atkinson J).

¹¹⁸ 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.

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*,¹¹⁹ 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.¹²⁰ The jury's verdict also made it clear that it accepted the complainant's evidence¹²¹ that the accused: had forced himself upon her;¹²² told her during the first act of intercourse "to keep her fucking mouth shut";¹²³ and threatened to kill her if she told anyone what had happened.¹²⁴ 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/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 s/he is a willing participant,¹²⁵ the accused must provide or point to some evidence that he/she mistakenly thought that there had been such a representation, if the s 24 issue is to be left with the jury.¹²⁶ If the complainant fails to manifest dissent, and the evidence, taken at its highest in favour of the accused, is that he/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,

¹¹⁹ [2004] QCA 411.

¹²⁰ As to which, see *Ibid* [22]-[23].

¹²¹ *Ibid* [41].

¹²² *Ibid* [13], [15], [17].

¹²³ *Ibid* [13].

¹²⁴ *Ibid* [14], [17].

¹²⁵ According to his Honour, it is not enough that the complainant is internally willing to participate in the sexual activity: *R v Makary* [2019] 2 Qd R 528, 543 [49]-[50] (Sopronoff P); see also 550 [94] (Bond J). This is because *Criminal Code 1899* (Qld) s 348(1), which makes it clear that consent must be "freely and voluntarily given" [emphasis added]: at 543 [49]-[50] (Sopronoff P), 550 [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: at 543 [50] (Sopronoff P), 550 [94] (Bond J).

¹²⁶ *R v Makary* [2019] 2 Qd R 528, 545 [60] (Sopronoff P), 550 [94] (Bond J).

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*,¹²⁷ 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”.¹²⁸ According to her, he kissed her anyway, and then started touching her breasts and sucking her nipples.¹²⁹ She said that, as he did so, she continued verbally to object to what he was doing.¹³⁰ When the accused started touching the complainant’s genital area, the complainant said that she was crying;¹³¹ 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.¹³² 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:¹³³

[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.

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.¹³⁴ 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.¹³⁵

¹²⁷ [2018] QCA 311.

¹²⁸ Ibid [17].

¹²⁹ Ibid [17]-[21].

¹³⁰ Ibid [17]-[19], [21].

¹³¹ Ibid [22].

¹³² Ibid [22]-[23].

¹³³ Crowe and Lee, above n 104.

¹³⁴ *R v Lennox* [2018] QCA 311, [40]-[43].

¹³⁵ 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”: Ibid [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.

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.¹³⁶ 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."¹³⁷ It must have thought that it was possible that, as the applicant deposed, the complainant "said no such thing."¹³⁸

Consider, finally, the facts of *Lyons v R*.¹³⁹ In that case, the complainant was a police officer who was investigating "homosexual activity carried on in or around [certain] toilet blocks."¹⁴⁰ Wearing "clothing of a type not inconsistent with what a homosexual might wear in such circumstances",¹⁴¹ he entered the relevant toilet block, washed his hands¹⁴² and "loitered there."¹⁴³ 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."¹⁴⁴ The appellant then asked the complainant "what are you here for?" The complainant responded "what are you here for?"¹⁴⁵ The complainant said "I'm here for this" and touched the complainant's groin over his shorts.¹⁴⁶ 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",¹⁴⁷ one wonders whether irrelevant considerations might have motivated their Honours. Surely, the question that the accused directed at the complainant was aimed at

¹³⁶ Cf. Crowe and Lee, above n 104. The complainant, who came from Hong Kong, did not speak English particularly well: *R v Lennox* [2018] QCA 311, [59].

¹³⁷ *R v Lennox* [2018] QCA 311, [110] (Henry J).

¹³⁸ *Ibid* (Henry J). Moreover, the majority of the QCA seems right to have found that, in those circumstances, the appellant's conviction for rape could not stand. After all, 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 *R v Lennox* [2018] QCA 311, [76] (McMurdo JA), [112] (Henry J).

¹³⁹ (1987) 24 A Crim R 298.

¹⁴⁰ *Ibid* 301.

¹⁴¹ *Ibid* 300.

¹⁴² *Ibid* 301.

¹⁴³ *Ibid* 300.

¹⁴⁴ *Ibid* 301.

¹⁴⁵ *Ibid*.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid* 300.

helping him to establish whether the complainant was consenting. Presumably, the answer that the accused received led him to form an honest belief that he *was*. When it is recalled that there were obvious dangers for gay men in such locations at that time,¹⁴⁸ 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.¹⁴⁹

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 I have argued in my submission to the QLRC's current review,¹⁵⁰ the Queensland Parliament should insert into the *Criminal Code* a provision along the lines of (though more stringent than) 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.¹⁵¹ 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*.¹⁵² Such matters are of course 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/his dissent and the accused has done nothing deliberately to intimidate her/him.¹⁵³ For, again, as soon as the accused has perpetrated or threatened violence, or as soon as the

¹⁴⁸ See, for example, *R v Howard* (1992) 29 NSWLR 242, 244.

¹⁴⁹ This is especially so when one takes account of the fact that, at that time, a person consented simply by being subjectively willing to engage in the relevant sexual activity: see *R v IA Shaw* [1996] 1 Qd R 641, 646 (Davies and McPherson JJA); cf. *R v Makary* [2019] 2 Qd R 528, 542-3 [48]-[50] and the material at n 125. Might not Mr Lyons have believed on reasonable grounds that the complainant had such an internal willingness?

¹⁵⁰ Andrew Dyer, 'Submission to the Queensland Law Reform Commission's Review of Queensland's Laws Relating to Consent and the Excuse of Mistake of Fact' (21 October 2019).

