24/13; [2013] VSC 161

SUPREME COURT OF VICTORIA

AZADZOI v COUNTY COURT of VICTORIA and KARA RODEN

Bell J

16 November 2012; 12 April 2013

CRIMINAL LAW – ACCUSED CHARGED WITH THREE CHARGES OF COMMITTING INDECENT ACT IN PRESENCE OF CHILDREN AGED UNDER 16 YEARS – ACTS COMMITTED IN STEAM ROOM OF AREA OF PUBLIC AQUATIC CENTRE RESERVED FOR PERSONS AGED 16 YEARS AND OLDER – THREE GIRLS AGED 15, 14 AND 14 YEARS WHO LOOKED OLDER GAINED ADMISSION – WHETHER INTENTION OF ACCUSED TO COMMIT ACT IN PRESENCE OF CHILD KNOWN TO BE UNDERAGE WAS AN ELEMENT OF OFFENCE – WHETHER HONEST AND REASONABLE MISTAKE AS TO AGE WAS A DEFENCE – THIRD COMPLAINANT WAS IN SAUNA (A DIFFERENT ROOM) WHEN ACT COMMITTED – WHETHER FACTS AS FOUND CAPABLE OF ANSWERING STATUTORY DESCRIPTION OF 'PRESENCE' – WHETHER JUDGE ERRED IN JURISDICTION OR LAW ON THE FACE OF THE RECORD – 'ABSOLUTE LIABILITY' – 'STRICT LIABILITY' – 'HONEST AND REASONABLE MISTAKE OF FACT' – 'PRESENCE': *CRIMES ACT* 1958 (VIC) S47(1)-(3).

A. was charged with wilfully committing an indecent act in the presence of three children under the age of 16 years. The offences occurred when A. was in a steam room and two of the children were standing immediately outside the room and looking in when A. committed the indecent act. The third child did not see what happened because she was in a sauna which was separate from the steam room. On trial, A. contended that he could not be convicted unless the prosecution proved that he had intended to commit the act in the presence of a child whom he knew to be under the statutory age. Alternatively, he contended that honest and reasonable mistake as to the age of the complainants was a defence to the charges. The trial judge ruled that the defence was not available. Upon appeal—

HELD: A.s application for judicial review in respect of the convictions and sentences on the charges relating to the first and second complainants was dismissed. In relation to the conviction on the charge relating to the complainant who did not see the indecent act, the conviction and sentence were quashed and the charge remitted to the trial judge for consideration according to law.

1. Whether intention or knowledge apply to elements of a statutory offence turns on the interpretation of the provision in question. Whether honest and reasonable mistake of fact is a defence also raises a question of statutory interpretation. According to the applicable principles, there is an interpretative presumption that intention and knowledge must be proved in respect of all of the elements or, if not that, then honest and reasonable mistake is a defence, subject to Parliament's plain contrary intention. When considering whether that plain contrary intention is indicated, the court examines the subject matter and the purpose of the legislation, the terms of the legislation and whether criminal liability without intention or knowledge, or honest and reasonable mistake as a defence, would promote observance of the legislative scheme.

2. After examining these matters, the trial judge was correct in deciding that, in respect of the age ingredient, intention and knowledge were not elements of the offence and honest and reasonable mistake was not a defence. The purposes of s47(1) of the *Crimes Act* 1958 are to protect children under the age of 16 years from exposure to indecent acts and to deter potential offenders from engaging in such acts in places where children might be. The purpose of the provision is as much to protect children from themselves as it is to protect them from others. Those purposes and promoting observance of the legislative scheme (among other things) plainly indicate that Parliament intended the offence to be one of absolute liability in relation to the age ingredient. Persons who commit indecent acts in places where children might be do so at their own peril.

3. In reaching this conclusion, the Court took into account that it is possible for potential offenders to take reasonable precautions to avoid criminal liability. On the interpretation which was plainly intended by Parliament, it was not possible to offend against s47(1) by accident. To be convicted, the accused must have intended to commit an indecent act. Potential offenders can avoid liability by not committing such acts in places where children might be. So interpreted, the provision imposes on persons an obligation to take greater than usual care to avoid criminal liability. Parliament has deliberately imposed that obligation to take greater than usual care in order to protect children from others and also to protect children from themselves. This interpretation accords not just with Parliament's plain intention but also with decisions of the Full Court of the Supreme court in relation to similar statutory provisions.

4. The plaintiff committed the indecent act in the steam room of the sauna, spa and steam room area of a public aquatic centre. He did the act at his peril. Although that area was reserved for persons over the age of 16 years, it was foreseeable that children under that age who looked older might obtain unauthorised access to the area, which the complainants did. The judge did not err in jurisdiction or law in convicting him on the charges relating to the presence of the first and second complainants. Accordingly, the application for judicial review in respect of those charges was dismissed.

5. In relation to the third complainant, a charge against s47(1) can only be established if the accused committed the indecent act 'with or in the presence' of the underage child. The prosecution relied only on 'presence'. The plaintiff did not commit the indecent act 'with' the third complainant (or the other two).

6. Properly interpreted, the 'presence' element in s47(1) required physical proximity between the accused and the complainant. In this case, it was not to the point that the third complainant was not aware of what the plaintiff was doing. It was not to the point that she did not participate in or consent to the indecent act in any way. It was not to the point that there was no physical contact or association between the two of them. If the accused and the third complainant were in the physical proximity of each other when the act was committed, none of that would matter. But the undisputed facts were that, at the material time, the third complainant was in the sauna and the plaintiff was in the steam room. There was a space in between. It was not possible for the third complainant to see into the steam room or for the plaintiff to see into the sauna. Those facts could not fall within the statutory concept of 'presence' and accordingly, the judge erred in jurisdiction and law in convicting the plaintiff on the charge in respect of that complainant.

BELL J:

INTRODUCTION

1. Hishmattulah Azadzoi ('the plaintiff') was convicted in the Magistrates' Court of Victoria of charges of wilfully committing the indecent act of masturbating in the presence of three children under the age of 16 years contrary to s47(1) of the *Crimes Act* 1958 (Vic). He was sentenced to imprisonment for 12 months to be served by way of an intensive corrections order.

2. His Honour Judge Coish dismissed the plaintiff's appeal to the County Court of Victoria and again convicted him of the three charges. As the plaintiff had a wife and five children, was previously of good character and had no prior convictions of any kind, his Honour imposed the lesser sentence of a community based order for 18 months with a condition that he complete a sex offender's program.

3. The circumstances of the alleged offending were unusual. In 2009 the plaintiff attended his local aquatic centre in a suburb of Melbourne. It had a spa and separate sauna and steam rooms. Entry to this area was forbidden to children under the age of 16 years. There was a sign to that effect. The three female complainants were friends aged 15, 14 and 14 years. Appearing to be over the age of 16 years, they gained entry to the area by purchasing wrist tags from the admissions desk. On the evidence before the judge, the plaintiff did the indecent act when alone in the steam room and while two of the complainants were looking at him through the door of that room. The third complainant did not see and was not aware of what happened. She was in the sauna which is separated from the steam room by the sauna and steam room walls and the area in between. The plaintiff left the centre shortly afterwards.

4. The complainants complained to a centre manager who noted the plaintiff's motor vehicle registration number as he was leaving. The police were informed and they went to the plaintiff's home. In his record of interview, he denied performing the indecent act alleged. He said the complainants had mistaken him scratching his genital region for him masturbating. He also expressed strong surprise about the presence of the complainants in the area. His belief was that no child under the age of 16 years was allowed to enter.

5. Kara Roden ('the second defendant'), a constable of police, brought five charges against the plaintiff: the three charges of wilfully committing the indecent act of masturbating in the presence of the three complainants contrary to s47(1) of the *Crimes Act*, and two lesser charges, one of behaving in an indecent manner in a public place (the aquatic centre) contrary to s17(1)(d) of the *Summary Offences Act* 1966 (Vic) and one of wilfully and obscenely exposing the genital area in a public place (the steam room) contrary to s19 of that Act. At the hearing of the plaintiff's appeal to the County Court, the fourth and fifth charges were withdrawn.

6. After the prosecution led its evidence, the plaintiff made a no-case submission contending that, as an element of the offence specified in s47 of the *Crimes Act*, the prosecution had to prove that he intended to do the indecent act in the presence of a child whom he knew to be under the age of 16 years. He contended alternatively that an honest and reasonable belief that the complainants were over that age was a defence.

7. The judge determined what the mental elements of s47(1) were in the context of dismissing the plaintiff's no-case submission. His Honour held that the mental element in the offence was that the accused had wilfully committed an indecent act in the presence of a child. He referred to the leading authorities and determined that, having regard to the terms and purposes of the provision, knowledge that the complainant was under the statutory age was not an element of the offence. It was sufficient for the accused to commit an indecent act in the presence of a child who was in fact under that age. Further, a mistake by the accused as to the complainant's age, even if honest and reasonable, was not a defence. In reaching that conclusion, the judge accepted that consent was not an issue as the plaintiff was not relying on it.

8. After the judge ruled on the no-case submission, the plaintiff chose not to offer evidence and relied on his record of interview. The judge found that he had masturbated in the steam room in the presence of the three complainants. His Honour then convicted and sentenced the plaintiff in respect of the three charges. He rejected the plaintiff's argument that no offence had been committed in respect of the third complainant because she was not present when he committed the act. The judge found that the offence had been committed in respect of the third complainant even though, on the evidence, she was in the sauna, was not outside the steam room looking in and did not see the act or know that it was occurring.

9. By reason of being found guilty of the three charges, the plaintiff must be entered and remain on the sex offenders' register under the *Sex Offenders Registration Act* 2004 (Vic) for the remainder of his life. If he had been found not guilty of the charge in respect of the third complainant, the period of registration would have been fifteen years. Being on the register imposes extremely onerous reporting obligations and restrictions on the plaintiff. It also carries consequences under the *Working with Children Act* 2005 (Vic) and other legislation.

10. Now to the present proceeding. In this court, the plaintiff seeks judicial review under O56 of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) of the orders of the judge convicting and sentencing him of the charges. On three grounds, he contends that jurisdictional errors and errors of law on the face of the record[1] were made:

> (1) The judge misinterpreted s47 of the *Crimes Act* by failing to require the prosecution to prove, as an element of the offence, that the plaintiff intended to commit the indecent act in the presence of children whom he knew were under the age of 16 years.
> (2) Alternatively, the issue having been legitimately raised, the judge misinterpreted s47 by failing to require the prosecution to prove that the plaintiff did not honestly and reasonably believe that the complainants were aged over 16 years.
> (3) The judge misinterpreted s47 in the meaning that he gave to the word 'presence' by finding that the plaintiff had committed the act in the presence of the third complainant when the found facts were incapable of answering that statutory description.

11. On those grounds, the plaintiff seeks orders in the nature of *certiorari* quashing the convictions and sentences and acquitting him of the three charges or, alternatively, orders in the nature of mandamus remitting the charges to the trial judge for reconsideration according to law. The second defendant contends that the judge made no jurisdictional errors or errors of law and, if any such errors were made, that the proceeding must be remitted back to the County Court for reconsideration according to law.

INTENTION AND MISTAKE (GROUNDS (1) AND (2))
'Absolute' and 'strict' liability offences

12. The question is whether s47(1) of the *Crimes Act* requires the prosecution to prove against an accused person that he or she had a guilty mind in respect of the age of the complainant, that is, that the accused intentionally committed the indecent act knowing that the complainant was under the age of 16 years. The second defendant contends that, as the trial judge held, the offence requires no such proof and is wholly established if the accused intentionally committed the act

which was indecent, whether or not he or she knew that the complainant was under that age. In the catalogue of offences, that would make the offence in s47(1) an 'absolute liability' offence.[2]

13. The plaintiff contends that proof of a guilty mind is required or, if not that, then honest and reasonable mistake as to age is a defence. Here we are using the term 'defence' not in the pure technical sense but in that loose sense which is conveniently[3] used to describe an honest and reasonable belief by the accused in a state of affairs which, if true, would take the accused's act 'outside the operation of the enactment'[4] and be 'a ground of exculpation'.[5] That would make the offence in s47(1) a 'strict liability' offence.[6]

14. The answer to this question depends on the proper interpretation of the provisions of s47 as to which a general presumption applies in favour of intention and knowledge being an element of the offence or, if not, mistake being a defence. The question is whether the presumption has been displaced. The answer is not free from difficulty.

15. It is convenient to address the question under three headings. Now I will consider the principles governing the general presumption of interpretation, where there is much to find in support of the plaintiff's case. Next I will consider the Victorian legislation historically, and previous decisions of the Full Court of this court, where there is much to find against the plaintiff's case. Later I will apply the general principles to the interpretation of the provisions of s47, on which the determination of the question in issue depends.

General presumption of interpretation

16. The general presumption was stated in the High Court of Australia in the earliest days of federation by Griffith CJ in *Hardgrave v The King*:[7]

> The general rule is that a person is not criminally responsible for an act which is done independently of the exercise of his will or by accident. It is also a general rule that a person who does an act under a reasonable misapprehension of fact is not criminally responsible for it even if the facts which he believed did not exist.[8]

17. This statement of the presumption reflected the common law, which had been authoritatively stated in the United Kingdom several years earlier by Wright J in *Sherras v De Rutzen*:[9]

> There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered.[10]

18. Wright J went on to specify three classes of case in which the presumption might be displaced: (i) acts which 'are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty';[11] (ii) acts which are 'public nuisances';[12] and (iii) 'cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right'.[13] In the plaintiff's submission, the present case falls into none of these categories and we are here dealing with an example of a true statutory crime. I accept that submission. Indeed the crime is a serious one.

19. It must be said that the presumption has been applied with varying degrees of force over the years. It was readily found to have been displaced in the much-debated[14] case of *R v Prince*[15] where 15 of 16 judges held that the accused had been properly convicted at trial of abducting a child under the age of 16 years[16] even though he honestly believed on reasonable grounds that she was over that age. Blackburn J[17] said:

> It seems to us that the intention of the legislature was to punish those who had connection with young girls, though with their consent, unless the girl was in fact old enough to give a valid consent. The man who has connection with a child, relying on her consent, does it as his peril, if she is below the statutable age.[18]

Likewise, in *R v Maughan*[19] Lord Hewart CJ, Avory and Roche JJ held that a reasonable and honest belief that a girl was over 16 years could never be a defence to a charge of indecent assault.[20]

20. So it is understandable that in, *Proudman v Dayman*,[21] Dixon J described the presumption as 'but a weak one'.[22] However, reflecting the ever increasing number of statutory offences, more stringent attention has recently been given to the presumption by the courts. For example, in *He Kaw Teh v The Queen*,[23] Gibbs CJ emphasised that interpretation of statutory offences in accordance with the presumption was required by 'the general principles of the common law which govern criminal responsibility'.[24] Similarly, in the more recent case of *CTM v The Queen*,[25] Gleeson CJ, Gummow, Crennan and Kiefel JJ said the presumption involved 'a basic legal principle of criminal responsibility which informs our understanding, and interpretation, of the criminal law'.[26] The plaintiff presented his case in the context of this recent emphasis on the application of the presumption.

21. The rationale of the presumption is that it is repugnant to basic and long-accepted notions of criminal responsibility to hold a person to be guilty of a crime without some element of mental fault, such as intention or knowledge.

22. In the emphatic words of Hayne J in *CTM*:[27]

> To read a statute which creates a statutory offence that forms part of the general criminal law as subject to the general principles according to which the criminal law is administered does no more than reflect the fact that '[s]ociety and the law have moved away from the primitive response of punishment for the *actus reus* alone'.[28] It avoids what has been called 'the public scandal of convicting on a serious charge persons who are in no way blameworthy'.[29] And '[i]t is now firmly established that *mens rea* is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject matter, it is excluded expressly or by necessary implication'.[30]

23. On human rights grounds sharing much in common with those fundamental considerations, in Canada[31] and Ireland[32] the statutory creation of a crime without need of proof of a guilty mind has been held to be unconstitutional. In Australia, as in the United Kingdom, the legislature is free to enact a crime of that nature, but only by plainly displacing the presumption of interpretation.[33] As stated by Cave J in *R v Tolson*:[34]

> Now it is undoubtedly within the competence of the legislature to enact that a man shall be branded as a felon and punished for doing an act which he honestly and reasonably believes to be lawful and right; just as the legislature may enact that a child or a lunatic shall be punished criminally for an act which he has been led to commit by the immaturity or perversion of his reasoning faculty. But such a result seems so revolting to the moral sense that we ought to require the clearest and most indisputable evidence that such is the meaning of the Act.[35]

24. This statement implicitly reveals that an important function of the presumptive principle is to mediate 'the relationship between the courts and Parliament' in respect of the interpretation of criminal law provisions. Those words were written by Gleeson CJ, Gummow, Crennan and Kiefel JJ in *CTM*.[36] In the same case, their Honours identified the close connection between the presumptive principle and the principle of legality.[37] According to the principle of legality, as explained by Gleeson CJ in *Plaintiff S157/2002 v Commonwealth*:[38]

> courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.[39] As Lord Hoffmann recently pointed out in the United Kingdom,[40] for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be 'subject to the basic rights of the individual'.[41]

25. This is the statement of Lord Hoffmann in *R v Secretary of State for the Home Department; Ex parte Simms*[42] to which Gleeson CJ referred:

> the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[43]

That, held Lord Steyn in *B (A Minor) v Director of Public Prosecutions*,[44] is the assumption on which 'Parliament must be presumed to legislate' and the 'theoretical framework' against which provisions must be interpreted.[45]

26. Adopting the same approach, in *CTM*, Gleeson CJ, Gummow, Crennan and Kiefel JJ said:

> The common law principle in question reflects fundamental values as to criminal responsibility. The courts should expect that, if Parliament intends to abrogate that principle, it will make its intention plain by express language or necessary implication.[46]

Not finding that plain intention, their Honours interpreted the provisions at issue such that an honest and reasonable mistake by the accused as to the age of a consenting party to sexual activity was an answer to an alleged contravention.