¹⁵¹ More specifically, I support a provision that requires triers of fact to "have regard to ... whether the accused person said or did anything to ascertain [whether] ... the other person consented to the sexual activity, and if so, what the person said or did" (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>>), when they assess whether he or she believed on reasonable grounds that the complainant was consenting.

¹⁵² Crowe and Lee, "Reform", above n 104.

¹⁵³ RA Duff, "Recklessness and Rape" (1981) 3(2) *Liverpool Law Review* 49, 62.

complainant does make her/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*,¹⁵⁴ 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."¹⁵⁵ The difficulty with this statement is that the trial judge did not leave honest and reasonable mistake with the jury in that case,¹⁵⁶ and the majority of the QCA upheld this decision.¹⁵⁷ With respect, the majority was right to do so. As pointed out by McMurdo P, because the evidence¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰ But such conduct had to be viewed alongside her very recent refusal to be intimate with the accused.¹⁶¹ Accordingly, 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*.¹⁶² In that case, the evidence¹⁶³ 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

¹⁵⁴ [2005] QCA 306.

¹⁵⁵ Crowe and Lee, above n 104.

¹⁵⁶ *R v Cutts* [2005] QCA 306, [30].

¹⁵⁷ *Ibid* [18]-[19] (McMurdo P), [48] (Williams JA).

¹⁵⁸ It was "the" evidence here, because the accused's account was that the sexual activity did not occur: *ibid* [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.

¹⁵⁹ *Ibid* [18].

¹⁶⁰ *Ibid* [60] (Jerrard JA).

¹⁶¹ *Ibid* [19].

¹⁶² [2009] 2 Qd R 263.

¹⁶³ Because the appellant denied that there had been any sexual activity between the complainant and him (*Ibid* 266 [10]), the only evidence relating to that sexual activity came from the complainant.

evidence was that the complainant physically resisted the accused.¹⁶⁴ The trial judge held that there was no evidence of mistake of fact.¹⁶⁵ On the third and fourth occasions, there was no evidence of physical resistance.¹⁶⁶ The trial judge left mistake of fact with the jury on the counts that related to this conduct.¹⁶⁷ Nevertheless, the rape conviction that the jury returned concerned one of the two incidents where the complainant did *not* resist.¹⁶⁸ 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.¹⁶⁹ 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 complainant, had intercourse with her again;¹⁷⁰ and (ii) a couple of weeks later, woke her up and had intercourse with her, again without encouragement, causing bleeding.¹⁷¹

Similar comments can be made about the final two cases that Crowe and Lee deal with: *R v Motlop*¹⁷² and *R v Rope*.¹⁷³ In *Motlop*, the accused subjected the complainant to some appalling domestic violence and then asked her for sex.¹⁷⁴ She asked him why he wanted to do that, and she made it clear that she was in pain.¹⁷⁵ He then told her to be quiet and had intercourse with her.¹⁷⁶ He was convicted of rape in relation to this incident.¹⁷⁷ The

¹⁶⁴ Ibid [3]-[4].

¹⁶⁵ Ibid [29].

¹⁶⁶ Ibid [5]-[6].

¹⁶⁷ Ibid [29].

¹⁶⁸ Ibid.

¹⁶⁹ 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: *ibid* [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.

¹⁷⁰ Ibid [5].

¹⁷¹ Ibid [6].

¹⁷² [2013] QCA 301.

¹⁷³ [2010] QCA 194.

¹⁷⁴ *R v Motlop* [2013] QCA 301, [10]-[17].

¹⁷⁵ Ibid [17].

¹⁷⁶ Ibid.

¹⁷⁷ 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.

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?"¹⁷⁸ But she also agreed that she said to the appellant "I love you and I want you for life."¹⁷⁹ She said that the accused then had sexual intercourse with her once more.¹⁸⁰ The accused denied that this second act of sexual intercourse occurred.¹⁸¹ The jury acquitted him of rape in relation to this alleged incident.¹⁸² 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.¹⁸³ 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.¹⁸⁴ 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.

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."¹⁸⁵ 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.¹⁸⁶ He then removed her trousers and underwear.¹⁸⁷ As he did so, she said nothing, and did not struggle.¹⁸⁸ He then inserted his fingers roughly into her vagina.¹⁸⁹ The complainant claimed that, as he did this, he made abusive remarks about his wife and said "you want it, you little whore."¹⁹⁰ She then said she was going to the toilet, left the room and did not return.¹⁹¹ The accused's account, on the other hand, was that he kissed the complainant and she kissed him back.¹⁹² After "playing with each other a bit", he said, he took off his pants and the complainant sucked his penis.¹⁹³

¹⁷⁸ Ibid [18].

¹⁷⁹ Ibid [25]; see also [18].

¹⁸⁰ Ibid [18].

¹⁸¹ Ibid [29].

¹⁸² Ibid [32].

¹⁸³ Ibid [49].

¹⁸⁴ Ibid [29].

¹⁸⁵ *R v Rope* [2010] QCA 194, [14].

¹⁸⁶ Ibid [14]-[15].

¹⁸⁷ Ibid [15].

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid [20].

¹⁹³ Ibid.

He was “fingering” her at this stage.¹⁹⁴ However, the complainant then said “I can’t do this to your wife” and left the room.¹⁹⁵

In these circumstances, it is easy to see why the resulting trial was all about consent.¹⁹⁶ 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”¹⁹⁷ 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”,¹⁹⁸ 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”¹⁹⁹ for honest and reasonable mistake. As 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.²⁰⁰ But, more importantly, the QCA’s recent decision in *R v Makary*²⁰¹ seems to

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid [21], where it is noted that the defence did not request a direction about mistake of fact.

¹⁹⁷ Ibid [42].

¹⁹⁸ Ibid [14].

¹⁹⁹ Ibid [44].

²⁰⁰ 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 183. 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 n 169) and on another count because it thought it possible that the conduct had not occurred. Concerning this latter count, see *R v 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).

²⁰¹ [2019] 2 Qd R 528.

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*²⁰² that the s 24 rule is one of “common sense as much as ... of law”, before contending:²⁰³

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.

Secondly, Sopronoff P cited with approval Moffit J’s remarks in *R v Taylor*,²⁰⁴ to the effect that:²⁰⁵

[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.²⁰⁶

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.²⁰⁷ 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.²⁰⁸ At trial, counsel for the accused contended that consensual intercourse had taken place.²⁰⁹ Alternatively, the defence contended that, if the complainant was not consenting to the sexual intercourse, there

²⁰² [1902] St R Qd 207, 217.

²⁰³ [2019] 2 Qd R 528, 544 [56]. [Emphasis added]

²⁰⁴ [1967] 2 NSW 278, 282.

²⁰⁵ *R v Makary* [2019] 2 Qd R 528, 545 [61].

²⁰⁶ *Ibid* 545 [59].

²⁰⁷ *Ibid* 532 [1].

²⁰⁸ *Ibid* 537 [24]-[25].

²⁰⁹ *Ibid* 537 [26].

was evidence from which it could be inferred that the appellant had an honest and reasonable but mistaken belief that the complainant was consenting.²¹⁰ 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.²¹¹ 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,²¹² none of this provided any foundation for honest and reasonable mistake.²¹³

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 convicted²¹⁴ despite the fact that the judge had directed the jury about the s 24 issue.²¹⁵ Nevertheless, where, as in cases such as *Makary*, *Rope*, *Motlop* and *Phillips*, it is “entirely speculative”²¹⁶ 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/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”;²¹⁷ rather, it arises from judicial conjecture.²¹⁸

²¹⁰ Ibid 537-8 [28].

²¹¹ Ibid 538 [28].

²¹² Ibid 546 [66].

²¹³ Ibid 547 [71]. Judge Richards had therefore been right not to leave this excuse with the jury.

²¹⁴ *R v Makary* (2018) 274 A Crim R 392, 405 [78].

²¹⁵ Ibid 408 [90]. See also, for example, *R v Lu* [2018] QCA 193.

²¹⁶ Ibid 407 [89].

²¹⁷ See *Lane v The Queen* (2013) 241 A Crim R 321, 348 [109].

²¹⁸ 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).

(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.”²¹⁹ This is true. When assessing whether an accused might honestly have believed in consent, all of his/her subjective characteristics are relevant.²²⁰ 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 s/he in fact did believe, simply because his/her belief was caused by his/her intoxication. It is not just in rape cases that the Courts have accepted such logic. For example, under s 418(2) of the *Crimes Act 1900* (NSW), a person acts in lawful self-defence if, among other requirements, the accused believes that his/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).”²²¹

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,²²² the accused’s self-induced intoxication is not taken into account when assessing whether he/she might have had reasonable grounds for his/her belief.²²³ Are there really jurors who will find that, while the accused’s intoxication was the only reason why he/she 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:²²⁴

²¹⁹ Crowe and Lee, “Cases: Intoxication”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/intoxication>>

²²⁰ *The Queen v Hopper* [1993] QCA 561.

²²¹ *Doran v Director of Public Prosecutions* [2019] NSWSC 1191, [46] (Simpson AJA).

²²² 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* 34, 34.

²²³ *The Queen v 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).

²²⁴ 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 fact” defence (sic) allowing defendants to use their own drunkenness to secure acquittals.” Lee provides no evidence to support this assertion.

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 acquitted. The QCA instead ordered a new trial.²²⁵ Furthermore, it did not do so because of any finding that the 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.”²²⁶ 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”,²²⁷ 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.²²⁸ 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.²²⁹ 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.”²³⁰ 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.

²²⁵ *R v Soloman* [2006] QCA 244, [39] (Jerrard JA), [40] (White J), [41] (Phillippides J).

²²⁶ *Ibid* [11], [32].

²²⁷ *Ibid* [34].

²²⁸ *Ibid* [34]-[35].

²²⁹ See text accompanying nn 216-8. It can be noted in this regard that the trial judge said that mistake of fact was “*technically open*”: *ibid* [30]. [Emphasis added]

²³⁰ Crowe and Lee, above n 219.

Similar remarks can be made about *The Queen v Hopper*.²³¹ 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."²³² 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 the complainant's one in that respect.²³³ And the Court made 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."²³⁴ It upheld the appellant's convictions.²³⁵

In *Hopper*, the QCA observed that, realistically, the mistake issue "admitted of only one answer."²³⁶ 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*²³⁷ and *R v Cook*.²³⁸ In both cases, the complainant's evidence was that she woke to find the accused having penile-vaginal intercourse with her.²³⁹ In both, the accused denied that sexual intercourse occurred at all.²⁴⁰ 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."²⁴¹ The judge thought that the evidence of honest and reasonable mistake was "pretty tenuous."²⁴² Her Honour only left this issue with the jury "out of caution."²⁴³ Accordingly, this seems just the sort of case to which Sopronoff P was

²³¹ *The Queen v Hopper* [1993] QCA 561.

²³² Crowe and Lee, above n 219.

²³³ *The Queen v Hopper* [1993] QCA 561.

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ [2017] 1 Qd R 297.

²³⁸ [2012] QCA 251.

²³⁹ *R v Duckworth* [2017] 1 Qd R 297, 313 [42]; *R v Cook* [2012] QCA 251.

²⁴⁰ *R v Duckworth* [2017] 1 Qd R 297, 317 [59]; *R v Cook* [2012] QCA 251.

²⁴¹ *R v Duckworth* [2017] 1 Qd R 297, 319 [68].

²⁴² *Ibid* 319-320 [68] (Bond J); see also 309 [22] (Philippides JA).