27. I accept the general significance of the decision in *CTM* for the present case. However, here the complainants were not consenting parties. Further, it must be noted that the conclusion of the court in *CTM* was based on a careful analysis of the particular provisions in issue which, it has been emphasised, must always be the focus of attention.[47] In relation to Victoria, the history of sex offence legislation and the previous decisions of the Full Court of this court have significance in this connection.

28. *Tolson*[48] illustrates the more stringent application of the presumption which occurred after Prince and which the plaintiff calls for in the present case. A woman was convicted of bigamy when she remarried within seven years after being deserted by her husband but believing reasonably and in good faith that he was dead. A strong majority of the Queen's Bench Division quashed the conviction. I have already referred to the judgment of Cave J. His Honour held that the seven year exclusion period did not indicate that criminal liability was intended to be absolute within that period. The plaintiff advances a similar argument here based on s47(2) of the *Crimes Act*. Stephen J held that neither express words nor any implication showed that Parliament intended the woman to be criminally liable, and her conduct 'was not in the smallest degree immoral, [but] perfectly natural and legitimate'.[49] That cannot be said about the conduct of the plaintiff in this case.

29. *Tolson* was followed by a majority of the High Court of Australia on very similar facts in *Thomas v The King*.[50] As Hayne J pointed out in *CTM*,[51] in *Thomas* the High Court adopted the more stringent approach to the application of the presumption in Tolson, not the weaker approach adopted in *Prince*. Admitting the force of the several strong statements of general principle in Thomas, I must note that there is a difference between the statutory offence of bigamy and that of committing indecent acts in the presence of children under the age of 16 years, particularly as regards the protective purposes of the latter.

30. The accused in *Sherras*[52] likewise benefited from the application of the presumption. He was a licensed victualler who was convicted of selling liquor to a police constable who was on duty but who appeared, and was honestly believed to be, off duty. Day and Wright JJ quashed the conviction. I have already referred to the judgment of Wright J. Day J held that, on the interpretation of the provision in question, there was no offence where the accused 'had no intention to do a wrongful act' and where 'he acted in a *bonâ fide* belief that the constable was off duty'.[53] With some force, the plaintiff submits in the present case that, if so much was held in relation to a regulatory offence, all the more should it be held in relation to a true crime.

31. Examples of the more stringent application of the presumption in sex offence cases can be found in New South Wales. For example, in *R v Turnbull*[54] Jordan CJ (Davidson and Street JJ agreeing) applied the presumption to hold that the statutory offence of 'knowingly' suffering any girl aged under the 18 years to be in a brothel[55] was not committed where the accused did not know the age of the girl concerned. The Chief Justice said:

> The general rule as to *mens rea* is clear and plain. It is a well established rule of the common law that an act is not criminal unless it is the product of a guilty mind. Thus, *mens rea* has two elements – (1) a mind; (2) which is guilty.[56]

His Honour held that this rule was not displaced in the case before the court and lamented

the readiness of courts 'to assume the role of legislators, and to fill imagined *lacunae* in penal statutes by the conjectural emendations of judges'[57] or by reference to the 'general atmosphere of a statute'.[58] This is an example of the definite application of the presumption in the context of a true statutory crime having the purpose of protecting young women from sexual exploitation. Arguably, the plaintiff's case is analogous. However, as we will see, there are Victorian decisions of high authority, also analogous, which are inconsistent with *Turnbull*. Further, the Victorian legislation must be interpreted according to its own terms.

32. The decision of the Privy Council in *Lim Chin Aik v The Queen*[59] is important because it shows that more than a protective purpose is required to displace the presumption. That consideration is directly relevant to the present case. The question was whether *mens rea* was an element of a statutory immigration offence. The Judicial Committee held that it was, rejecting the proposition that a displacing intention was sufficiently revealed by the nature and subject matter of the offence alone.[60] Giving that judgment, Lord Evershed said:

> it is not enough ... merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations.[61]

In words that influenced the subsequent development of the principle,[62] his Lordship went on the say that 'there must be something [the defendant] can do, directly or indirectly ... which will promote the observance of' the law.[63] Where the defendant could not avoid the possibility of committing the offence, 'there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim'.[64] I will come back to these principles frequently.

33. Strong restatements of the presumption are to be found in the speeches in the House of Lords in *Sweet v Parsley*[65] which has been followed by the High Court. A tenant of a farmhouse sublet some of its rooms. When the subtenants smoked cannabis without the tenant's knowledge, she was convicted of allowing the premises to be so used.[66] Unsurprisingly, the case went on appeal; surprisingly, it reached the House of Lords.

34. Applying the presumption, the House of Lords overturned the conviction. Lord Reid spoke of the importance of applying the presumption in the interpretation of provisions creating true crimes:

> a stigma ... attaches to any person convicted of a truly criminal offence, and the more serious or more disgraceful the offence the greater the stigma. So [a reasonable legislator] would have to consider whether, in a case of this gravity, the public interest really requires that an innocent person should be prevented from proving his innocence in order that fewer guilty men may escape.[67]

Lord Morris said:

> it has frequently been affirmed and should unhesitatingly be recognised that it is a cardinal principle of our law that *mens rea*, an evil intention or a knowledge of the wrongfulness of the act, is in all ordinary cases an essential ingredient of guilt of a criminal offence. It follows from this that there will not be guilt of an offence created by statute unless there is *mens rea* or unless Parliament has by the statute enacted that guilt may be established in cases where there is no *mens rea*.[68]

His Lordship went on to say that the courts looked to 'the words of the enactment ... to see whether either expressly or by necessary implication' the presumption was displaced.[69] Lord Diplock considered when a criminal provision might be interpreted so as to impose a higher than usual duty of care on the individual, which is a critical question in the present case:

> where the subject-matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals in which citizens have a choice as to whether to participate or not, the court may feel driven to infer an intention of Parliament to impose by penal sanctions a higher duty of care on those who choose to participate and to place upon them an obligation to take whatever measures may be necessary to prevent the prohibited act ... But such an inference is not lightly to be drawn, nor is there any room for it unless there is something that the person on whom the obligation is imposed can do directly or indirectly ... which will promote the observance of the obligation.[70]

I will frequently return to these principles also.

35. *He Kaw Teh*[71] comes next and is the leading Australian authority. Customs legislation made it an offence for a person to import or export prohibited goods or to have such goods in their possession without reasonable excuse.[72] The court had to decide whether *mens rea* was an element of the offence.

36. Gibbs CJ, Mason, Brennan and Dawson JJ (Wilson J dissenting) held that the presumption that *mens rea* was required had not been displaced and that the prosecution bore the onus of proving that the accused knew they were importing prohibited goods.

37. Citing and referring to authorities I have discussed,[73] Gibbs CJ said that, in deciding whether the presumption was displaced, the courts took into account 'the words of the statute creating the offence',[74] 'the subject-matter with which the statute deals'[75] and 'whether putting the defendant under strict liability will ... promote the observance of the [provision]'.[76] There is no dispute that this is the approach which must be adopted in this case.

38. Referring to *Proudman*, the Chief Justice pointed out that, between liability where *mens rea* had to be proved (ie the presumed position) and liability where it did not (ie absolute liability), there was a 'middle course'[77] (ie strict liability). Gibbs CJ said that this middle course applied where, on the proper interpretation of the provision,

> an accused will not be guilty if he acted under an honest and reasonable mistake as to the existence of facts, which, if true, would have made his act innocent.[78]

Although in the present case the plaintiff relied on the requirement of full *mens rea* in respect of all elements of the offence, his main submission was that this middle course applied in respect of the age ingredient.

39. After considering the various indicia, Gibbs CJ concluded that the presumption of *mens rea* had not been displaced.[79] In doing so, he said:

> it is more likely that the Parliament will have intended that full *mens rea*, in the sense of guilty intention or guilty knowledge, will be an element if an offence is one of a serious kind.[80]

This conclusion was warranted because the 'gravity of the offence suggest[ed] that guilty knowledge was intended to be an element of it'.[81] Committing an indecent act in the presence of children carries a potential sentence of imprisonment for ten years. Conviction comes with a heavy stigma. It too is an offence of a grave and serious kind. These indicia firmly support the plaintiff's submissions.

40. The detailed judgment of Brennan J supports the same general conclusions as Gibbs CJ in relation to the applicable principles[82] and the result.[83] Brennan J also stressed the significance of the severity of the crime and the penalty which might be imposed. He said that the offences were 'truly criminal in character'.[84] So is the one here.

41. Reflecting the same body of authority on which Gibbs CJ relied,[85] Brennan J dealt with the relevance of the purpose and enforcement of the statute in the application of the presumption. His Honour said that the principles discussed in these authorities were based on a purpose of the criminal law, which was 'to deter a person from engaging in prohibited conduct'.[86] That purpose was not served by imposing criminal liability on persons who (for example) did not know the criminal nature of their conduct or who could not take effective precautions:

> The penalties of the criminal law cannot provide a deterrent against prohibited conduct to a person who is unable to choose whether to engage in that conduct or not, or who does not know the nature of the conduct which he may choose to engage in or who cannot foresee the results which may follow from that conduct (where those results are at least part of the mischief at which the statute is aimed). It requires clear language before it can be said that a statute provides for a person to do or to abstain from doing something at his peril and make him criminally liable if his conduct turns out to be prohibited because of circumstances that that person did not know or because of results that he could not foresee.[87]

His honour went on the describe the requirement of *mens rea* as 'a reflection of the purpose of the statute and a humane protection for persons who unwittingly engage in prohibited conduct'.[88] Those observations are important in the resolution of the issues in the present case.

42. The plaintiff relied on, and the second defendant sought to distinguish, the recent decisions of the House of Lords in *B (A Minor)*[89] and *R v K*[90] in which the presumption was held not to have been displaced by provisions creating particular sexual offences. The decisions are examples of the more stringent application of the presumption in the modern era.

43. In *B (A Minor)*[91] a boy aged 15 years sat on a bus next to a girl aged 13 years. He kept asking her to perform oral sex which she repeatedly refused to do. Although it was accepted that he honestly believed that the girl was aged over 14 years, he was convicted of the charge of inciting a girl aged under 14 years to commit an act of gross indecency.[92] The House of Lords quashed the conviction.

44. In a judgment with which Lord Irvine LC and Lord MacKay agreed, Lord Nicholls of Birkenhead held that there was neither an express provision nor any necessary implication[93] 'that the ordinary common law requirement of a mental element should be excluded in respect of the age ingredient of [the] offence'.[94] Having regard to the breadth of the offence and the gravity of the stigma and penal consequences, there were no sufficient grounds for interpreting the provisions otherwise.[95] His Lordship did not accept that the purpose of the provision warranted a different conclusion:

> The purpose of the section is, of course, to protect children. An age ingredient was therefore an essential ingredient of the offence. This factor in itself does not assist greatly. Without more, this does not lead to the conclusion that liability was intended to be strict so far as the age element is concerned, so that the offence is committed irrespective of the alleged offender's belief about the age of the 'victim' and irrespective of how the offender came to hold this belief.[96]

That statement is pertinent in the present case because it is an example of the application of the general principle enunciated in *Lim Chin Aik* in the context of the age ingredient of a sex offence. But here the question is, as regards the specific legislation which is in question, whether there was more than a protective purpose to indicate a plain displacing intention.

45. The appellant in *B (A Minor)* lost in the Queen's Bench Division before Brooke LJ and Tucker and Rougier JJ, largely because the court considered itself to be bound by a line of authority going back to *Prince*[97] and the similar case of *Maughan*,[98] on which Brooke LJ made a famous attack.[99] *Prince* and *Maughan* have influenced Victorian law (see below). In reaching his conclusion, Lord Nicholls made observations about the weight to be given to these decisions. Lord Nicholls refused to apply them because the provisions creating the offence in the case before the House of Lords, and the provisions creating the offences dealt with in *Prince* and *Maughan*, were not part of a coherent statutory scheme.[100] That cannot be said of the Victorian provisions, which have always been part of a coherent statutory scheme and were recently interpreted as such by Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA in *Clarkson v The Queen*.[101] Further, his Lordship considered that the reasoning in those decisions had to be understood in the light of the modern and more stringent approach to the nature and weight of the common law presumption.[102] Given that the High Court has adopted that more stringent approach, that observation is applicable in Victoria. But, it is still necessary to focus on whether the provisions in question, properly interpreted, plainly reveal a displacing intention.

46. Lord Steyn applied the principle of legality as explained by Lord Hoffman in *Simms*[103] and held that the presumption had not been displaced.[104] In relation to Prince, Lord Steyn was very forthright. His Lordship said that it was 'a relic from an age dead and gone', and it was 'no longer possible to extract from Prince's case a special principle of construction applicable only to age-based sexual offences'.[105]

47. Prince thus appears to be a doubtful authority in the United Kingdom.[106] In the Supreme Court of Ireland, it is regarded as 'unsound and bad in law',[107] 'incorrect'[108] and not a 'credible authority'.[109] In *CTM*, Hayne J questioned whether Prince could be reconciled with more modern authority.[110] But, as we will see, it has been followed on three occasions in sex offence cases by the Full Court of the Supreme Court of Victoria.

48. Despite the doubts surrounding *Prince* as an authority and the decision in *B (A Minor)*, it appears that there are limits to the application of the presumption in sex offence cases. That is illustrated by *R v K*.[111] A man aged 26 years was charged with indecently assaulting a girl aged

14 years. He claimed that the sexual activity was consensual and that she told him she was aged 16 years. Under the statute, consent could not be given by a girl under the age of 16 years.[112] The question was whether, in the light of that provision, the requirement to prove the mental element in relation to age was excluded in a case where a girl under that age had consented. A similar (but not identical) question arises in the present case in relation to s47(2) of the *Crimes Act*. The House of Lords answered the question in favour of the accused by holding that it was necessary to prove the mental element.

49. The leading judgment was delivered by Lord Bingham of Cornhill.[113] His Lordship discussed, 'without admiration',[114] the legislative history of sex offence legislation in the United Kingdom and the inconsistent decisions of the courts on the interpretation of the provisions. He emphatically restated and applied the presumption to hold that the provisions in question did not exclude the requirement to prove the mental element in a case where the complainant had consented.[115] It was therefore necessary for the prosecution to prove 'an absence of genuine belief on the part of a defendant as to the age of [a consenting] under-age victim'.[116]

50. However, Lord Bingham expressly confined that conclusion to the case of an accused who, under s14(2) of the *Sexual Offences Act*, was relying on the consent of a female complainant. While the provision was to be interpreted as not excluding the requirement to prove the mental element as to age, this did not have 'any bearing on a case in which the victim does not in fact consent'.[117] Where the allegation was that the accused had indecently assaulted a woman contrary to s14(1) and consent under s14(2) was not being relied on, 'any belief by the defendant concerning her age is irrelevant, since her age is relevant only to her capacity to consent'.[118]

51. *B (A Minor)* and *R v K* may be compared, or perhaps contrasted, with the subsequent decision of the House of Lords in *R v G*.[119] There the legislation specifically criminalised the intentional sexual penetration of persons under the age of 13 years.[120] The main issue was whether the strict liability nature of the offence, and the conviction of a child offender aged 15 years for rape of a complainant aged 12 years (whom the offender believed to be aged 15 years) breached the offender's human rights. It was held that the accused's human rights were not breached by these circumstances.[121]

52. In the course of giving judgment, several of the Lords commented on the nature of the offence and the importance of the protective policy of the legislation. In relation to the strict liability nature of the offence, Lord Hoffmann said 'the language and structure' of the provision made it clear that the prosecution did not have to prove the accused's knowledge of the complainant's age.[122] His Lordship then referred to the policy of the legislation:

> The policy of the legislation is to protect children. If you have sex with someone who is on any view a child or young person, you take your chance on exactly how old they are. To that extent the offence is one of strict liability and it is no defence that the accused believed the other person to be 13 or over.[123]

Lord Hope of Craighead said Parliament had deliberately decided that mistake as to age would not be a defence.[124] Baroness Hale of Richmond stressed the protective purposes of the legislation, which made it irrelevant whether the complainant consented or the accused knew her age.[125] Lord Mance did likewise.[126]

53. As we will see, *R v G* was extensively cited by Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA in a related context in *Clarkson*,[127] especially as regards the importance of the protective purpose of the provisions.