²⁴³ *Ibid.*

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.²⁴⁴

The same comments seem applicable also to *Cook*. In that case, McMurdo P said:²⁴⁵

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 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.²⁴⁶ 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."²⁴⁷ 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".²⁴⁸ 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.²⁴⁹ 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",²⁵⁰ 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"²⁵¹ for the s 24 excuse. I have already sufficiently dealt with one of these, *R v Elomari*.²⁵² By majority, the QCA held that the trial judge had been right not to

²⁴⁴ 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.

²⁴⁵ *R v Cook* [2012] QCA 251.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid* (McMurdo P).

²⁵¹ Crowe and Lee, above n 219.

²⁵² *R v Cook* [2012] QCA 251.

direct the jury about mistake of fact. As noted above,²⁵³ 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 to the appellant because she was heavily affected by marijuana"²⁵⁴ 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*²⁵⁵ and *R v Cannell*,²⁵⁶ 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.²⁵⁷ One of those reasons was that she had convictions for offences of dishonesty.²⁵⁸ Another was that her sworn evidence differed markedly from her previous accounts of the relevant events.²⁵⁹ The trial judge was obviously correct so to direct the jury.

In *Cannell*, the complainant's evidence was that she could not remember leaving the tavern where she had been drinking immediately before the incident.²⁶⁰ This was presumably because she had a blood alcohol concentration of between 0.202 and 0.442 at that time.²⁶¹ 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.²⁶² As he did so, the complainant testified, he whispered in her ear that he was going to shoot her.²⁶³ On the

²⁵³ See text accompanying nn 114-118.

²⁵⁴ *R v Elomari* [2012] QCA 27, [5].

²⁵⁵ [2004] 2 Qd R 672.

²⁵⁶ [2009] QCA 94.

²⁵⁷ *R v Awang* [2004] 2 Qd R 672, 676-7 [15].

²⁵⁸ *Ibid* 676 [15].

²⁵⁹ *Ibid* 676-7 [15].

²⁶⁰ *R v Cannell* [2009] QCA 94, [3].

²⁶¹ *Ibid* [21].

²⁶² *Ibid* [3].

²⁶³ *Ibid*.

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.²⁶⁴

Crowe and Lee are clearly wrong to state that.²⁶⁵

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.²⁶⁶ Rather, as McMurdo P explained, the jury "may have been troubled about the complainant's cognitive capacity to consent[,] because of her intoxication."²⁶⁷ In other words, the jury might have been asking: if it was possible that the accused was telling the 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."²⁶⁸

In the final two cases on which Crowe and Lee rely – *R v SAX*²⁶⁹ and *R v CU*²⁷⁰ – 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.²⁷¹ 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."²⁷² According to the appellant, however, the complainant made sexual advances to him before and after she got

²⁶⁴ Ibid [3], [7].

²⁶⁵ Crowe and Lee, above n 219.

²⁶⁶ Accordingly, the jury's request concerned the question of consent, not the s 24 issue – and so did the judge's response to that request: *R v Cannell* [2009] QCA 94, [47].

²⁶⁷ Ibid [52].

²⁶⁸ Ibid [53].

²⁶⁹ [2006] QCA 397.

²⁷⁰ [2004] QCA 363.

²⁷¹ *R v SAX* [2006] QCA 397, [10].

²⁷² Ibid [11].

into his car and, once at his house, invited him to have a shower with her.²⁷³ They then had sexual intercourse, he said.²⁷⁴ Two witnesses gave evidence that they saw the complainant walk up the front stairs of the appellant's house.²⁷⁵ 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.²⁷⁶ 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.²⁷⁷ 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 reasonably have believed that she had capacity and *was* consenting.²⁷⁸

Contrary to what Crowe and Lee argue, *SAX* does not establish that:²⁷⁹

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.*"²⁸⁰ 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 her/him, 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

²⁷³ Ibid [12].

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ Ibid [16].

²⁷⁷ Ibid [20] (Keane JA), [30] (Jones JA).

²⁷⁸ Ibid [1] (Jerrard JA), [21] (Keane JA), [30] (Jones JA).

²⁷⁹ Crowe and Lee, above n 219.

²⁸⁰ *R v SAX* [2006] QCA 397, [1] (Jerrard JA). [Emphasis added]

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*²⁸¹ – 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.²⁸² 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.²⁸³ The accused’s claim, in a “pretext telephone call” with the complainant later on, that he had “misread [her] ... body language”,²⁸⁴ might have formed the basis for his claim of honest and reasonable mistake. 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 to be incapable 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.²⁸⁵ His Honour noted that the jury had asked the trial judge following question:²⁸⁶

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?

²⁸¹ See text accompanying nn 162-199 and 236-250.

²⁸² *R v CU* [2004] QCA 363.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ Crowe and Lee, above n 219.

²⁸⁶ *R v CU* [2004] QCA 363.

While Jerrard JA said that he could “understand what the jury were (sic) asking” (and said that the answer to its question was “yes”),²⁸⁷ I am not confident that I do. Crowe and Lee, however, express no such diffidence. Their comment is that:²⁸⁸

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/she might have an honest and reasonable belief that the complainant had cognitive capacity and was consenting.²⁸⁹ 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:²⁹⁰

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

²⁸⁷ Ibid.

²⁸⁸ Crowe and Lee, above n 219.

²⁸⁹ That said, it is unclear whether the accused in *CU* alleged that the complainant had been responsive.

²⁹⁰ Jonathan Crowe and Bri Lee, “Cases: Language Barriers”, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/language-barriers>>.

“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*²⁹¹ and *R v Kovacs*,²⁹² 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*,²⁹³ 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.²⁹⁴ 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, though she in fact repeatedly said “I don’t want to do that”,²⁹⁵ she had not made her dissent clear. It arose because of the accused’s evidence that she had at no stage uttered these words²⁹⁶ and had seemed to him to be responsive to his advances.²⁹⁷ 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.²⁹⁸ 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.²⁹⁹ 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.³⁰⁰

According to the complainant, the accused raped her again the following morning after she had tried to pull away.³⁰¹

²⁹¹ [2018] QCA 311.

²⁹² [2007] QCA 143.

²⁹³ [2005] 1 Qd R 307.

²⁹⁴ See text accompanying nn 127-138.

²⁹⁵ See *R v Lennox* [2018] QCA 311, [17]-[19].

²⁹⁶ *Ibid* [43].

²⁹⁷ *Ibid* [42]-[43].

²⁹⁸ *R v Kovacs* [2007] QCA 143, [3].

²⁹⁹ *Ibid*.

³⁰⁰ *Ibid*.

³⁰¹ *Ibid*.

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."³⁰² In other words, the accused never claimed that that "any language difficulty" contributed to the mistake that he said he made.³⁰³ Accordingly, this was not an issue at trial,³⁰⁴ 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.³⁰⁵ 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.³⁰⁶ 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 speak fluent English."³⁰⁷ But that is clearly wrong. If a person agrees to have sexual intercourse with another person for payment,³⁰⁸ 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'"³⁰⁹ 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.³¹⁰

This brings us back to *Mrzljak*. In that case, the evidence was that, as well as having an IQ of 56,³¹¹ the accused knew very little English.³¹² According to Holmes J, with whom Williams JA agreed,³¹³ this evidence:³¹⁴

³⁰² Ibid [47].

³⁰³ Ibid [19] (Holmes CJ and McMurdo P).

³⁰⁴ Ibid (Holmes CJ and McMurdo P).

³⁰⁵ Ibid [19] (Holmes CJ and McMurdo P), [47] (Jones J).

³⁰⁶ Ibid [6]-[7].

³⁰⁷ Crowe and Lee, above n 290.

³⁰⁸ *R v Kovacs* [2007] QCA 143, [7].

³⁰⁹ Crowe and Lee, above n 290.

³¹⁰ *R v Kovacs* [2007] QCA 143, [1].

³¹¹ *R v Mrzljak* [2005] 1 Qd R 307, 325 [71].

³¹² Ibid 323 [62].

³¹³ Ibid 321 [53].

³¹⁴ Ibid 330 [92].

of intellectual impairment was ... relevant to possible excuse from criminal responsibility under s 24, as 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/his non-consent.³¹⁵ It is also true that where, as in *Mrzljak*, the complainant has an intellectual disability,³¹⁶ the room for misinterpretation might increase still further.³¹⁷ But, as argued above,³¹⁸ 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/her* – taking into account those characteristics of his/hers that are capable of affecting his/her perceptions – has not behaved culpably. Nor is it correct to suggest, as Crowe and Lee do, that, “typically”, the law treats the accused's personal characteristics as being relevant only to whether he or she honestly believed X, and not to reasonableness.³¹⁹ For example, in *R v Julian*,³²⁰ 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.³²¹ It is instead whether it was reasonable *for the accused* to think what he or she did.³²² Similarly, in *R v Conlon*,³²³ 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 s/he might have had reasonable grounds for his/her belief that it was necessary in self-defence to act as s/he did. And in *Director of Public Prosecutions (Vic) v Parker*,³²⁴ the Victorian Court of Appeal rejected a Crown argument that

³¹⁵ Crowe and Lee, above n 290.

³¹⁶ *R v Mrzljak* [2005] 1 Qd R 307, 322 [58].

³¹⁷ Crowe and Lee, above n 290.

³¹⁸ See text accompanying nn 60-63.

³¹⁹ Crowe and Lee, above n 290.

³²⁰ (1998) 100 A Crim R 430.

³²¹ *Ibid* 438-9 (Thomas J), 448 (Dowsett J).

³²² *Ibid* 434 (Pincus JA), 438-9 (Thomas J), 448 (Dowsett J).

³²³ *R v Conlon* (1993) 69 A Crim R 92, 99.

³²⁴ (2016) 258 A Crim R 527, 541-2 [43]-[44].

the “reasonable belief” test for duress under the former s 9AG(2) of the *Crimes Act 1958* (Vic) was a wholly objective one. Rather, their Honours found, it required the jury to consider what the accused might reasonably have believed “in the circumstances in which [he/she] ... found himself or herself having regard to the personal characteristics of the accused.”³²⁵

3. CROWE AND LEE’S REFORM SUGGESTIONS

A. Introductory remarks

Crowe has recently argued that “the evidence is in,”³²⁶ and that that evidence demonstrates that reform of “the mistake of fact excuse for rape” is “badly needed.”³²⁷ 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 than anyone else in Australia (and quite possibly the world).”³²⁸ 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”³²⁹ 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

³²⁵ *Director of Public Prosecutions (Vic) v Parker* (2016) 258 A Crim R 527, 544 [58].

³²⁶ Crowe, above n 31, 32.

³²⁷ *Ibid.*

³²⁸ *Ibid.*

³²⁹ *R v Duckworth* [2017] 1 Qd R 297, 309 [22] (Philippides JA).

that judges will continue sometimes to leave honest and reasonable mistake with juries in cases where, in truth, the basis for it is questionable.

If this does happen, there is a risk of juries granting undeserved 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.”³³⁰ 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. 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.³³¹

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”,³³² or for Lee’s assertion that a rape or sexual assault accused should be unable to rely on mistake of fact³³³

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/she should nonetheless be convicted because of the injury that he/she has caused the complainant to

³³⁰ Virginia Bell, “Jury Directions: The Struggle for Simplicity and Clarity” (Banco Court Lecture, Supreme Court of Queensland, 20 September 2018) 16.

³³¹ See n 200.

³³² Crowe, above n 7.