54. Tending against the plaintiff's submissions is the South Australian case *R v Clarke*.[128] A woman was convicted of a charge of producing child pornography[129] and another charge of inciting a child to commit an indecent act.[130] The trial judge, his Honour Judge Boylan, found that the accused truly believed that the two girls were aged 17 years and therefore not children.[131] His Honour found that they 'could easily be taken to be 17'.[132] But he held that an honest and reasonable mistake of age was not a defence. Doyle CJ, Bleby and David JJ upheld the decision of the trial judge and dismissed the appeal. Special leave to appeal was refused by the High Court.[133]

55. The trial judge analysed the provisions in question in the context of the South Australian sex offender legislation as a whole. His Honour held that, unlike the legislation in the United

Kingdom, the various provisions of the South Australian legislation were part of a 'coherent statutory scheme'.[134] It was the policy of that scheme 'that there be absolute liability as to the age ingredient in sexual offences against children under 16'.[135] Doyle CJ (David J agreeing) agreed with the trial judge that this was the established approach to the interpretation of the South Australia legislation.[136] As we will see, this is also the established approach in the interpretation of the Victorian legislation.

56. The leading judgment in the Court of Criminal Appeal was delivered by Doyle CJ. The Chief Justice made extensive reference to the leading authorities, which I have discussed in this judgment. In determining whether the presumption was displaced, his Honour paid particular regard to the considerations identified by Gibbs CJ in *He Kaw Teh*.[137] As I have indicated, these considerations are the terms of the provisions in question, the purpose and subject matter of the legislation and the interpretation which would assist in promoting observance of the statutory scheme.

57. Doyle CJ accepted that several important considerations pointed to the conclusion that displacing the presumption was not intended, including the heavy stigma attaching to the offences and the severe penalties involved. However, his Honour said that it was possible to understand why Parliament would penalise those producing pornography without realising that the subjects were children:

> The reason for taking that approach would be that the suppression of child pornography is sufficiently important to punish not only risk takers (those who do not have an honest and reasonable belief that a child is not involved), but also those who have an honest and reasonable belief that a child is not involved. The justification for punishing the latter group would be, on this hypothesis, that the suppression of the production of the trade in child pornography warrants such a stringent approach.[138]

58. Both Doyle CJ and Bleby J considered that it was feasible for potential offenders to take precautions and that accidental behaviour would not be punished[139] and that the policy of the legislation required those producing pornography to take steps to avoid the risk of involvement by children.[140] In that connection, Bleby J said:

> in offences created by [the provisions in question] a choice is made to engage in the relevant conduct. It would be most unusual for there to be an accidental committing of the *actus reus*. Where there is no available proof of age, a potential offender must be taken to be aware of the possibility that, notwithstanding an honest and reasonably held belief that the child is of or above the age of 16, that person may turn out to be under 16. The actual conduct, rather than being accidental, is deliberate. The risk of possible offending is present notwithstanding the reasonably held belief as to the child's age.[141]

His Honour went on the say that, as the offending liability could be avoided, the 'imposition of absolute liability for these offences would encourage greater vigilance to prevent the commission of the prohibited acts'.[142] That applies equally to the provision which is at issue in the present case.

59. In refusing special leave to appeal, French CJ said (for his Honour and Crennan J):

> In our opinion, the case raises a question of statutory construction. It is a question particular to the South Australian legislation. There appears to be no error of principle and nothing inconsistent with the interpretation principles enunciated in the decision of this Court of *CTM*.

The decision of the Full Court is not attended with sufficient doubt to warrant the grant of special leave.[143]

Their Honours refused special leave to appeal even though the Court of Criminal Appeal of the Supreme Court of South Australia had relied on the decision of the Court of Criminal Appeal of the Supreme Court of New South Wales in *CTM v The Queen*[144] which was later overturned by the High Court in *CTM*[145] and even though, in that latter decision, the High Court held that honest and reasonable mistake as to age was a ground of exculpation in respect of the New South Wales statutory offence which was in issue.

60. Understandably, the plaintiff relies heavily on the decision of the High Court in *CTM*. So it

is necessary to examine it closely. The offence in issue was specified in s66C(3) of the *Crimes Act* 1900 (NSW), which provided that '[a]ny person who has sexual intercourse with another person who is of or above the age of 14 years and under the age of 16 years is liable to imprisonment for 10 years'. By s77(2) of that Act, it was a defence to a charge under s66C(3) that the complainant consented and was reasonably believed by the accused to be above the age of 16 years. That defence was repealed by the *Crimes Amendment (Sexual Offences) Act* 2003 (NSW).

61. The facts of *CTM* involved a boy aged 17 years who was found guilty of a charge under s 66C(3) after having consensual[146] sexual intercourse with a girl aged 15 years. In an interview with police, he stated that the complainant had told him that she was aged 16 years. It was common ground that the trial judge had misdirected the jury in relation to the issue of mistake of age. In dismissing the appeal, Hodgson JA, Howie and Price JJ held that honest and reasonable mistake of age was not a ground of exculpation in relation to a charge under s66C(3).[147] The High Court held that this ground of exculpation was available to the charge,[148] but that the appeal should be dismissed because the accused had not satisfied the evidentiary burden necessary to raise it.[149]

62. It can be seen from the facts of *CTM* that it was concerned with the availability of honest and reasonable mistake of age as a defence where the sexual activity was consensual. In the present case, the complainants did not consent to being exposed to the plaintiff's indecent act. However, the plurality judgment in *CTM* contains the most recent statements of the court in respect of the general availability of the defence. As I have already mentioned, Gleeson CJ, Gummow, Crennan and Kiefel JJ held that the requirement of mental fault was a 'basic legal principle of criminal responsibility', but the presumption that mental fault had to be proved could be excluded by a 'sufficiently plain manifestation of legislative intention'.[150] Paying particular attention to the provisions of the New South Wales legislation, the plurality decided that the presumption was not displaced. It was held that an 'honest and reasonable belief that the other party to sexual activity is above the age of sixteen years is an answer to a charge of contravention' of the provision.[151] Hayne J adopted the same approach of analysing the particular provisions in question and reached the same conclusion.[152]

63. The plurality referred to the difficulty of determining the nature and scope of a provision which made it a serious crime to have sexual relations with a female of a certain age. Their Honours said that, in considering such a provision,

> it is impossible to ignore the case of an alleged offender who honestly and reasonably believes that the female is above the specified age. It would be absurd to suggest that honest and reasonable mistakes of that kind are never made.[153]

Their Honours also referred to the considerations that the provisions in question applied to sexual conduct between offenders and victims who were approximately of the same age and to offenders who were not sexual predators but were themselves children engaged in consensual sexual activity.[154] Hayne J made similar remarks.[155] In the present case, the statutory crime also covers a wide range of offending conduct.

64. I have already referred to the judgment of Jordan CJ, Davidson and Street JJ in *Turnbull*[156] in which it was held that knowledge of age was an ingredient of the statutory offence in New South Wales of allowing a child to be in a brothel. In another New South Wales case, *Chard v Wallis*,[157] Roden J (applying *Tolson*, *Proudman* and *He Kaw Teh*) held that a reasonable mistake as to age was a defence to a charge of offending against s78Q(2) of the *Crimes Act* 1900 (NSW) by performing an act of gross indecency upon a male person under the age of 18 years. In support of that conclusion, his Honour said:

> To those brought up under the Common Law, there is something repugnant about the notion that a person can be guilty of a serious criminal offence by accident.[158]

With respect, I would endorse that remark. Later I will examine whether it can truly be said that the plaintiff in this case has been convicted of committing a serious criminal offence by accident.

65. In the Court of Criminal Appeal in *CTM v The Queen*,[159] Howie J doubted the correctness of the decision of Roden J in *Chard*. However, in the High Court in *CTM* the plurality said the decision had stood for some time, the framers of the legislation at issue must have been aware of

it and there was no indication that the legislation had been enacted so as to reverse it.[160] As we will now see, the same reasoning applies with equal force to the Victorian legislation, but towards the opposite conclusion.

Victorian sex offence legislation

66. I will take as my starting point the *Criminal Law and Practice Statute* 1864 (Vic) because it was the subject of the decision of the Full Court of this Court in *R v Gibson*.[161] The Act appears to have been derived from the *Offences Against the Person Act* 1861 (UK), as was the equivalent legislation in New South Wales.[162] But the Victorian legislation was never a clone of its parent. Even as enacted it was different in relevant respects to the legislation in the United Kingdom (and New South Wales). As time went on, the differences became wider.

67. Division (6) of our 1864 Act contained a series of offences dealing with 'Rape[,] Abduction and the Defilement of Women'. Divisions (7) and (8) contained the offences of child-stealing and bigamy. A mental element was expressly specified as part of the crimes of attempted rape of a woman (s43) or girl (s46), abduction and forcible abduction of a woman of any age (ss50 and 51) and child-stealing (s53). A mental element was not expressly specified for the other offences. For example, s45 provided:

> Whosoever shall unlawfully and carnally know and abuse any girl under the age of ten years shall be guilty of felony and being convicted thereof shall suffer death.

Under s46, the same offence in respect of a girl above the age of 10 years and under the age of 12 years was a misdemeanour punishable by imprisonment for 10 years. In neither case was knowledge of the age of the girl specified to be an element of the offence.

68. The crime at issue in *Gibson* was indecently assaulting a girl under the age of 12 years contrary to s48 of the 1864 Act.[163] There too knowledge of the age of the girl was not expressly specified to be an element of the offence. The question was whether a drunken man had committed the offence by indecently assaulting a girl whom he had found in the dark in a brothel and did not know to be aged under 12 years. On a special case stated for the Full Court, Higinbotham, Williams and Holroyd JJ held that he did.

69. Delivering the judgment of the court, Higinbotham J treated s48 as one of a series of provisions dealing with crimes against girls and women, that is, as part of a coherent statutory scheme. As I have done, his Honour noted that some of the provisions did, and others did not, make intent an element of the crime. As regards crimes against girls containing an age ingredient, he acknowledged that, in a large number of cases, the accused might have 'reasonable or plausible' grounds for believing the girl was beyond the protected age.[164] However, the criminal liability of the accused turned on the intention of the legislature.[165] Applying the judgment of the majority in Prince, his Honour held that *bona fide* ignorance of the age of the girl concerned was not an excuse.[166]

70. That was in 1885. To my knowledge, the judgment of the Full Court in *Gibson* has never been doubted or overturned. It was followed by the Full Court in *R v Peters*[167] and *R v Kennedy*.[168]

71. Looking at the *Crimes Act* 1891 (Vic), the *Crimes Act* 1915 (Vic) and the *Crimes Act* 1928 (Vic), it clear that, in the period between Gibson and Peters (which was decided in 1956), the relevant offences were re-enacted, sometimes in amended form, and the provisions remained grouped in a single division of the Act.

72. Looking at the *Criminal Law Amendment Act* 1885 (UK), it is clear that, after *Prince*, the United Kingdom made reasonable mistake as to age an excuse to the crime of consensual carnal knowledge of a girl aged between 13 and 16 years[169] and abduction of a girl under the age of 18 years with intent to have carnal knowledge.[170]

73. Looking again at the *Crimes Act* 1891, it referred to[171] and adopted some of the changes to the law which had been made by the amending legislation in the United Kingdom. But Parliament did not make reasonable mistake of age a free-standing defence to any of the sexual crimes, no

matter what the age of the complainant. No Victorian legislation since has introduced such a defence.

74. Our Act of 1891 did abolish the defence of consent, subject to limited exceptions. By s6, consent to the crime of carnal knowledge of a girl under the age of 16 was not available as a defence, unless the girl was older or of the same age as the accused (the so-called 'young man's defence').[172] The 1928 consolidation, which was in force when *Peters* was decided, was to the same effect. Further, by s46(2) of the 1928 Act, consent was no defence to the crime where the accused was over 21 years and the girl was aged between 16 and 18 years. By s48(3), consent was no defence where the crime was incestuous. By s51(2), consent was no defence to the crime of unlawfully and indecently assaulting a girl under the age of 16 years. None of the provisions of the 1891 or the 1928 Acts made reasonable mistake of age a free-standing defence.

75. In Peters, the accused sought leave to appeal against conviction on the ground that it was an excuse to a charge against s44(1) of the 1928 Act[173] of carnally knowing a girl over the age of 10 years and below the age of 16 years for the accused to believe on reasonable grounds that the girl was aged over 16 years. The trial judge had instructed the jury that this was not an excuse. Leave to appeal was refused. Herring CJ (Martin and Barry JJ agreeing) said[174] that the judge had done 'what has been done in [Victorian] Courts since' *Gibson* and *Prince*. Holding that the issue was one of legislative intention, the Chief Justice said that, following these decisions, provisions creating sexual offences of this nature were interpreted such that knowledge of age was not an element:

> The majority in *Prince's Case* said that a man, who has connection with a child, relying on her consent, does it at his peril, if she is below the statutory age. The Full Court in *Gibson's Case* adopted this statement, and since then in Victoria this principle has been applied in cases falling under sec. 44(1) and kindred sections. It is too late now to apply to this Court to adopt a different view.[175]

That was in 1956. If it was too late then to adopt a different view, it is even later now, and only the Court of Appeal (or the High Court) could do it. Further, in 1981 came *Kennedy*, where the same approach was taken in relation to another of these 'kindred sections'.

76. Between *Peters* and *Kennedy*, the law was consolidated in the Act of 1958 without relevant amendment. The sexual offences remained grouped together in a single division.

77. The accused in *Kennedy* appealed against a conviction for abducting a girl under the age of 18 years with intent carnally to know her contrary to s59 of the 1958 Act.[176] His defence was that he honestly and reasonably believed that the girl had her custodian's permission to go with him, which the prosecution had not negatived. Brooking J (Young CJ and Starke J concurring) held that, just as mistake of age was not a defence, so mistake of permission was not a defence. That conclusion was given in terms which again approved of *Prince* and also *Gibson* and *Peters*: It is clear enough that honest and reasonable mistake as to the age of the girl affords no defence to a charge under s59, having regard to the nature of the offence and to the manifest object of the legislature in proscribing the conduct the subject of the section.[177] It would not be sensible to impose strict liability in relation to one necessary circumstance – the age of the girl – and to admit the defence of mistake in relation to another – the will of the custodian.[178]

78. In the view of his Honour, this conclusion was justified by the purpose of the offence, which was 'to protect girls and young women'.[179] By reason of that purpose,

> persons who take girls and young women out of the possession and against the will of their parents or guardians should act at their peril not only as regards the age of the female but also as regards the will of the custodian.[180]

Applying the test applied by Dixon J in *Thomas*,[181] his Honour held that the presumptive availability of honest and reasonable mistake as an excuse was displaced by the 'subject matter of the legislation'.[182] Whatever doubts may surround the authority of *Prince*, the authority of *Thomas* is not in doubt.

79. Since *Kennedy*, the sex offence legislation has been significantly amended in the direction of enhancing its protective purpose, including the purpose of protecting children from sexual harm

and exploitation. Parliament and those drafting the amendments would have been aware of the law as stated in *Gibson*, *Peters* and *Kennedy*, but left it untouched.

80. The *Crimes (Sexual Offences) Act* 1980 (Vic) amended pt 1, div 1 of the *Crimes Act* 1958 to add new sub-divisions, including sub-divs (8) ('Sexual Assaults') and (8A) ('Sexual Offences against Young Persons'). Besides introducing new offences and abolishing obsolete rules, the new provisions were expressed in gender-neutral terms. The provisions did not introduce a free-standing mistake of age defence, but did continue the abolition of the general defence of consent, subject to limited exceptions.

81. For example, under s48(1), as amended, it was an offence to take part in an act of sexual penetration with a person who was aged above 10 years but under 16 years. By s48(4), the consent of the person was not a defence unless –

> (a) the accused believed on reasonable grounds that the person was of or above the age of sixteen years; or
>
> (b) the accused was not more than two years older than the person.