³³³ 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>>.

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:³³⁴

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.

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.³³⁵ 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,³³⁶ 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

³³⁴ Simon Bronitt and Patricia Easteal, *Rape Law in Context: Contesting the Scales of Injustice* (The Federation Press, 2018) 8.

³³⁵ 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].

³³⁶ In this respect, see *Human Rights Act 2019* (Qld), which has not yet entered into force.

to life, which is protected by Article 2 of the *European Convention*.³³⁷ 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 3.³³⁸ 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.³³⁹ 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 it to breach the Convention rights of convicted offenders or criminal suspects.³⁴⁰

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.”³⁴¹ In many jurisdictions, murder is, or is to an extent,³⁴² 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*.³⁴³ It would therefore be foolish to suggest that the “objective culpability”³⁴⁴ 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.³⁴⁵

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*

³³⁷ *Osman v United Kingdom* (2000) 29 EHRR 245, [115].

³³⁸ See, for example, *Jendrowiak v Germany* (2015) 61 EHRR 32, [37].

³³⁹ *Ibid* [37].

³⁴⁰ *Ibid*.

³⁴¹ *Osman v United Kingdom* (2000) 29 EHRR 245, [115].

³⁴² See *Criminal Code Act* (Qld) s 302; *Crimes Act 1900* (NSW) s 18(1)(a).

³⁴³ *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.

³⁴⁴ *Tabbah v The Queen* [2017] NSWCCA 55, [139]. Sexual assault and rape are crimes of objective fault, because a person who *unintentionally* (though negligently) 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.

³⁴⁵ As to which, see *Human Rights Act 2019* (Qld), s 17(b).

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.³⁴⁶ For him, absolute – or what the English courts and commentators call “strict”³⁴⁷ – liability should be removed from all offences for which the maximum sentence is a term of imprisonment. This is because, to use his words:³⁴⁸

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/she has not been proved to have been at all culpable.³⁴⁹ The Crown has not proved that s/he has chosen to cause the harm that s/he has caused, or even that s/he ought to have realised that s/he would cause it. Yet the state has “imposed public condemnation”³⁵⁰ on him/her and subjected him/her to hard treatment even so. Quoting Joel Feinberg, Ashworth says that this is “arbitrary and cruel.”³⁵¹

Such arbitrariness perhaps comes into even sharper focus when we consider a second argument against absolute liability for imprisonable offences. Ashworth calls this the “rule of law argument,”³⁵² 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.³⁵³ 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.³⁵⁴ When the state creates criminal

³⁴⁶ Ashworth, above n 21.

³⁴⁷ See, for example, *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428, 469 (Lord Steyn).

³⁴⁸ Ashworth, above n 21, 21.

³⁴⁹ *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.

³⁵⁰ Ashworth, above n 21, 6.

³⁵¹ *Ibid*, quoting Joel Feinberg, *Doing and Deserving* (Princeton University Press, 1970) 111.

³⁵² *Ibid* 5.

³⁵³ HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2nd ed, 2008) ch 6, 152.

³⁵⁴ Ashworth, above n 21, 5.

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.”³⁵⁵ 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.³⁵⁶

Like Ashworth,³⁵⁷ 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 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,³⁵⁸ when we do this we fail to acknowledge the “intrinsic worth”³⁵⁹ of such persons. Whatever controversy exists over precisely what human dignity entails, there is wide agreement that, in these circumstances, human dignity is breached.³⁶⁰

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.³⁶¹ Given that that is so, says Ashworth, might it not be argued that imprisonment for an absolute liability offence amounts to a grossly disproportionate sentence³⁶² – and therefore, if this were to happen in Queensland, a contravention of s 17(b)?

³⁵⁵ Ibid.

³⁵⁶ Ibid.

³⁵⁷ Ibid 15.

³⁵⁸ 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.”

³⁵⁹ Christopher McCrudden, “Human Dignity and the Judicial Interpretation of Human Rights” (2008) 19 *European Journal of International Law* 655, 679.

³⁶⁰ Ibid 679.

³⁶¹ 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].

³⁶² Ashworth, above n 21, 19.

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/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 BC 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”³⁶³ 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.”³⁶⁴ In that case, the Attorney-General of British Columbia had submitted that the term “fundamental justice” simply meant “natural justice.”³⁶⁵ But Lamer J considered that such an interpretation would fail to “secure for persons “the full benefit of the *Charter*’s protection,””³⁶⁶ 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.³⁶⁷ Instead, he held, the “principles of fundamental justice” “are to be found in the basic tenets of the legal system.”³⁶⁸ They:³⁶⁹

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/her.³⁷⁰ Or, to put the matter negatively, to punish without proof of such fault “offends the principles of fundamental justice.”³⁷¹ Where imprisonment is involved, it follows that there will be a breach of s 7. That breach will rarely be saved by s 1,³⁷² which, like s 13(1) of the *Human*

³⁶³ [1985] 2 SCR 486, 492 (Lamer J, writing for himself, Dickson CJ, Beetz, Chouinard and Le Dain JJ).

³⁶⁴ Or, as Lamer J put it, “absolute liability and imprisonment cannot be combined”: *ibid* 492.

³⁶⁵ *Ibid* 501.

³⁶⁶ *Ibid* 499.

³⁶⁷ *Ibid* 497.

³⁶⁸ *Ibid* 503.

³⁶⁹ *Ibid* 512.

³⁷⁰ *Ibid* 513-516.

³⁷¹ *Ibid* 514.

³⁷² *Ibid* 518.

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.³⁷³ Accordingly, Feinberg’s description of the combination of absolute liability and imprisonment, as “arbitrary,”³⁷⁴ 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.³⁷⁵ The individual citizen is given no proper opportunity to avoid criminal liability. S/he may incur such liability even if s/he has exercised all the care that it is reasonable to expect him/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].”³⁷⁶ 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)³⁷⁷ – requires merely that the Crown prove “each and every constitutive element of a criminal offence, *whatever those elements may be.*”³⁷⁸ It is also true that, after some equivocation on

³⁷³ See Oxford English Dictionary (online) <<https://www.lexico.com/en/definition/arbitrary>>.

³⁷⁴ See text accompanying n 351.

³⁷⁵ See text accompanying nn 352-6.

³⁷⁶ Crowe and Lee, above n 14. See also Crowe, “Consent, Power and Mistake of Fact, above n 8, 38.

³⁷⁷ Section 6(2) provides that: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

³⁷⁸ 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.

this point by the Strasbourg Court,³⁷⁹ the House of Lords³⁸⁰ and the ECtHR³⁸¹ have accepted that, to use Lord Hope's words, Article 6(2) simply:³⁸²

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,³⁸³ they have also been criticised. As Victor Tadros and Stephen Tierney have pointed out, one major problem with such a reading of the right to be presumed innocent is that, under it, that right “fails to provide citizens with any real protection from wrongful conviction.”³⁸⁴ 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/she is to avoid liability.³⁸⁵ 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.³⁸⁶

It was partly for this reason that, in *Vaillancourt v The Queen*,³⁸⁷ 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,

³⁷⁹ 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.”

³⁸⁰ *R v 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).

³⁸¹ *G v United Kingdom* (European Court of Human Rights, Chamber, Application No 37334/08, 30 August 2011) [27].

³⁸² *R v 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 378, 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 63, 144.

³⁸³ See, for example, Sullivan, above n 21, 212; Ashworth, “Four Threats”, above n 349, 254-5.

³⁸⁴ Victor Tadros and Stephen Tierney, “The Presumption of Innocence and the Human Rights Act” (2004) 67(3) *Modern Law Review* 402, 407.

³⁸⁵ See, for example, *R v Lambert* [2002] 2 AC 545.

³⁸⁶ 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.

³⁸⁷ [1987] 2 SCR 636, 645-6 (Lamer J with whom Dickson CJ, Estey and Wilson JJ agreed), 661 (Betz J), 665 (La Forest J).

“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.”³⁸⁸ Those essential elements, he continued, were not just the elements for which the legislature had actually provided.³⁸⁹ They also included those that were required by the “principles of fundamental justice” in s 7 of the Charter.³⁹⁰ As we have seen,³⁹¹ 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/she acted without fault, but would not breach the section if it were to remove the fault requirement altogether.³⁹²

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.”³⁹³ Another is the “lawful detention of a person of unsound mind.”³⁹⁴ 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.³⁹⁵ Rather, there must also “be some relationship between the ground of permitted deprivation of liberty relied upon and the place and conditions of detention.”³⁹⁶ So, for example, mental illness detention must be “effected in a hospital, clinic or other appropriate institution authorised for that purpose.”³⁹⁷ And during the preventive part of a sentence of indefinite

³⁸⁸ *Vaillancourt v The Queen* [1987] 2 SCR 636, 654.

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid* 655.

³⁹¹ See text accompanying nn 370-371.

³⁹² *Vaillancourt v The Queen* [1987] 2 SCR 636, 655.

³⁹³ ECHR, Article 5(1)(a).

³⁹⁴ ECHR, Article 5(1)(e).

³⁹⁵ *Saadi v United Kingdom* [2008] 1 Eur Court HR 31, 61 [67].

³⁹⁶ *Ibid* 62 [69].

³⁹⁷ *Ashingdane v United Kingdom* (1985) 7 EHRR 528, 543 [44].

imprisonment, prisoners must be granted a “real opportunity for rehabilitation.”³⁹⁸ Importantly, the reason for this is that, if the position were different, the individual would not “protect[ed] ... from arbitrariness.”³⁹⁹

Given that: (i) to act “lawfully” within the meaning of provisions such as *ECHR* Art 5 is to act other than “arbitrarily”;⁴⁰⁰ (ii) it is well-established that rights must be interpreted “generous[ly]”⁴⁰¹; 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,⁴⁰² it seems that there is a strong argument that absolute liability for serious crime does breach the right for which s 32(1) provides. Moreover, Roberts’ suggestion that such an interpretation would fail to respect parliamentary sovereignty/elected representatives’ right to decide upon the substantive content of criminal offences⁴⁰³ 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.⁴⁰⁴

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

³⁹⁸ *Brown v Parole Board for Scotland* [2018] AC 1, 11 [8]. See also *James v United Kingdom* (2013) 56 EHRR 12, [218].

³⁹⁹ *Saadi v United Kingdom* [2008] 1 Eur Court HR 31, 61 [67].

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Reyes v The Queen* [2002] 2 AC 235, 246 [26]. Note, too, that this was of course the approach that Lamer J took in *Re BC Motor Vehicle Act* [1985] 2 SCR 486: see text accompanying nn 363-372.

⁴⁰² 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 v The Queen* [2002] 2 AC 235, 246 [26].

⁴⁰³ Roberts, “The Presumption of Innocence Brought Home?”, above n 378, 69.

⁴⁰⁴ Tadros and Tierney, above n 384, 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.

- (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 her⁴⁰⁵ 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/her self-induced intoxication to believe that the complainant is consenting, is unable successfully to raise mistake of fact. But he/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/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.⁴⁰⁶ The QCA recognised as much in *Hopper*.⁴⁰⁷

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 to act anyway.⁴⁰⁸ The latter involves the accused who gives no thought to whether the relevant circumstance exists. If the risk of its existence would have been obvious to him/her if he/she had turned her mind to the relevant question, he/she will have the requisite mental state for the offence with which he/she has been charged

⁴⁰⁵ 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.