This qualified defence of consent was attached to other sexual offences in similar terms,[183] including the offence of committing an act of gross indecency with a person aged under 16 years.[184]

82. In *R v Douglas*,[185] the accused sought leave to appeal against a conviction for having sexual intercourse with a female above the age of 10 years and under the age of 16 years, contrary to s48 of the 1958 Act (as amended). Relying on s48(4), his defence was that the complainant consented and he believed on reasonable grounds that she was aged over 16 years. O'Brien J (Starke and Nathan JJ agreeing) dismissed the application for leave to appeal. In the course of doing so, his Honour held that 'the onus of proof of the defence of mistake [of] age [where consent is alleged] lies upon the defendant'.[186]

83. After the judgment in *Douglas* was given, the High Court delivered judgment in *He Kaw Teh*. Doubts then arose about whether the decision in *Douglas* that the onus of proof lies upon the defendant was consistent with the judgment in *He Kaw Teh*. The issue was indirectly considered by Maxwell P, Vincent JA and Bongiorno AJA in *R v Mark and Elmazofski*[187] and directly considered by Vincent JA, Coldrey and Curtain AJJA in *R v Deblasis and Deblasis*.[188] After referring to various inconsistent rulings on the issue by judges of the County Court, including the ruling of her Honour Judge King (as King J then was) that *Douglas* was decided *per incuriam*,[189] Vincent JA, Coldrey and Curtain AJJA held in *Deblasis and Deblasis* that the issue had been settled in *Mark and Elmazofski* on the basis that it was for the prosecution to prove lack of consent and disprove honest and reasonable mistake of age where the issue was legitimately raised.[190]

84. The point is, the discussion in *Douglas*, *Mark and Elmazofski* and *Deblasis and Deblasis* as regards mistake of age was in the context of the qualified statutory defence of consent. Nothing in the discussion in these cases casts doubt upon the decisions in *Gibson*, *Peters* and *Kennedy* that mistake of age as such was not a free-standing defence.

85. The accused in the present case was charged with the offence of committing an indecent act in the presence of a child under the age of 16 years contrary to s47(1) of the 1958 Act. This provision was introduced by the *Crimes (Sexual Offences) Act* 1991 (Vic) which enacted the new sub-divs (8) to (8F) of the 1958 Act. Section 47 was introduced as part of the new sub-div (8C).

86. As so introduced, s47 provided:

> (1) A person must not wilfully commit, or wilfully be in any way a party to the commission of an indecent act with or in the presence of a child under the age of 16 to whom he or she is not married. Penalty: Imprisonment for 10 years.
>
> (2) Consent is not a defence to a charge under sub-section (1) unless at the time of the alleged offence –
> (a) the accused believed on reasonable grounds that the child was aged 16 or older; or
>
> (b) the accused was not more than 2 years older than the child; or

(c) the accused believed on reasonable grounds that he or she was married to the child.

87. In *R v TSR*,[191] Chernov JA (Phillips CJ and Phillips JA agreeing) explained the place of the provision in the revised statutory scheme:

> s47 was to stand in place of both the old ss44(3) and 50(1), with this change in particular: s47 made no reference to 'assault' (as did s44) or to the act of indecency having to be 'gross' (as did s50). To that extent at least it was wider than the earlier provisions … In short, s47 is the particular provision when children under the age of 16 are involved …[192]

So, this new offence was intended to give wider protection to children against exposure to or involvement in indecent acts. I will consider TSR further, but later.

88. Under the amendments, where qualified consent was made available as a defence to particular offences, it was in the form in s47(2).[193] Consent was expressly declared not to be a defence at all for some other offences.[194] Nothing in the amending legislation or the second reading speech of the Attorney-General[195] suggests any intention to make mistake of age as such a defence or to alter the law as stated in *Gibson*, *Peters* and *Kennedy*.

89. In 2001 the Victorian government gave the Victorian Law Reform Commission a reference to review current legislative provisions relating to sexual offences 'to determine whether legislative, administrative or procedural changes are necessary to ensure the criminal justice system is responsive to the needs of complainants in sexual offence cases.'[196]

90. The Commission issued a discussion paper on the law with respect to sexual offences,[197] including sexual offences against children and young people.[198] The paper discussed[199] the issue of mistake of age in the context of consent, the burden of proof and the doubts about the correctness of *Douglas* in the light of *He Kaw Teh*. It raised as an issue whether the burden of proof should be clarified,[200] including in relation to the offence of committing an indecent act with or in the presence of a child.[201]

91. The final report[202] made a large number of wide-ranging recommendations for the reform of the law. One of the recommendations was that, as regards the offence of sexual penetration with a child aged between 10 and 16 years (s45), the position in *Douglas* should be accepted.[203] In making that recommendation, the Commission took into account that the defence of reasonable mistake as to age 'is only available when the complainant consented to penetration'.[204] That view of the law reflected, and must have been based on, the decisions of the Full Court in *Gibson*, *Peters* and *Kennedy*.

92. The government accepted most of the Commission's recommendations. Legislative changes were implemented in the *Crimes (Sexual Offences) Act* 2006 (Vic), the *Crimes (Sexual Offences) (Further Amendment) Act* 2006 (Vic) and the *Crimes Amendment (Rape) Act* 2007 (Vic). Among the provisions enacted were new objectives and guiding principles for sub-divs (8A) to (8G) (introduced by s5 of the *Crimes (Sexual Offences) Act* 2006, which I will discuss below), and amendments to s47, which is the provision under which the plaintiff was charged.

93. The amendments to s47 reflected the government's acceptance of the Commission's recommendation that, where the defence was that the complainant had consented to the sexual activity, the burden of proof should be on the accused to establish a reasonable belief that the complainant was above the protected age. Accordingly, s47(2) of the principal Act was amended such that consent was not a defence unless:

> (a) the accused satisfies the court on the balance of probabilities that he or she believed on reasonable grounds that the child was aged 16 or older; or
>
> (b) the accused was not more than 2 years older than the child; or
>
> (c) the accused satisfies the court on the balance of probabilities that he or she believed on reasonable grounds that he or she was married to the child.

A new s47(3) was also introduced, providing: 'If consent is relevant to a charge under subsection (1), the prosecution bears the burden of proving lack of consent.'

94. The principal Act was amended in the same way in relation to other offences where age was an ingredient.[205]

95. Those are the provisions which were in force when the plaintiff committed the relevant act and which are still in force. It is important for present purposes to identify what the provisions do and do not do. In cases where consent is relied upon and available as a defence, the provisions do impose a legal burden of proof on an accused to establish on the balance of probabilities that he or she believed on reasonable grounds that (for example) the child was over the protected age.[206] In the words of Maxwell P, Weinberg and Harper JJA in *Curtis v The Queen*,[207] 'it is for the [accused] at trial to make good the "reasonable grounds" limb of the defence'.[208] However, in cases where consent is not relied on as a defence, the provisions do not alter the law, as stated in *Gibson*, *Peterson* and *Kennedy*, that mistake as to age is not a free-standing defence.

96. In conclusion, the history of Victoria's sex offences legislation and the previous decisions of the Full Court of this court suggest that it was the plain intention of Parliament that intention or knowledge in respect of the complainant's age was not required to prove a charge of offending against s47(1) of 1958 Act, and mistake as to age was not to be a defence. However, the previous decisions of the Full Court preceded the decision of the High Court in the now leading authority of *He Kaw Teh*. The tests enunciated by the High Court in that case (and applied in *CTM*) require the court to examine the question by reference to the provisions which are in issue, taking into account particular considerations. To that task I now turn.

Whether presumption displaced

Plaintiff's submissions

97. The plaintiff submitted that the presumption of interpretation was not displaced and either knowledge of the age of the complainant was an element of the offence or honest and reasonable mistake of age was a defence. The plaintiff faintly contended that the first alternative applied but strongly contended that the second alternative applied. In support of that submission, he relied on the decision of the High Court in *He Kaw Teh* and particularly the words and subject matter of the statute and the enforcement of its provisions.

98. In relation to the words of the statute, the plaintiff submitted that the word 'wilfully' in s47(1) made clear that subjective intention or knowledge of all of the elements was required. The word 'wilfully' applied to the intentional commission of the indecent act, the plaintiff's knowledge of the presence of a person and that the person was a child aged under 16 years.

99. It was submitted that s47(2) and (3) did not cover the field of circumstances in which reasonable mistake of fact may be an issue. As consent was not an issue in the present case, these provisions did not apply and had nothing to say about the availability of honest and reasonable mistake of fact as a defence.

100. In relation to the subject matter of the statute, the plaintiff accepted that the sexual abuse of children was a 'grave social evil'. On the other hand, the offence in s47 was 'truly criminal' and carried a maximum penalty of imprisonment for 10 years. A consequence of being found guilty was registration under the *Sex Offenders Registration Act*, with the very onerous restrictions which that involves.

101. In relation to the enforcement of the provisions, it was submitted that requiring *mens rea*, or not excluding the defence of honest and reasonable mistake in relation to the age of the child, would not significantly compromise the enforcement of the provisions. In most instances, the age of a child is apparent from the child's appearance or from the accused's personal knowledge of the child. It was only where the child was aged under 16 years but apparently older that enforcement would become more difficult.

102. The plaintiff relied on the decision of the High Court in *CTM*, particularly the holding that the defence of honest and reasonable mistake of age was available as a defence despite the repeal of a provision which made consent a defence when the accused had that belief. In the plaintiff's submission, if the mistake defence was available in *CTM* despite the repeal of the consent defence, it was available under s47(1) despite the provisions of s47(2) and (3). That was because the defence of consent and the defence of honest and reasonable mistake as to age were

fundamentally different. In s47(1)-(3), the (qualified) consent defence and the defence of honest and reasonable mistake of age co-existed. Therefore s47 did not preclude the operation of the general principle of criminal responsibility in relation to mistaken belief.

103. The plaintiff sought to distinguish the decision of the Court of Criminal Appeal of South Australia in *Clarke*. It was submitted that the provisions in South Australia dealt with pornography, not committing indecent acts. It may be difficult to know whether or prove that a person involved in pornography was a child. That was not so with committing an indecent act in a child's presence. There were differences in the terms of the legislation (for example, in South Australia a child was a person 'under, or apparently under, the age of 16 years', suggesting that an honest and reasonable mistake as to age was not a defence). The Court of Criminal Appeal of South Australia relied on the decision of the Court of Criminal Appeal of New South Wales in *CTM v The Queen*, which was overturned by the High Court in *CTM*. Finally, the New South Wales provisions in *CTM* were much closer to the Victorian provisions than the South Australian provisions in Clarke.

104. For the reasons which follow, those submissions must be rejected.

Interpretation of provisions in question

105. Section 47 of the *Crimes Act* provides:

> (1) A person must not wilfully commit, or wilfully be in any way a party to the commission of, an indecent act with or in the presence of a child under the age of 16 to whom he or she is not married. Penalty: Level 5 imprisonment (10 years maximum).
>
> (2) Consent is not a defence to a charge under subsection (1) unless at the time of the alleged offence—
> (a) the accused satisfies the court on the balance of probabilities that he or she believed on reasonable grounds that the child was aged 16 or older; or
> (b) the accused was not more than 2 years older than the child; or
> (c) the accused satisfies the court on the balance of probabilities that he or she believed on reasonable grounds that he or she was married to the child.
>
> (3) If consent is relevant to a charge under subsection (1), the prosecution bears the burden of proving lack of consent.

106. According the authorities which I have discussed, there is a presumption of interpretation that intention or knowledge is an ingredient of all of the elements of the offence in s47(1) or, if not that, then honest and reasonable mistake as to age is a defence, unless Parliament has plainly revealed a contrary intention expressly or by necessary implication. In determining whether that contrary intention is plainly revealed, it is necessary to examine the subject matter and purpose of the legislation creating the offence, the terms of the legislation and whether criminal liability without intention or knowledge, or honest and reasonable mistake of age as a defence, would promote the observance of the legislative scheme.

Subject matter and purpose of legislation

107. The subject matter of s47 is the crime of committing an indecent act with or in the presence of a child under the age of 16 years. We have here a true crime and not a regulatory offence. It is a serious crime which is punishable by imprisonment for up to 10 years. A finding of guilt results in registration of the offender under the *Sex Offenders Registration Act* and other serious consequences. The crime covers a broad spectrum of possible offending, from the very minor to the very grave. Offenders who are themselves children may be convicted of the crime.[209] If intention or knowledge is not required and reasonable mistake as to age is not a defence, all persons found guilty (including child offenders) will be stigmatised as sex offenders, even those who reasonably believed that the complainant was aged over 16 years. In *CTM*, Gleeson CJ, Gummow, Crennan and Kiefel JJ[210] and also Hayne J[211] emphasised the importance of this consideration.

108. So understood, the subject matter of s47 supports the plaintiff's case that the interpretative presumption has not been displaced. It is unlikely that Parliament would have intended such serious penal and other consequences to be visited upon accused persons (including accused who are themselves children) who did not intend to offend, had no knowledge that they were doing so or who honestly and reasonably believed that their actions were not criminal.

109. On the other hand, the purposes of s47 support the interpretation that the presumption has been displaced. I will consider the purposes of the provision in the context of the statutory scheme and the principles by which it must be interpreted.

110. I have referred to the decisions of the Full Court of this court in *Gibson*,[212] *Peters*[213] and *Kennedy*[214] which treated the former sex offence provisions of the *Crimes Act* as 'kindred' (to use the word of Herring CJ (Martin and Barry JJ agreeing) in *Peters*).[215]

111. As we have seen, the Full Court held in those cases that, by reason of the purposes and subject matter of the offences in question, it was plainly intended that mistake of age was not a defence. In *Gibson*, the offence was indecently assaulting a girl under the age of 12 years contrary to s48 of the 1864 Act. In *Peters*, it was carnally knowing a girl over the age of 10 years and below the age of 16 years contrary to s44(1) of the 1928 Act. In *Kennedy*, it was abducting a girl under the age of 18 years with intent carnally to know her contrary to the 1958 Act. This reasoning applies equally to the interpretation of s47(1) of 1958 Act.

112. The issue in *Clarkson* was whether and in what way consent was relevant when sentencing an offender for committing sexual offences against a child. Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA held that a child's so-called consent could never be a mitigating factor but that the circumstances in which it was given could form part of the court's assessment of the gravity of the offending.[216]

113. A crime at issue in that case was the one specified in s47. Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA said it was 'axiomatic'[217] that s47 had to be interpreted in context. That meant taking into account the objectives and guiding principles of sub-div (8C) as specified in ss37A and 37B respectively.

114. Here are the objectives specified in s37A:

> The objectives of Subdivisions (8A) to (8G) are—
> (a) to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity;
>
> (b) to protect children and persons with a cognitive impairment from sexual exploitation.

115. These are the guiding principles specified in s37B:

> It is the intention of Parliament that in interpreting and applying Subdivisions (8A) to (8G), courts are to have regard to the fact that—
> (a) there is a high incidence of sexual violence within society; and
> (b) sexual offences are significantly under-reported; and
> (c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment; and
> (d) sexual offenders are commonly known to their victims; and
> (e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.

116. Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA made the following pertinent remarks about the interpretation of s47 (and s45) having regard to ss37A and 37B:

> Parliament's intention could hardly have been made clearer. Although enacted previously, ss45 and 47 were thereafter to be treated as governed by the objectives in s37A and the interpretive principles in s37B. Relevantly for present purposes, these sections are to be approached – and interpreted – on the basis that children are vulnerable persons against whom a significant number of sexual offences are committed, and they must be protected from sexual exploitation.[218]

117. The observations of the Court of Appeal in *Clarkson*,[219] the structure and contents of sub-divs (8)-(8G) and the objectives and guiding principles specified in ss37A and 37B require s47 to be seen as part of a coherent legislative scheme, unlike the provisions which were examined by the House of Lords in *B (A Minor)*. Further, in relation to the purposes of the relevant provisions, the observations of the Court of Appeal are consistent with the decisions of the Full Court of this court in *Gibson*, *Peters* and *Kennedy*. As to those purposes, there is no reasonable basis for distinguishing the legislation which is in issue in this case.

118. Those purposes were addressed in detail by the Court of Appeal in *Clarkson*. Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA made reference to an official report and judgments in other jurisdictions, both in Australia and overseas, including the decision of the House of Lords in *R v G*.[220] Then their Honours emphasised two purposes in particular:

> In its statutory context, the absolute prohibition on sexual activity with a child can be seen as having twin purposes. The first is to protect children from the harms caused by premature sexual activity and – to that end – to protect them from their own immaturity. On behalf of the community, Parliament has decided that those under 16 cannot meaningfully consent to sexual activity, even if subjectively attracted to the idea of participating in such activity. Secondly – and in order to advance the protective purpose – the prohibition is designed to deter those who might contemplate sexual activity with a person under 16.[221]

119. Likewise, exposing children to indecent acts, including indecent sexual acts, causes them serious physical, emotional and social harm from which they need protection, especially because the immaturity of children renders them particularly vulnerable to that harm. The purposes of s47 are to give children that protection and deter those who might contemplate that exposure. As the premise of s47 is that children under 16 years of age cannot meaningfully consent to such exposure, the purposes embrace protecting children from themselves as much as protecting them from others. The purposes of the provision apply equally to both adult and child offenders. The purposes support a conclusion that Parliament intended the offence in s47(1) to be an absolute liability offence as regards the age ingredient.