⁴⁰⁶ See text accompanying nn 222-223.

⁴⁰⁷ [1993] QCA 561. See text accompanying n 234.

⁴⁰⁸ *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.”

(supposing that inadvertent recklessness is a sufficient mens rea for that offence).⁴⁰⁹ 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.⁴¹⁰ Because an accused can rely on the s 24 excuse only if he/she has a positive belief in the existence of the relevant circumstance,⁴¹¹ it is already clear that the “reckless” accused would not be able successfully to rely upon that ground of exculpation.⁴¹²

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 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.”⁴¹³

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

⁴⁰⁹ *R v Tolmie* (1995) 37 NSWLR 660, 672; *R v Mitton* (2002) 132 A Crim R 123, 129 [28].

⁴¹⁰ See *Proudman v Dayman* (1941) 67 CLR 426, 433 (Dixon J).

⁴¹¹ *R v Makary* [2019] 2 Qd R 528, 545 [59] (Sopronoff P), 550 [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).

⁴¹² Cf. Crowe, “Consent, Power”, above n 8, 39.

⁴¹³ Similarly, Ashworth and Temkin point to the man or woman who initiates sexual contact with his/her regular sexual partner while s/he is asleep, in circumstances where he/she has done this many times beforehand and his/her 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, 340-341. 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.

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 s/he is consenting.⁴¹⁴ My argument was that, if this were the law, these offences would become offences of absolute liability. That argument is as follows:⁴¹⁵

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 have made 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 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/her partner is consenting before he/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."

⁴¹⁴ 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.

⁴¹⁵ Dyer, "The Mens Rea for Sexual Assault", above n 414.

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,⁴¹⁶ or a youth,⁴¹⁷ might be caused by his/her disability or inexperience wrongly to think that, the substantially intoxicated, complainant *has* clearly indicated her/his consent to engage in sexual activity. He/she might therefore not have behaved in blameworthy manner. Under s 24A(d), however, he/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/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."⁴¹⁸ By insisting that the "steps" taken by the accused should not merely have to be "reasonable",⁴¹⁹ 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.⁴²⁰ 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."⁴²¹ If

⁴¹⁶ See *R v B(MA)* [2013] 1 Cr App R 481, 491-2 [41].

⁴¹⁷ *Aubertin v Western Australia* (2006) 33 WAR 87, 96 [43].

⁴¹⁸ *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.

⁴¹⁹ 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 15, 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/her] ... at the time" without gaining a clear indication that the complainant is consenting, though the accused who witnesses conduct of the complainant that he/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 414, 14; Dyer, "Yes! To Communication About Consent", above n 414, 35.

⁴²⁰ 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 416-417.

⁴²¹ It is noteworthy in this regard that Lee has recently indicated that she understands *Criminal Code Act 1924* (Tas) s 14A(1)(c) to "require ... the defendant to have taken steps either verbally or physically to inquire whether the complainant was consenting": Bri Lee, "Tabling of Consent", *Saturday Paper*, 16-22 November

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 he/she verbally or by gesture ensures that his/her sexual partner is consenting, they might be wrong to do so. In *R v Lazarus*,⁴²² 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 the complainant was consenting. According to Bellew J (with whom Hoeben CJ at CL and Davies J agreed):⁴²³

[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/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/she would also seemingly have to believe that the complainant had clearly indicated that s/he was consenting, even if s/he had not.⁴²⁴ But that does leave some room for honest and reasonable mistake.⁴²⁵

2019 <<https://www.thesaturdaypaper.com.au/news/law-crime/2019/11/16/proposed-reforms-nsw-consent-law/15738228009097>>.

⁴²² (2017) 270 A Crim R 378.

⁴²³ Ibid 407 [147] (Bellew J). See also 380 [1] (Hoeben CJ at CL), 381 [4] (Davies J).

⁴²⁴ *Barton* [2019] SCC 33, [107]; see also [109]. See also n 419.

⁴²⁵ 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 *R v Makary* [2019] 2 Qd R 528, 545 [60] (see also 543 [49]-[50] and 544 [54]), if an accused is successfully to rely on honest and reasonable mistake, it must be reasonably possible that he/she mistakenly believed both that the complainant (i) was consenting and (ii) represented to the accused that

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. 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.⁴²⁶ "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."⁴²⁷ He continued:⁴²⁸

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 (un)willingness 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* of 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 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

this was so. (It must further be reasonably possible, of course, that these beliefs were reasonable - as his Honour noted: at 545 [60]).

⁴²⁶ *R v Dunrobin* [2008] QCA 116, [32].

⁴²⁷ *Ibid.*

⁴²⁸ *Ibid.*

Makary, at the trial over which Clare DCJ had presided.⁴²⁹ 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.”⁴³⁰ 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*⁴³¹ 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 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 should not be excessive focus on their behaviour; and 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 noted briefly above.⁴³² 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 recently proposed, which are aimed at disabusing jurors of any prejudicial views they might hold about sexual assault complainants.⁴³³ But the QLRC and the Queensland legislature should resist reactionary, unrealistic and unfair proposals that – however “progressive” their promoters consider them to be – are incompatible with human rights.

⁴²⁹ *R v Makary* (2018) 274 A Crim R 392, [85] 406-7 (Sopronoff P), 421 [165] (McMurdo JA), 424 [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 the QCA found that he had been right to take this approach: *R v Makary* [2019] 2 Qd R 528, 547 [71] (Sopronoff P), 550 [91] (McMurdo JA), 550 [94] (Bond J).

⁴³⁰ See, for example, Gleeson, above n 333.

⁴³¹ [2019] 2 Qd R 528.

⁴³² See n 151. See also Dyer, “Sexual Assault Law Reform in New South Wales”, above n 414, 97-9.

⁴³³ NSW Law Reform Commission, n 151, 25-9.