120. While the purposes of s47 supports that conclusion, I am not suggesting that, without more, such purposes are sufficient to displace the presumption. Authorities which I have discussed establish that the court cannot infer from protective purposes alone that Parliament intended an offence to be established without intention and knowledge or that mistake as to age is not a defence.

121. Further, when referring to the context in which s47 must be interpreted, I am not meaning to imply that, when determining whether Parliament plainly intended the interpretative presumption to be displaced, attention can be allowed to drift away from the language of the provision towards the 'general atmosphere'[222] of the scheme. It is to the language of s47 that I now turn.

Terms of legislation creating offence

122. It is clear that s47(1) does not create an absolute liability offence in every respect. To offend against that provision, a person must 'wilfully' commit an indecent act with or in the presence of a child. The word 'wilfully' conveys the sense that the act must be committed intentionally and knowingly. This requirement for intention and knowledge clearly applies to the 'indecent' nature of the act. The accused must commit the act intentionally and knowingly in that respect. The accused cannot be convicted if the act was committed accidentally. The question is, does the word 'wilfully' also apply to the age of the child such that intention and knowledge in respect of that age is an ingredient of the offence or that mistake as to age is a defence.

123. The fact that s47 does not create an absolute liability offence in all respects assists the plaintiff's case to a certain extent in relation to the age ingredient. The act must be committed intentionally and knowingly in relation to the indecency ingredient. If Parliament's reasoning was consistent, as is natural to think, the intention would more likely be that the act must be committed with intention and knowledge in relation to the age ingredient as well.

124. However, it does not automatically follow from the presence of one element of an offence requiring intention and knowledge that the other elements of the offence have the same requirement. That principle was stated by Black CJ in *Chief of the General Staff v Stuart*:

> In determining whether in a provision such as s44 the presumption has been displaced, and to what extent it has been displaced, I see no reason why different elements of an offence should necessarily be treated in the same way: see *He Kaw Teh*[223] … Although it is convenient to be able to classify an offence in its entirety as one of 'strict' or 'absolute' liability, the task is one of construction and it is by no means inevitable that the application of the same principles of construction should produce the same result with respect to each ingredient in an offence.[224]

125. So it was that, in *Gibson*, *Peters* and *Kennedy*, mistake of age was held not to be a defence to a charge of committing the sexual offences in question even though intention and knowledge applied to other elements of those offences. That reasoning applies equally to the age ingredient in s47(1).

126. Under the terms of s47(1), two elements are committing an indecent act and doing so with or in the presence of a child under the age of 16 years. A great many acts are indecent depending on the situation and not *per se*. Therefore the indecency of the act and the age of the complainant may not be completely independent. An act may be natural and lawful and therefore not indecent when committed consensually with or in the presence of someone over the age of 16 years yet be indecent when committed with a child under that age. In such cases, whether the act is indecent may turn on the age of the complainant and the circumstances in which the act was done. The accused's mental state of intentionally and knowingly committing an act which is indecent will be inextricably bound up with the accused's belief about the age of the complainant. It might be argued that, because the mental state of the accused with respect to the indecency of the act is an element of the offence and the two elements are potentially connected in this way, the mental state of the accused with respect to the age of the complainant must also be an element, or at least that honest and reasonable mistake of age is a defence.

127. If there was no answer to that argument, it would be an obstacle in the way of finding a displacing intention. But I think the answer lies in s47(2). The connection between the indecency of the act and the age of the complainant can only arise where the involvement of the complainant was consensual. The terms of s47(2)(a) expressly deal with that situation. Under that provision, the consent of the complainant is not a defence. Children under the statutory age are not considered capable of giving meaningful consent. But if the act was committed consensually and the accused satisfies the court on the balance of probabilities that he or she believed on reasonable grounds that the complainant was over the statutory age, the offence will not be established.

128. In the present case, the complainants did not 'consent' to the appellant's act. The finding of the judge that the act was indecent in the circumstances was not and could not be challenged. There was no connection between the plaintiff's mental state as to the indecency of the act and his mental state as to the age of the complainants. In relation to whether the terms of the legislation indicate a displacing intention, I do not take this into account one way or the other. I simply observe that, if the presumption is displaced in s47(1) in relation to the age ingredient, s47(2)(a) expressly deals with the consequences in a case where the act was consensual.

129. Section 47 does not contain a provision like s210(5) of the *Criminal Code* 1899 (Qld)[225] that it is a defence to the crime of indecent treatment of children under the age of 16 years (s 210(1)) that, if the child was aged above 12 years, the accused believed on reasonable grounds that the child was aged above 16 years. The significance of such a provision is that it amounts to explicit acceptance by the parliament that the defence applies in all cases and not just where the complainant consents. In other words, the intermediate principle of criminal responsibility (strict liability) is to be applied in relation to the age ingredient. Such a provision makes plain that the parliament has accepted democratic responsibility for that outcome. While there is no such provision in s47, that does not detract from the plaintiff's case. The application of the interpretative presumption is the starting point of the analysis. The question is whether the presumption has been plainly displaced. A failure by Parliament expressly to legislate in favour of the presumption does not indicate any intention to displace it.

130. The Victorian legislation does not have a provision like that in South Australia defining 'child' to include a person 'apparently under the age of 16 years'.[226] Our provision applies to 'a child under the age of 16'. So here it is cut and dried: as to whether the child is a child, the fact of the child's age is what counts and the appearance of the child is irrelevant. That lessens somewhat the strength of one aspect of the reasoning in *Clarke*[227] for this case. It must also be accepted that there are stronger considerations in favour of the displacement of the presumption in relation to pornography offences involving children than there are in relation to the offence of committing an indecent act with or in the presence of a child.

131. Section 47 is silent on whether the accused must have intention and knowledge in respect of the age of the child. It is also silent on whether reasonable mistake as to age is a defence. This too

counts in favour of the plaintiff's case because it means that there are no express words displacing the interpretative presumption. Therefore it can only be displaced by a necessary implication, and one strong enough to satisfy the consideration on which such emphasis was placed in *CTM*: the court must be persuaded that Parliament has taken responsibility for displacing a fundamental rule of criminal responsibility.[228]

132. On one view, s47(2)(a) suggests that the presumption has been displaced. On that view, by enacting this provision Parliament has plainly indicated that reasonable mistake of age is only relevant when the accused relies on the consent of the complainant. In other words, s47(2)(a) covers the field of circumstances in which reasonable mistake of age may be relied upon.

133. One difficulty with that view is that, according to the interpretative presumption, the starting point is that criminal liability normally depends on intention and knowledge. The intermediate position (strict liability) is that honest and reasonable mistake is a defence. Section 47(2)(a) does not speak directly to the issue of whether that presumption has been displaced for all purposes and to the full extent. It specifies particular circumstances in which reasonable mistake as to age is a defence; it does not specify that, in other circumstances, prove of intention and knowledge is not required and mistake of age is not a defence.

134. That was the reasoning of the High Court in *CTM* in relation to the repeal of the consent defence in the New South Wales legislation which was there in issue. In the words of Gleeson CJ, Gummow, Crennan and Kiefel JJ, the defence which was repealed did not operate as

> a statutory narrowing of a wider potential ground of exculpation that, according to established principle, would ... have been available otherwise and ... in 1988, had been held to be available in the case of certain homosexual offences.[229]

(The case in 1998 to which their Honours were referring was *Chard*.)[230]Accepting the force of that reasoning, two significant considerations regarding s47(2)(a) point in the other direction.

135. In the first place, the reasoning of the High Court in *CTM* looks through the repeal or amendment of the relevant specific provision to the underlying legal position concerning the availability of the defence in respect of the offence in question. In *CTM*, the established underlying position, as stated in Chard, was that the defence of reasonable mistake as to age applied to like offences. In Victoria, the established underlying position is the opposite. As stated in *Gibson*, *Peters* and *Kennedy*, the defence of reasonable mistake as to age does not apply to like offences.

136. In the second place, if honest and reasonable mistake of age is a defence, the prosecution must negative any reasonable doubt about that issue once it has been legitimately raised. That was explained by Dawson J in *He Kaw Teh*:

> There is no onus upon the accused to prove honest and reasonable mistake upon the balance of probabilities. The prosecution must prove his guilt and the accused is not bound to establish his innocence. It is sufficient for him to raise a doubt about his guilt and this may be done, if the offence is not one of absolute liability, by raising the question of honest and reasonable mistake. If the prosecution at the end of the case has failed to dispel the doubt then the accused must be acquitted.[231]

Yet, under s47(2)(a) (as amended),[232] when consent is alleged the onus is on the accused to satisfy the court on the balance of probabilities that he or she believed on reasonable grounds that the complainant was above the statutory age.

137. It is unlikely that Parliament would have intended the onus to be on the prosecution to disprove honest and reasonable mistake as to age when legitimately raised as a free-standing defence yet intended the onus to be on the accused to prove the factual basis of the defence when raised in the context of consent. It is more likely that Parliament has acted all along on the basis that mistake as to age is not a defence except as specified in a qualified way in s47(2)(a).

138. As can be seen, the indications based on the terms of s47 are countervailing. However, once it is accepted that Parliament enacted s47 against the background of the legal position which was established by *Gibson*, *Peters* and *Kennedy*, it is more likely that displacement of the presumption was intended in relation to the age ingredient, both as to intention and knowledge

and honest and reasonable mistake as a defence, ie that s47 was to be an offence of absolute liability in relation to the age ingredient. That conclusion is supported by the two considerations concerning s47(2) to which I have referred.

Promoting observance of legislative scheme

139. As I understand the authorities, the purposes of the criminal law include protecting the community and deterring wrongdoers while at the same time respecting the fundamental rights of persons. Those purposes are not well served by convicting persons of crimes which they did not intend to commit. Therefore, when interpreting a criminal provision, it is presumed that the prosecution must prove a guilty mind or, in some circumstances, at least an absence of honest and reasonable mistake of fact, subject to plain contrary legislative intention. In determining whether that intention has been made plain, it is necessary to take into account promoting observance of the legislative scheme, among other things. This is not a coarse or robust exercise. It cannot simply be reasoned that the observance of the provision would be promoted by adopting an absolute or strict liability interpretation because it would make it easier for the prosecution to obtain convictions. If that were to be permissible, the interpretative presumption would be a mirage. The question is not so much whether prosecution would be made easier by adopting such an interpretation but how absolute or strict liability would promote the observance of the provision by potential offenders.

140. In that regard, it is necessary to consider whether absolute or strict liability would turn a luckless person who had no intention to commit an offence, or one who could not take reasonable avoiding precautions, into a criminal. Especially in relation to serious offences, people are generally liable to conviction and punishment because they are personally responsible for intentionally allowing their standard of behaviour to fall below a legislated norm, not because they have accidentally stumbled into a criminal liability trap. An interpretation in favour of absolute or strict liability would not promote observance of the provision in those circumstances.

141. That is the significance of the observations of Brennan J in *He Kaw Teh* to which I earlier drew attention. In determining whether the presumption was displaced, his Honour placed stress on whether, so interpreted, the provision in question allowed the individual to take reasonable avoiding action. If the provision allowed the individual to do so, the courts would be more likely to hold that, on a proper interpretation, liability was intended to be absolute and that a potential offender would commit the proscribed act at their peril.[233] It could not be said in such circumstances that the provision would operate like a criminal liability trap. The potential offender would only be liable if he or she had intentionally done or not done something which was reasonably avoidable.

142. The application of these principles is well illustrated by the decision of the Court of Criminal Appeal of the Supreme Court of South Australia in *Clark*.[234] As we have seen, the court considered carefully whether the enforcement of the offence of producing pornography with under-age persons as one of absolute liability would 'give rise to a likelihood that luckless or innocent persons will be convicted, without serving any useful purpose',[235] to use the words of Doyle CJ. That took the court to a consideration of the circumstances in which the offence was likely to be committed and the avoidance action which was reasonably open to potential offenders. You will recall that the High Court refused special leave to appeal against this decision.

143. With that in mind, I turn to s47. Now, s47 does not criminalise 'indecent' acts which are committed when the accused is alone or with or in the presence of someone who is not under the statutory age. Putting aside s47(2), the act is criminal when an act which is indecent is wilfully committed by the offender with or in the presence of a person under that age. Relevantly to this case, the crime is constituted by the wilful committing of the indecent act and the presence of such a person. Therefore, potential offenders are those who might intentionally and knowingly commit an indecent act and do so with or in the presence of a child under the age of 16 years.

144. If s47(1) operates as an offence of absolute liability in relation to the age ingredient, it cannot be said that such potential offenders might be subject to futile prosecution for their luckless and accidental behaviour. The potential offender deliberately will have put themselves at risk of offending by intentionally committing an act which is indecent and doing so with or in the presence of another person or other persons when they cannot be sure that the other person is or all the other persons are above the statutory age. Potential offenders can take reasonable

avoiding action by not committing indecent acts with or in the presence of a person or persons when they cannot be so sure.

145. A problem is that it is not easy to be sure that a young person is over or under the age of 16 years. The age of children is not stamped on their foreheads. It is common knowledge that, by their mature appearance, many children who are under the age of 16 years can and do deceive others into believing honestly that they are above that age. Moreover, as such children can and do behave in that way, it is not easy to be sure that they will not have made their way into some place where they not allowed to be. To use the present case as an example, it not easy to be sure that, in a public aquatic centre, there will be nobody under the age of 16 years in a spa, sauna and steam room area which is reserved for people over that age. But, in my view, all of this is reasonably foreseeable.

146. Because this is reasonably foreseeable, potential offenders can take it into account when choosing whether or not deliberately to commit an indecent act in the presence of people in such a place. They can take reasonably avoiding action simply by refraining from the commission of indecent acts where children might be. If a potential offender goes ahead anyway and a person present happens to be a child under the age of 16 years, the offender has committed the act at their offender peril. It is not right to say that the offender has walked accidentally into a situation where he or she might commit an indecent act in the presence of that child. An interpretation of absolute liability would promote the observance of the provision in those circumstances. Those are the circumstances of the present case.

147. So interpreted, s47(1) would impose on potential offenders a greater duty of care to avoid liability than is normally required under the criminal law. The authorities establish that a court would not lightly interpret a provision in such a way. However, the subject matter and purposes of s47 combine with the promotion of the observance of the legislative scheme to suggest that this was Parliament's plain intention.

148. The subject matter of s47(1) is the offence of committing an indecent act in the presence of a child under the age of 16 years. The cardinal purposes of the provision are protecting children from such acts, which includes protecting children from themselves, and deterring potential offenders. Imposing on potential offenders a duty of greater vigilance to avoid liability is consistent with the nature of the offence and the purpose of the provision: for the effective protection of children from indecent acts which children may in their immaturity seek out, the provision requires potential offenders to do more than usually required to avoid exposing children to such acts. Absolute liability promotes the observance of the provision in this way. Strict liability would do so to a significantly lesser extent. The force of this consideration is not as great in the case of child offenders who themselves may lack decision-making maturity. But the main target of the provision is the adult offender from whom children need protection most.

Presumption displaced

149. The subject matter and purpose of the legislation, the terms of the legislation and promoting observance of the legislative scheme plainly indicate by necessary implication that the interpretative presumption has been displaced and that Parliament intended the crime in s47(1) to be one of absolute liability in respect of the age ingredient. In cases not involving consent as covered by s47(2), honest and reasonable mistake of age is not available as a defence and the judge was correct to so conclude. The plaintiff's application for judicial review of his convictions and sentences on the charges relating to the first and second complainants will be dismissed.

PRESENCE (GROUND (3))

150. Although the trial judge did not give particular reasons for finding that the third complainant had been present when the plaintiff committed the indecent act, his Honour found her to be a 'straightforward witness of truth'. On this basis, I think I should conclude that his Honour accepted her evidence on this issue.

151. The evidence of the third complainant was that she was in the sauna when the other two complainants observed the plaintiff commit the indecent act. She deposed that she did not see the act being committed and was told about it afterwards by the first and second complainants. There was no evidence that she knew the plaintiff was committing the act or that he knew she

was in the sauna at the time. There is no evidence of any communication or association between the plaintiff and the third complainant at the time.

152. On the other uncontested evidence, the sauna and the steam room were in separate rooms and there was a space in between. Therefore, the plaintiff and the third complainant were separated by two walls and that space when the act was committed. It was not possible for the plaintiff or the third complainant to see through the walls of the rooms into the other. The first and second complainants were able to see what the plaintiff was doing in the steam room because they had left the sauna and were standing outside the steam room looking in.

153. It must be acknowledged that the judge was conscious that presence was an element of the offence and expressly found that all three complainants were present when the act was committed. However, the plaintiff challenges that finding on the basis that it could not be supported by the unchallenged facts and therefore the judge committed a jurisdictional error or error of law on the face of the record.

154. The second defendant submitted that such errors were not established where the judge had simply made an error of fact, even an unreasonable or perverse error. On her submissions, the judge applied the law to the facts as his Honour found them to be and in doing so properly discharged his judicial function.

155. There was debate before me about the precise nature of the jurisdictional error or error of law on the face of the record on which the plaintiff was relying. In the end, it became clear that the plaintiff was really submitting that the judge must have misinterpreted the word 'presence' in s47(1) because the uncontested facts could not answer that description. I allowed an amendment of the grounds of the application accordingly.

156. This ground of review for jurisdictional error is well established. In *Hope v Bathurst City Council*,[236] Mason J said that '[m]any authorities can be found to sustain the proposition that the question whether facts fully found fall within the provisions of a statutory enactment properly construed is a question of law'.[237] That statement of principle was approved by Gleeson CJ, Gummow and Crennan JJ in *Vetter v Lake Macquarie City Council*.[238] However, their Honours went on[239] also to approve the statement made by Mason JA in *Williams v Bill Williams Pty Ltd*[240] that there will be no error of law where, on the facts, 'it is reasonably possible to arrive at different conclusions, the question being largely one of degree upon which different minds may take different views'.[241] So, whether facts as found answer a statutory description is a question of law which implicitly turns on the proper interpretation of the provision in question. But, no error of law is revealed simply because a trial judge has reached a view of the facts which is reasonably open about matters of fact and degree.

157. The decision-maker in the present case was a judge of the County Court of Victoria. As established by such cases as *Craig v South Australia*[242] and *Kirk v Industrial Court (New South Wales)*,[243] there is a distinction between jurisdictional and non-jurisdictional error of law which takes account of the fact that the decision-maker was a judge of a court. It is clear, however, that errors of law about the nature of the jurisdiction which the court is exercising are jurisdictional errors. For a judge to make a decision which is outside the limits of the functions and powers conferred on the County Court by a statutory provision and to make orders which the judge does not have the power to make would, on the authorities, be a clear jurisdictional error.[244] In the words of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in Kirk, an example of jurisdictional error is:

> [M]isconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case.[245]

The plaintiff submits that the trial judge committed that kind of error in convicting and sentencing him on the charge in relation to the third complainant when, on no view of the facts, did he commit the indecent act in her 'presence', as that word is to be properly interpreted. I accept this submission, for reasons I will now give, beginning with the natural and ordinary meaning of the word, as given in the dictionaries.

158. *The Macquarie Dictionary* defines 'presence' to include 'the state or fact of being present,

as with others or in a place ... immediate vicinity; close proximity'; it defines 'present' to include 'being with one or others'.[246] *The Oxford English Dictionary* defines 'presence' to include '[t]he fact or condition of being present; the state of being before, in front of, or in the same place with a person'; it defines 'present' to include '[b]eing before, beside, with, or in the same place as the person to whom the word has relation'.[247]

159. It can be seen that the word 'presence' is capable of applying in a wide range of circumstances, depending on the context. Someone can be present with another in different ways. However, the dictionary meaning of the word emphasises the concept of physical proximity between the persons concerned. That physical proximity is the core concept of 'presence' in s47(1) is borne out by cases which I will now examine.

160. The Court of Appeal decided in *Clarkson* that s47(1) was to be interpreted in the context of the objectives in s37A and the guiding principles in s37B. Those provisions emphasise the protective purposes of the sex offences in the *Crimes Act*. The purposes of s47 specifically are to protect children from the serious physical, emotional and social harm which is caused when they are exposed to indecent acts and to deter offenders from committing such acts with or in the presence of children. The purpose of the provision is as much to protect children from themselves as it is to protect them from others. Having regard to that context and those purposes, no narrow meaning is to be given to the word 'presence'.

161. The proper interpretation of that word may be illustrated by reference to the interpretation which was adopted by the Court of Criminal Appeal of the Supreme Court of South Australia in *R v AWL*.[248] Section 58(1) of the *Criminal Law Consolidation Act* made it an offence for any person, in public or private, to commit 'any act of gross indecency with, or in the presence of, any person under the age of sixteen years'. The accused took a photograph of himself naked with his erect penis placed on the pillow close to the head of a sleeping child under that age. The accused did not touch the child, who knew nothing about what he did. The accused was found guilty at trial.

162. The Court of Criminal Appeal dismissed the appeal. Debelle J (Prior and Bleby JJ agreeing) held that the expression 'in the presence of' indicated 'that Parliament intended to cast the net very wide and include conduct not falling within the expression "with ... any person"' under the statutory age.[249] The protection of children required 'not only that they not see acts of gross indecency but also that they are not subjected to them or unknowingly involved in them so that later knowledge causes shame or affront'.[250] Therefore 'it is not an essential ingredient of the offence that the child saw the act or was aware of it'.[251] In my view, that reasoning applies equally to the offence in s47(1) of our Act.

163. The Court of Appeal of this Court relevantly considered the interpretation of s47(1) in *TSR*, *Alexander* and *McKenzie*, *R v Coffey*,[252] *R v Barnes*,[253] *R v ADJ*[254] and *Savage v R*.[255]

164. It is here that I return to *TSR*. The accused had been charged with committing an indecent act 'with' a child. Analysing the history of s47(1), Chernov JA (Phillips CJ and Phillips JA agreeing) rejected a submission that the provision was limited to cases where the indecent act was committed 'with' the willing participation, consent or co-operation of the child.[256] The offence could be constituted

> by an indecent act committed in front of the child, as well as by an indecent act committed on the person of the child, and in neither case is it necessary to know whether the child was consenting or even approving. Indeed to hold to the contrary would seriously impinge upon what I conceive to have been the legislative intention.[257]

165. In *Alexander* and *McKenzie*, one appellant had a telephone conversation with the complainant in which he encouraged the complainant to masturbate. He was convicted of committing an indecent act 'with' a child contrary to s47(1). The Court of Appeal upheld the appeal and directed a verdict of acquittal to be entered. It was held that the involvement or participation of the complainant in a telephone conversation with the accused could not constitute the offence of committing an indecent act 'with' a child.

166. On the proper interpretation of the provision, Winneke P (Charles and Vincent JJA agreeing) held that the word 'with' required 'actual physical contact' with the complainant,[258]

although 'consent or concert' on the part of the complainant was not required.[259] The use of indecent language over the telephone by the accused towards the complainant did not amount to committing an offence 'with' the complainant.[260] However, following *TSR*, his Honour also held that the expression 'in the presence of' comprehended a broader range of offending than the word 'with'.[261]

167. The accused in *Coffey* persuaded the complainant to perform a strip dance for him while the accused fondled himself. He pleaded guilty to a charge of committing an indecent act 'with' a child. On appeal, the accused contended that he could not be found guilty of the charge as framed because he had not done an indecent act 'with' the complainant. The Court of Appeal dismissed the appeal. Callaway AJA (Buchanan and Eames JJA agreeing) examined the history of s47, emphasising its protective purposes.[262] Applying *TSR*, his Honour held that s47(1) created 'a single, modern offence dealing with indecent acts involving children under the age of 16'.[263] The accused had pleaded guilty to committing that single offence. On the found facts, the accused did not commit an indecent act 'with' the complainant, but he had committed one 'in the presence of' the complainant.[264]

168. On the proper interpretation of s47(1), following *Alexander* and *McKenzie*, Callaway JA held that, juxtaposed with the word 'with', the expression 'in the presence of' was a wider one. Actual physical contact was not required.[265] Further, '[f]ine distinctions are inappropriate, particularly as indecent acts are as various as human imagination can make them'.[266]

169. Barnes was decided on the same day as Coffey. The accused had stared at the genitals of the complainant for five and 10 minutes respectively while the latter was naked or nearly so. Callaway JA (Buchanan and Eames JJA agreeing) upheld a conviction for committing an indecent act contrary to s47(1). Following Coffey, it was held that, even if the act had not been committed 'with' the complainant because there had been no physical contact, the act had been committed in his 'presence'.[267]

170. In *ADJ*, the Court of Appeal was required to consider whether a substantial miscarriage of justice had occurred when the accused was convicted of an offence against s47(1) in circumstances where there had been no physical contact between the accused and the complainant when the act was committed. The accused had caused the complainant to assume indecent poses in front of him whereupon he took photographs and video recordings of the complainant in those poses.

171. Following the previous cases, Batt JA (Warren CJ and Chernov JA agreeing) held that no miscarriage of justice had occurred because physical contact between the accused and the complainant was not required for the indecent act to be 'in the presence of' the complainant.[268]

172. Lastly there is *Savage*. The accused sent indecent images via his mobile telephone to the underage complainants. He pleaded guilty to committing indecent acts with or in the presence of a child contrary to s47(1). On appeal, he submitted that, despite his plea of guilty, what he did was incapable in law of constituting that offence. Following *TSR*, *Alexander* and *McKenzie* and *Coffey*, Mandie JA (Redlich and Bongiorno JJA agreeing) accept that submission.

173. Mandie JA identified two relevant but separate questions of interpretation. The first was whether the words 'in the presence of' extended to indecent acts committed by means of a telephone, computer or similar means of communication. Following *Alexander* and *McKenzie* and *Coffey*, his Honour held that the words did not extend to those acts.[269] The second question of interpretation was whether the acts had to be participatory or consensual. Following *TSR*, his Honour held that the acts did not have to be participatory or consensual.[270]

174. In my view, consistently with the natural and ordinary meaning of the word 'presence', these authorities establish that, on the proper interpretation of s47(1), the indecent act will be committed 'in the presence of' a child under the age of 16 years when the act is committed by the accused in the physical proximity of the child concerned. The child need not be aware that the indecent act is being committed. It is not necessary for the child to participate in or consent to the commission of the act. There need not be physical contact or other association between the accused and the child. However, presence being a physical state, the accused and the complainant must be in the physical proximity of each other.

175. While the present case is to be distinguished on the facts from all of these cases, the principles applied assist in the identification of the issue which must here be determined. The third complainant and the plaintiff did not communicate while the indecent act was being committed. That does not necessarily take the circumstances outside the meaning of 'presence'. The third complainant did not know that the act was being committed or participate (consensually or otherwise) in the commission of the act. Again, the circumstances could still be within the statutory description. There could be 'presence' even though no physical contact occurred between the third complainant and the plaintiff. The act was committed physically by the plaintiff on himself, not verbally and remotely by telephone or other similar means.

176. When these features of the case are put to one side, it can be seen that the central question is whether the undisputed facts were capable of amounting to 'presence' having regard to the requirement of physical proximity. In my view, the undisputed facts were not capable of amounting to 'presence'.

177. The third complainant and the plaintiff were in different rooms which were separated by the walls of those rooms and the space in between. Unlike the other two complainants, the third complainant was not immediately outside the steam room looking in while the acts were being committed. At the material time she was in the sauna and the plaintiff was in the steam room. They could not see each other. This is not a case where the trial judge was making a decision about which reasonable minds could differ in relation to a question of fact and degree. In my view, the facts were incapable of establishing that the plaintiff was physically proximate to the third complainant when the indecent act was committed. The finding involved an error of law about the nature of the jurisdiction of the judge to try the plaintiff on the charge in respect of the third complainant.

178. The plaintiff is therefore entitled to orders by way of judicial review of the conviction and sentence in respect of the charge relating to the third complainant. As the court is here exercising it supervisory judicial review jurisdiction and not its appellant jurisdiction, I am not prepared to make an order for the entering of an acquittal in respect of that charge. The appropriate order is an order in the nature of certiorari quashing the conviction and sentence and an order in the nature of mandamus remitting the charge back to the trial judge for reconsideration according to law.

CONCLUSION

179. On the facts found by the trial judge, the plaintiff committed an indecent act in the steam room in an area of a public aquatic centre where children under the age of 16 years were not allowed to be. Three girls under that age who looked older were admitted to the area. Two of them were standing immediately outside the steam room and looking in when the plaintiff committed the indecent act. The third did not see what happened because she was in the sauna, which is separate from the steam room.

180. In this application for judicial review, the plaintiff challenged the legal basis of his conviction on three charges of committing an indecent act with or in the presence of a child under the age of 16 years contrary to s47(1) of the *Crimes Act*. He contended that he could not be convicted unless the prosecution proved that he intended to commit the act in the presence of a child whom he knew to be under the statutory age. The prosecution offered no such proof. Alternatively, he contended that honest and reasonable mistake as to the age of the complainants was a defence to the charges. The judge ruled that the defence was not available. Finally he contended that the third charge should have been dismissed because the act was not committed in the presence of that complainant who, at the material time, was in the sauna.

181. Whether intention or knowledge apply to elements of a statutory offence turns on the interpretation of the provision in question. Whether honest and reasonable mistake of fact is a defence also raises a question of statutory interpretation. According to the applicable principles, there is an interpretative presumption that intention and knowledge must be proved in respect of all of the elements or, if not that, then honest and reasonable mistake is a defence, subject to Parliament's plain contrary intention. When considering whether that plain contrary intention is indicated, the court examines the subject matter and the purpose of the legislation, the terms of the legislation and whether criminal liability without intention or knowledge, or honest and reasonable mistake as a defence, would promote observance of the legislative scheme.

182. After examining these matters, I have concluded that the trial judge was correct in deciding that, in respect of the age ingredient, intention and knowledge were not elements of the offence and honest and reasonable mistake was not a defence. The purposes of s47(1) are to protect children under the age of 16 years from exposure to indecent acts and to deter potential offenders from engaging in such acts in places where children might be. The purpose of the provision is as much to protect children from themselves as it is to protect them from others. In my view, those purposes and promoting observance of the legislative scheme (among other things) plainly indicate that Parliament intended the offence to be one of absolute liability in relation to the age ingredient. Persons who commit indecent acts in places where children might be do so at their own peril.

183. In reaching this conclusion, I have taken into account that it is possible for potential offenders to take reasonable precautions to avoid criminal liability. On the interpretation which I think was plainly intended by Parliament, it is not possible to offend against s47(1) by accident. To be convicted, the accused must have intended to commit an indecent act. Potential offenders can avoid liability by not committing such acts in places where children might be. So interpreted, the provision imposes on persons an obligation to take greater than usual care to avoid criminal liability. In my view, Parliament has deliberately imposed that obligation to take greater than usual care in order to protect children from others and also to protect children from themselves. This interpretation accords not just with Parliament's plain intention but also with decisions of the Full Court of this court in relation to similar statutory provisions.

184. The plaintiff committed the indecent act in the steam room of the sauna, spa and steam room area of a public aquatic centre. He did the act at his peril. Although that area was reserved for persons over the age of 16 years, it was foreseeable that children under that age who looked older might obtain unauthorised access to the area, which the complainants did. The judge did not err in jurisdiction or law in convicting him on the charges relating to the presence of the first and second complainants. I therefore dismiss the application for judicial review in respect of those charges.

185. In relation to the third complainant, a charge against s47(1) can only be established if the accused committed the indecent act 'with or in the presence' of the underage child. The prosecution relied only on 'presence'. The plaintiff did not commit the indecent act 'with' the third complainant (or the other two).

186. Properly interpreted, the 'presence' element in s47(1) requires physical proximity between the accused and the complainant. In this case, it is not to the point that the third complainant was not aware of what the plaintiff was doing. It is not to the point that she did not participate in or consent to the indecent act in any way. It is not to the point that there was no physical contact or association between the two of them. If the accused and the third complainant were in the physical proximity of each other when the act was committed, none of that would matter. But the undisputed facts were that, at the material time, the third complainant was in the sauna and the plaintiff was in the steam room. There is a space in between. It was not possible for the third complainant to see into the steam room or for the plaintiff to see into the sauna. Those facts could not fall within the statutory concept of 'presence' and the judge erred in jurisdiction and law in convicting the plaintiff on the charge in respect of that complainant.

187. The plaintiff's application for judicial review in respect of the convictions and sentences on the charges relating to the first and second complainants will be dismissed. The plaintiff's conviction and sentence on the charge relating to the third complainant will be quashed and that charge will be remitted to the trial judge for reconsideration according to law.

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[1] The judge gave reasons for the ruling and the convictions and sentences. The reasons were recorded in the transcript of the hearing. Under s10 of the *Administrative Law Act* 1978 (Vic), those reasons are taken to form part of the record. Further, the transcript of the hearing may be considered for the purpose of understanding those reasons*: Easwaralingam v Director of Public Prosecutions (Vic)* [2010] VSCA 353; (2010) 208 A Crim R 122, 127 [22] (Tate JA, Buchanan JA agreeing).

[2] *He Kaw Teh v The Queen* [1985] HCA 43; (1985) 157 CLR 523, 590; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 (Dawson J) ('*He Kaw Teh*').

[3] *CTM v The Queen* [2008] HCA 25; (2008) 236 CLR 440, 446 [6] (Gleeson CJ, Gummow, Crennan and Kiefel JJ) ('*CTM*').

[4] *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536, 541 (Dixon J) ('*Proudman*').
[5] *CTM* [2008] HCA 25; (2008) 236 CLR 440, 447 [8]; (2008) 247 ALR 1; (2008) 82 ALJR 978; (2008) 185 A Crim R 188 (Gleeson CJ, Gummow, Crennan and Kiefel JJ).
[6] *He Kaw Teh* [1985] HCA 43; (1985) 157 CLR 523, 590; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 (Dawson J).
[7] [1906] HCA 47; (1906) 4 CLR 232; 13 ALR 206.
[8] Ibid 237.
[9] [1895] 1 QB 918; 11 TLR 369 ('*Sherras*').
[10] Ibid 921 (reference omitted). This statement of principle was adopted by Gibbs CJ (Mason J agreeing) in *He Kaw Teh* [1985] HCA 43; (1985) 157 CLR 523, 528; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[11] *Sherras* [1895] 1 QB 918, 922; 11 TLR 369.
[12] Ibid.
[13] Ibid.
[14] See Rupert Cross, 'Centenary Reflections on Prince's Case' (1975) 91 *Law Quarterly Review* 540; PR Glazebrook, 'How old did *you* think she was?' (2001) 60(1) *Cambridge Law Journal* 26.
[15] (1875) LR 2 CCR 154 ('*Prince*').
[16] Section 55 of the *Offences Against the Person Act* 1861 (UK) c 100 provided:
Whosoever shall unlawfully take or cause to be taken any unmarried Girl, being under the Age of Sixteen Years, out of the Possession and against the Will of her Father or Mother, or of any other person having the lawful Care or Charge of her, shall be guilty of a Misdemeanor, and being convicted thereof shall be liable, at the Discretion of the Court, to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.
[17] With whom Cockburn CJ, Mellor, Lush, Quain, Denman, Archibald, Field and Lindley JJ and Pollock B agreed.
[18] (1875) LR 2 CCR 154, 171-2.
[19] (1934) 24 Cr App R 130 ('*Maughan*').
[20] Ibid 133-4.
[21] [1941] HCA 28; (1941) 67 CLR 536.
[22] Ibid 540.
[23] [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[24] Ibid 528.
[25] [2008] HCA 25; (2008) 236 CLR 440; (2008) 247 ALR 1; (2008) 82 ALJR 978; (2008) 185 A Crim R 188.
[26] Ibid 446 [5].
[27] [2008] HCA 25; (2008) 236 CLR 440, 483-4 [148]; (2008) 247 ALR 1; (2008) 82 ALJR 978; (2008) 185 A Crim R 188.
[28] *Leary v The Queen* [1978] 1 SCR 29, 43 (Dickson J), cited by Stephen J in *R v O'Connor* [1980] HCA 17; (1980) 146 CLR 64, 96; (1980) 29 ALR 449; (1980) 4 A Crim R 348; (1980) 54 ALJR 349. See also *He Kaw Teh* [1985] HCA 43; (1985) 157 CLR 523, 565; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 (Brennan J).
[29] *Sweet v Parsley* [1969] UKHL 1; [1970] AC 132, 150 (Lord Reid) ('*Sweet*'), cited by Brennan J in *He Kaw Teh* [1985] HCA 43; (1985) 157 CLR 523, 565; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[30] *He Kaw Teh* [1985] HCA 43; (1985) 157 CLR 523, 566; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 (Brennan J).
[31] *R v Hess*; *R v Nguyen* (1990) 2 SCR 906 (Lamer CJC, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ; Gonthier and McLachlin JJ dissenting) ('*Hess and Nguyen*').
[32] *CC v Ireland* [2006] IESC 33; [2006] 4 IR 1; [2006] 2 ILRM 161 (Murray CJ, Hardiman, Geoghegan, Fennelly and McCracken JJ) ('*CC*').
[33] The impact of s32(1) of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) on the interpretation of s47 of the *Crimes Act* was not raised in this case and therefore I have not examined here the human rights issues which were discussed in *Hess and Nguyen* and *CC*.
[34] (1889) 23 QBD 168 ('*Tolson*').
[35] Ibid 182.
[36] [2008] HCA 25; (2008) 236 CLR 440, 456 [34]; (2008) 247 ALR 1; (2008) 82 ALJR 978; (2008) 185 A Crim R 188.
[37] Ibid 447 [7].
[38] [2003] HCA 2; (2003) 211 CLR 476 492 [30]; (2003) 195 ALR 24; (2003) 72 ALD 1; (2003) 77 ALJR 454; (2003) 24 Leg Rep 2.
[39] *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427, 437; (1994) 120 ALR 415; (1994) 72 A Crim R 32; (1994) 68 ALJR 401; [1994] Aust Torts Reports 81-270 (Mason CJ, Brennan, Gaudron and McHugh JJ) (footnote in quotation).
[40] *R v Home Secretary; Ex parte Simms* [1999] UKHL 33; [2000] 2 AC 115, 131; [1999] 3 All ER 400; [1999] 3 WLR 328; [1999] EMLR 689; (1999) 7 BHRC 411; (1999) 2 CHRLD 359 ('*Simms*').
[41] See also *Annetts v McCann* [1990] HCA 57; (1990) 170 CLR 596, 598; 97 ALR 177; (1990) 65 ALJR 167; 21 ALD 65 (Mason CJ, Deane and McHugh JJ).

[42] [1999] UKHL 33; [2000] 2 AC 115; [1999] 3 All ER 400; [1999] 3 WLR 328; [1999] EMLR 689; (1999) 7 BHRC 411; (1999) 2 CHRLD 359.
[43] Ibid 131.
[44] [2000] UKHL 13; [2000] 2 AC 428; [2000] 1 All ER 833; [2000] 2 WLR 452; [2000] Crim LR 403; [2000] 2 Cr App R 65 ('*B (A Minor)*').
[45] Ibid 470.
[46] [2008] HCA 25; (2008) 236 CLR 440, 456 [35]; (2008) 247 ALR 1; (2008) 82 ALJR 978; (2008) 185 A Crim R 188.
[47] See eg *R v Getachew* [2012] HCA 10; (2012) 286 ALR 196, 198-9 [11]; (2012) 86 ALJR 397 (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[48] [1886-90] All ER 26; (1889) 23 QBD 168; 9 WR 709.
[49] Ibid 191.
[50] [1937] HCA 83; (1937) 59 CLR 279; [1938] ALR 37 (Latham CJ, Rich and Dixon JJ; Starke and Evatt JJ dissenting) ('*Thomas*').
[51] [2008] HCA 25; (2008) 236 CLR 440, 487 [160]; (2008) 247 ALR 1; (2008) 82 ALJR 978; (2008) 185 A Crim R 188.
[52] [1895] 1 QB 918; 11 TLR 369.
[53] Ibid 920.
[54] (1943) 44 SR (NSW) 108; 61 WN (NSW) 70.
[55] Section 91D of the *Crimes Act* 1900 (NSW) provided:
Whosoever employs in, or under any circumstances whatever knowingly suffers to resort to, or be upon, any premises used as a brothel or house of ill-fame any girl under the age of 18 years, shall be liable to penal servitude for five years.
[56] (1943) 44 SR (NSW) 108, 109; 61 WN (NSW) 70.
[57] Ibid 110.
[58] Ibid 111.
[59] [1963] AC 160; [1963] 1 All ER 223; (1963) 2 WLR 42 ('*Lim Chin Aik*').
[60] Ibid 174-5.
[61] Ibid 174.
[62] See *Sweet* [1969] UKHL 1; [1970] AC 132, 163; [1969] 1 All ER 347; (1969) 53 Cr App R 221; [1969] 2 WLR 470 (Lord Diplock); *Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong* [1985] AC 1, 12-13, 14 (see especially proposition (5)); [1984] 2 All ER 503; [1984] 3 WLR 437; [1984] Crim LR 479; (1984) 80 Cr App R 194; [1985] LRC (Crim) 439 ('*Gammon*'); *He Kaw Teh* [1985] HCA 43; (1985) 157 CLR 523, 530; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 (Gibbs CJ), 566-8 (Brennan J); *B (A Minor)* [2000] UKHL 13; [2000] 2 AC 428, 464; [2000] 1 All ER 833; [2000] 2 WLR 452; [2000] Crim LR 403; [2000] 2 Cr App R 65 (Lord Nicholls of Birkenhead).
[63] *Lim Chin Aik* [1963] AC 160, 174; [1963] 1 All ER 223; (1963) 2 WLR 42.
[64] Ibid.
[65] [1969] UKHL 1; [1970] AC 132; [1969] 1 All ER 347; (1969) 53 Cr App R 221; [1969] 2 WLR 470.
[66] Section 5 of the *Dangerous Drugs Act* 1965 (UK) c 15 provided:
If a person – (*a*) being the occupier of any premises, permits those premises to be used for the purpose of smoking ... cannabis resin ... or (*b*) is concerned in the management of any premises used for any such purpose as aforesaid; he shall be guilty of an offence against this Act.
[67] [1969] UKHL 1; [1970] AC 132, 149; [1969] 1 All ER 347; (1969) 53 Cr App R 221; [1969] 2 WLR 470.
[68] Ibid 152.
[69] Ibid.
[70] Ibid 163, referring to *Lim Chin Aik* [1963] AC 160, 174; [1963] 1 All ER 223; (1963) 2 WLR 42 (Privy Council).
[71] [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[72] Section 233B(1) of the *Customs Act* 1901 (Cth) provided:
Any person who – ... (b) imports, or attempts to import, into Australia any prohibited imports to which this section applies or exports, or attempts to export, from Australia any prohibited exports to which this section applies; or (c) without reasonable excuse (proof whereof shall lie upon him) has in his possession, or attempts to obtain possession of, any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act ... shall be guilty of an offence.
[73] Citing *Lim Chin Aik* [1963] AC 160, 174; [1963] 1 All ER 223; (1963) 2 WLR 42 (Privy Council) and referring to *Sweet* [1969] UKHL 1; [1970] AC 132, 163; [1969] 1 All ER 347; (1969) 53 Cr App R 221; [1969] 2 WLR 470. (Lord Diplock) and *Gammon* [1985] AC 1, 14; [1984] 2 All ER 503; [1984] 3 WLR 437; [1984] Crim LR 479; (1984) 80 Cr App R 194; [1985] LRC (Crim) 439 (Privy Council).
[74] [1985] HCA 43; (1985) 157 CLR 523, 529; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[75] Ibid.
[76] Ibid 530 (the quoted words are from *Lim Chin Aik* [1963] AC 160, 174; [1963] 1 All ER 223; (1963) 2 WLR 42 (Privy Council)).
[77] Ibid 533.
[78] Ibid. As explained by Gleeson CJ, Gummow, Crennan and Kiefel JJ in *CTM*, the term 'innocent' is being used in this context to mean 'not guilty of a criminal offence': [2008] HCA 25; (2008) 236 CLR 440, 447 [8];

(2008) 247 ALR 1; (2008) 82 ALJR 978; (2008) 185 A Crim R 188.
[79] Ibid 537.
[80] Ibid 535.
[81] Ibid.
[82] Ibid 582 (summary of general principles).
[83] Ibid 589.
[84] Ibid 583.
[85] *Lim Chin Aik* [1963] AC 160; [1963] 1 All ER 223; (1963) 2 WLR 42 (Privy Council); *Sweet* [1969] UKHL 1; [1970] AC 132, 163; [1969] 1 All ER 347; (1969) 53 Cr App R 221; [1969] 2 WLR 470 (Lord Diplock); *Gammon* [1985] AC 1, 12-13, 14; [1984] 2 All ER 503; [1984] 3 WLR 437; [1984] Crim LR 479; (1984) 80 Cr App R 194; [1985] LRC (Crim) 439 (Privy Council) (see especially proposition (5)).
[86] *He Kaw Teh* [1985] HCA 43; (1985) 157 CLR 523, 567; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[87] Ibid
[88] Ibid 568.
[89] [2000] UKHL 13; [2000] 2 AC 428; [2000] 1 All ER 833; [2000] 2 WLR 452; [2000] Crim LR 403; [2000] 2 Cr App R 65.
[90] [2002] 1 AC 462.
[91] [2000] UKHL 13; [2000] 2 AC 428; [2000] 1 All ER 833; [2000] 2 WLR 452; [2000] Crim LR 403; [2000] 2 Cr App R 65.
[92] Section 1(1) of the *Indecency with Children Act* 1960 (UK) c 33 provided:
Any person who commits an act of gross indecency with or towards a child under the age of 14, or who incites a child under that age to such an act with him or another, shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months, to a fine not exceeding [the prescribed sum], or to both.
[93] Lord Nicholls held that a 'necessary implication' was one that was 'compellingly clear': [2000] UKHL 13; [2000] 2 AC 428, 464; [2000] 1 All ER 833; [2000] 2 WLR 452; [2000] Crim LR 403; [2000] 2 Cr App R 65.
[94] Ibid 465.
[95] Ibid.
[96] Ibid 464.
[97] (1875) LR 2 CCR 154.
[98] (1934) 24 Cr App R 130.
[99] [2000] UKHL 13; [2000] 2 AC 428, 444-51; [2000] 1 All ER 833; [2000] 2 WLR 452; [2000] Crim LR 403; [2000] 2 Cr App R 65.
[100] Ibid 465.
[101] [2011] VSCA 157; (2011) 32 VR 361, 366-8 [16]-[25]; (2011) 212 A Crim R 72 ('*Clarkson*').
[102] [2000] UKHL 13; [2000] 2 AC 428, 466; [2000] 1 All ER 833; [2000] 2 WLR 452; [2000] Crim LR 403; [2000] 2 Cr App R 65.
[103] [1999] UKHL 33; [2000] 2 AC 115, 131; [1999] 3 All ER 400; [1999] 3 WLR 328; [1999] EMLR 689; (1999) 7 BHRC 411; (1999) 2 CHRLD 359.
[104] [2000] UKHL 13; [2000] 2 AC 428, 470, 477; [2000] 1 All ER 833; [2000] 2 WLR 452; [2000] Crim LR 403; [2000] 2 Cr App R 65.
[105] Ibid 476.
[106] *Prince* was cited in argument in *Sweet* but not referred to in any of the judgments in the House of Lords.
[107] *CC* [2006] IESC 33; [2006] 4 IR 1, 26 [45]; [2006] 2 ILRM 161 (Denham J) (as her Honour then was).
[108] Ibid 44 [113] (Geoghegan J, Hardiman J agreeing).
[109] Ibid 60 [149] (Fennelly J).
[110] [2008] HCA 25; (2008) 236 CLR 440, 487 [160]; (2008) 247 ALR 1; (2008) 82 ALJR 978; (2008) 185 A Crim R 188 see also 485 [155].
[111] [2002] 1 AC 462; [2001] 3 All ER 897; [2001] 3 WLR 471.
[112] Section 14 of the *Sexual Offences Act* 1956 (UK) c 69 provided:
(1) It is an offence, subject to the exception mentioned in subsection (3) of this section, for a person to make an indecent assault on a woman. (2) A girl under the age of 16 cannot in law give any consent which would prevent an act being an assault for the purposes of this section. (3) Where a marriage is invalid under section two of the *Marriage Act* 1949, or section one of the *Age of Marriage Act* 1929 (the wife being a girl under the age of 16), the invalidity does not make the husband guilty of any offence under this section by reason of her incapacity to consent while under that age, if he believes her to be his wife and has reasonable cause for the belief. (4) A woman who is a defective cannot in law give any consent which would prevent an act being an assault for the purposes of this section, but a person is only to be treated as guilty of an indecent assault on a defective by reason of that incapacity to consent, if that person knew or had reason to suspect her to be a defective.
[113] Lord Nicholls of Birkenhead, Lord Steyn, Lord Hobhouse of Woodborough and Lord Millett agreed.
[114] *CTM* [2008] HCA 25; (2008) 236 CLR 440, 450 [17]; (2008) 247 ALR 1; (2008) 82 ALJR 978; (2008) 185 A Crim R 188 (Gleeson CJ, Gummow, Crennan and Kiefel JJ).
[115] [2002] 1 AC 462, 471-4 [16]-[21]; [2001] 3 All ER 897; [2001] 3 WLR 471.
[116] Ibid 474 [20].
[117] Ibid 474 [23].

[118] Ibid.
[119] [2008] EWCA Crim 394; [2009] 1 AC 92; [2008] 3 All ER 91; [2008] 2 BCLC 281; [2008] All ER (D) 216; [2008] 1 WLR 1379; [2008] BCC 323.
[120] Section 5 of the *Sexual Offences Act* 2003 (UK) c 42 provided:
(1) A person commits an offence if – (a) he intentionally penetrates the vagina, anus or mouth of another person with his penis; and (b) the other person is under 13. (2) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.
[121] It was unanimously decided by Lord Hoffmann, Lord Hope of Craighead, Baroness Hale of Richmond, Lord Carswell and Lord Mance that there was no breach of the accused's human right to a fair trial. A narrow majority decided that there had been no breach of his human right to privacy (Lord Hoffmann, Baroness Hale of Richmond and Lord Mance (Lord Hope of Craighead and Lord Carswell dissenting)).
[122] [2008] EWCA Crim 394; [2009] 1 AC 92, 96 [3]; [2008] 3 All ER 91; [2008] 2 BCLC 281; [2008] All ER (D) 216; [2008] 1 WLR 1379; [2008] BCC 323.
[123] Ibid 96-7 [3].
[124] Ibid 100-1 [21].
[125] Ibid 108 [45]; see also 109 [49].
[126] Ibid 114 [71]-[72].
[127] [2011] VSCA 157; (2011) 32 VR 361, 370-1 [30]-[33].
[128] [2008] SASC 100; (2008) 100 SASR 363; 183 A Crim R 581 ('*Clarke*').
[129] Section 63 of the *Criminal Law Consolidation Act* 1935 (SA) provided:
A person who – (a) produces, or takes any step in the production of, child pornography knowing of its pornographic nature; or (b) disseminates, or takes any step in the dissemination of, child pornography knowing of its pornographic nature, is guilty of an offence. Maximum penalty: Imprisonment for 10 years.
[130] Section 63B(1) of the *Criminal Law Consolidation Act* provided:
(1) A person who – (a) incites or procures the commission by a child of an indecent act; or (b) acting for a prurient purpose – (i) causes or induces a child to expose any part of his or her body; or (ii) makes a photographic, electronic or other record from which the image, or images, of a child engaged in a private act may be reproduced, is guilty of an offence. Maximum penalty: Imprisonment for 10 years.
[131] Section 62 of the *Criminal Law Consolidation Act* defined 'child' to mean 'a person under, or apparently under, the age of 16 years'.
[132] *R v Clarke* [2007] SADC 128 (6 December 2007) [11].
[133] Transcript of Proceedings, *Clarke v The Queen* [2008] HCATrans 376 (13 November 2008) (French CJ and Crennan J).
[134] *R v Clarke* [2007] SADC 128 (6 December 2007) [20].
[135] Ibid [15].
[136] *Clarke* [2008] SASC 100; (2008) 100 SASR 363, 372-3 [31]-[33]; 183 A Crim R 581.
[137] [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 .
[138] [2008] SASC 100; (2008) 100 SASR 363, 374 [39]; 183 A Crim R 581.
[139] Ibid 375-6 [49] (Doyle CJ), 381 [79], 386 [103] (Bleby J).
[140] Ibid 374 [39] (Doyle CJ), 386 [103] (Bleby J).
[141] Ibid 381 [79].
[142] Ibid 386 [103].
[143] Transcript of Proceedings, *Clarke v The Queen* [2008] HCATrans 376 (13 November 2008) 422-8.
[144] [2007] NSWCCA 131; (2007) 171 A Crim R 371.
[145] [2008] HCA 25; (2008) 236 CLR 440; (2008) 247 ALR 1; (2008) 82 ALJR 978; (2008) 185 A Crim R 188.
[146] The jury found the accused to be not guilty of alternative charges of having non-consensual sexual intercourse with the complainant: *ibid* 458 [45] (Kirby J) and 494 [186] (Hayne J).
[147] [2007] NSWCCA 131; (2007) 171 A Crim R 371, 404 [148].
[148] [2008] HCA 25; (2008) 236 CLR 440; (2008) 247 ALR 1; (2008) 82 ALJR 978; (2008) 185 A Crim R 188 (Gleeson CJ, Gummow, Hayne, Crennan, Kiefel JJ; Hayden J *contra*).
[149] Ibid (Gleeson CJ, Gummow, Hayne, Crennan and Kiefel JJ; Kirby J dissenting).
[150] Ibid 446 [5].
[151] Ibid 456 [35].
[152] Ibid 490 [172].
[153] Ibid 449 [15].
[154] Ibid 449-50 [16].
[155] Ibid 490 [171]-[172].
[156] (1943) 44 SR (NSW) 108; 61 WN (NSW) 70.
[157] (1988) 12 NSWLR 453; 36 A Crim R 147 ('*Chard*').
[158] Ibid 455.
[159] [2007] NSWCCA 131; (2007) 171 A Crim R 371, 400-1 [130].
[160] [2008] HCA 25; (2008) 236 CLR 440, 450 [18]; (2008) 247 ALR 1; (2008) 82 ALJR 978; (2008) 185 A Crim R 188 (Gleeson CJ, Gummow, Crennan and Kiefel JJ).
[161] [1885] VicLawRp 22; (1885) 11 VLR 94 (Higinbotham, William and Holroyd JJ) ('*Gibson*').
[162] See *CTM* [2008] HCA 25; (2008) 236 CLR 440, 485 [152]-[153]; (2008) 247 ALR 1; (2008) 82 ALJR 978; (2008) 185 A Crim R 188 (Hayne J).

[163] Section 48 provided:
Whosoever shall unlawfully and indecently assault any girl under twelve years of age whether such assault be with or without the consent of such girl shall be guilty of a misdemeanour and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding three years.
[164] [1885] VicLawRp 22; (1885) 11 VLR 94, 97.
[165] Ibid 97-8.
[166] Ibid 97, 100.
[167] [1956] VicLawRp 108; [1956] VLR 743; [1956] ALR 689 (Herring CJ, Martin and Barry JJ) ('*Peters*').
[168] [1981] VicRp 55; [1981] VR 565; (1980) 3 A Crim R 40 (Young CJ, Starke and Brooking JJ) ('*Kennedy*').
[169] Section 5 specified this proviso:
Provided that it shall be a sufficient defence to any charge under sub-section one of this section if it shall be made to appear to the court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.
[170] Ibid s 7.
[171] See the notes beside ss5, 11(2), 14(1), 15(1) and 17(1) etc.
[172] Section 6 provided:
It shall be no defence to any charge presentment indictment or information for unlawfully and carnally knowing, or for attempting or for assaulting with intent unlawfully and carnally to know, any girl under the age of sixteen years that such carnal knowledge or attempt to have carnal knowledge or assault with intent was or was made with the consent of such girl unless such girl be older than or of the same age as the defendant.
[173] Section 44(1) provided:
Whosoever unlawfully and carnally knows any girl of or above the age of ten and under the age of sixteen years shall be guilty of felony, and shall be liable to imprisonment for a term of not more than ten years; but if he is a schoolmaster or teacher, and such girl his pupil, he shall be liable to imprisonment for a term of not more than fifteen years.
[174] [1956] VicLawRp 108; [1956] VLR 743, 744; [1956] ALR 689.
[175] Ibid 745 (footnotes omitted).
[176] Section 59 provided:
Whosever with intent that any girl or woman under the age of eighteen years should be unlawfully and carnally known by any man whether such carnal knowledge is intended to be with any particular man or generally takes or causes to be taken such girl or woman out of the possession and against the will of her father or mother or any person having the lawful charge of her shall be guilty of a misdemeanour, and shall be liable to imprisonment for a term of not more than two years (footnote omitted).
Brooking J noted that s 59 was derived from s 7 of the *Criminal Law Amendment Act 1885* (UK) but differed from that provision 'by omitting the proviso concerning reasonable mistakes as to age': [1981] VicRp 55; [1981] VR 565, 568; (1980) 3 A Crim R 40.
[177] *R v Prince* (1875) LR 2 CCR 154; *R v Gibson* [1885] VicLawRp 22; (1885) 11 VLR 94; *R v Peters* [1956] VicLawRp 108; [1956] VLR 743; [1956] ALR 689.
[178] [1981] VicRp 55; [1981] VR 565, 568; (1980) 3 A Crim R 40.
[179] Ibid.
[180] Ibid.
[181] [1937] HCA 83; (1937) 59 CLR 279, 305; [1938] ALR 37.
[182] [1981] VicRp 55; [1981] VR 565, 568; (1980) 3 A Crim R 40.
[183] See eg ss44(3) (sexual assault), 49(4) (sexual penetration with a person aged between 16 and 18 years).
[184] Section 50(3).
[185] [1985] VicRp 70; [1985] VR 721 ('*Douglas*').
[186] Ibid 724.
[187] [2006] VSCA 251 (24 November 2006) ('*Mark and Elmazofski'*).
[188] [2007] VSCA 297; (2007) 19 VR 128; (2007) 179 A Crim R 31 ('*Deblasis and Deblasis'*).
[189] The ruling is set out in *Deblasis and Deblasis*: see [2007] VSCA 297; (2007) 19 VR 128, 135; (2007) 179 A Crim R 31.
[190] [2007] VSCA 297; (2007) 19 VR 128, 131 [10]; (2007) 179 A Crim R 31.
[191] [2002] VSCA 87; (2002) 5 VR 627; (2002) 133 A Crim R 54.
[192] Ibid 656-7 [95].
[193] See eg sexual penetration of a child under the age of 16 years (s46(2)) and committing an indecent act with or in the presence of a child aged 16 years (s49(1)).
[194] See eg the incest offences (s44(5)) and sexual penetration of a child aged under the age of 10 years (s45(2)).
[195] Victoria, *Parliamentary Debates*, Legislative Assembly, 20 March 1991, 145-50 (Jim Kennan, Attorney-General).
[196] Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Discussion Paper No 2 (2001) vii.
[197] Ibid.
[198] Ibid ch 6.
[199] Ibid 89-91 [6.24]–[6.29].
[200] Ibid 91 (question 22).
[201] Ibid 108 [6.88].
[202] Victorian Law Reform Commission, *Sexual Offences,* Final Report No 6 (2004).

[203] Ibid 454 (recommendation 191).
[204] Ibid 454 [9.34].
[205] See ss45 (sexual penetration of child under the age of 16), 47A (persistent sexual abuse of child under the age of 16), 48 (sexual penetration of 16 or 17 year old child) and 49 (indecent act with 16 or 17 year old child).
[206] *LAL v The Queen* [2011] VSCA 111 (20 April 2011) [45]-[48] (Buchanan JA, Hansen and Tate JJA agreeing); *Curtis v The Queen* [2011] VSCA 102 (15 April 2011) [7] (Maxwell P, Weinberg and Harper JJA).
[207] [2011] VSCA 102 (15 April 2011).
[208] Ibid [7]. It remains the burden of the prosecution to prove beyond reasonable doubt that the complainant did not consent: see eg *Crimes Act* 1958 (Vic) s47(3).
[209] If not under the age of 10 years: *Children, Youth and Families Act 2005* (Vic) s 344.
[210] [2008] HCA 25; (2008) 236 CLR 440, 449 [15]; (2008) 247 ALR 1; (2008) 82 ALJR 978; (2008) 185 A Crim R 188.
[211] Ibid 490 [172].
[212] [1885] VicLawRp 22; (1885) 11 VLR 94.
[213] [1956] VicLawRp 108; [1956] VLR 743; [1956] ALR 689.
[214] [1981] VicRp 55; [1981] VR 565; (1980) 3 A Crim R 40.
[215] [1956] VicLawRp 108; [1956] VLR 743, 745; [1956] ALR 689.
[216] [2011] VSCA 157; (2011) 32 VR 361, 364 [3]-[5]; (2011) 212 A Crim R 72.
[217] Ibid 367 [18].
[218] Ibid 367 [21].
[219] I note that Doyle CJ reached the same conclusion in relation to the South Australian provisions in *Clarke* [2008] SASC 100; (2008) 100 SASR 363, 376-7 [54]; 183 A Crim R 581.
[220] [2008] EWCA Crim 394; [2009] 1 AC 92; [2008] 3 All ER 91; [2008] 2 BCLC 281; [2008] All ER (D) 216; [2008] 1 WLR 1379; [2008] BCC 323.
[221] [2011] VSCA 157; (2011) 32 VR 361, 368 [26]; (2011) 212 A Crim R 72 (footnote omitted).
[222] *Turnbull* (1943) 44 SR (NSW) 108, 111; 61 WN (NSW) 70 (Jordan CJ, Davidson and Street JJ agreeing).
[223] [1985] HCA 43; (1985) 157 CLR 523, 568; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 (Brennan J).
[224] (1995) 58 FCR 299, 305; (1995) 133 ALR 513; 84 A Crim R 529.
[225] Section 210(5) provides:
If the offence is alleged to have been committed in respect of a child of or above the age of 12 years, it is a defence to prove that the accused person believed, on reasonable grounds, that the child was of or above the age of 16 years.
[226] *Criminal Law Consolidation Act* 1935 (SA) s62.
[227] See [2008] SASC 100; (2008) 100 SASR 363, 372 [28]-[29]; 183 A Crim R 581 (Doyle CJ).
[228] *CTM* [2008] HCA 25; (2008) 236 CLR 440, 447 [7], 456 [34]-[35]; (2008) 247 ALR 1; (2008) 82 ALJR 978; (2008) 185 A Crim R 188 (Gleeson CJ, Gummow, Crennan and Kiefel JJ).
[229] Ibid 453 [24].
[230] (1988) 12 NSWLR 453; ; 36 A Crim R 147 (Roden J).
[231] [1985] HCA 43; (1885) 157 CLR 523, 593; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[232] I set out above the background to the amendment of s47(2)(a) by the *Crimes (Sexual Offences) Act*.
[233] [1985] HCA 43; (1985) 157 CLR 523, 567; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[234] [2008] SASC 100; (2008) 100 SASR 363; 183 A Crim R 581 (Doyle CJ, Bleby and David JJ).
[235] Ibid 375 [43] (Doyle CJ).
[236] [1980] HCA 16; (1980) 144 CLR 1; (1980) 29 ALR 577; (1980) 12 ATR 231; (1980) 54 ALJR 345; (1980) 41 LGRA 262.
[237] Ibid 7.
[238] [2001] HCA 12; (2001) 202 CLR 439, 450 [24]; (2001) 178 ALR 1; (2001) 75 ALJR 578; see also Hayne J 477-8 [108].
[239] Ibid 451 [26].
[240] [1971] 1 NSWLR 547.
[241] Ibid 557.
[242] [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359 ('*Craig*').
[243] [2010] HCA 1; (2010) 239 CLR 531; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437 ('*Kirk*').
[244] *Craig* [1995] HCA 58; (1995) 184 CLR 163, 177; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359 (Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Re Refugee Review Tribunal; Ex parte AALA* [2000] HCA 57; (2000) 204 CLR 82, 141 [163] (Hayne J); *Kirk* [2010] HCA 1; (2009) 239 CLR 531, 571 [66], 573-75 [72]-[74]; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[245] *Kirk* [2010] HCA 1; (2010) 239 CLR 531, 574 [72]; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437.
[246] Susan Butler (ed), *Macquarie Dictionary* (Macquarie Dictionary Publishers Pty Ltd, 5th ed, 2009) 1313.
[247] JA Simpson and ESC Weiner, *The Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989) vol XII, 393,

395.
[248] [2003] SASC 416 (10 December 2003) (Prior, Debelle and Bleby JJ).
[249] Ibid [11].
[250] Ibid [12].
[251] Ibid.
[252] [2003] VSCA 155; (2003) 6 VR 543; (2003) 143 A Crim R 235 ('*Coffey*').
[253] [2003] VSCA 156 (2 October 2003) ('*Barnes*').
[254] [2005] VSCA 102; (2005) 153 A Crim R 324 ('*ADJ*').
[255] [2010] VSCA 220; (2010) 29 VR 229 ('*Savage*').
[256] [2002] VSCA 87; (2002) 5 VR 627, 656 [96]; (2002) 133 A Crim R 54.
[257] Ibid 656 [94].
[258] [2002] VSCA 183; (2002) 6 VR 53, 78 [52].
[259] Ibid.
[260] Ibid 77-8 [51].
[261] Ibid 77 [51].
[262] [2003] VSCA 155; (2003) 6 VR 543, 546 [10]ff; (2003) 143 A Crim R 235.
[263] Ibid 548 [17].
[264] Ibid 550 [23].
[265] Ibid 550 [20] and [23].
[266] Ibid 550 [22].
[267] [2003] VSCA 156 (2 October 2003) [8].
[268] [2005] VSCA 102; (2005) 153 A Crim R 324, 333-4 [32].
[269] [2010] VSCA 220; (2010) 29 VR 229, 240 [25].
[270] Ibid.

APPEARANCES: For the plaintiff Azadzoi: Mr DW Gibson, counsel. Laura McDonough, Victoria Legal Aid. For the second defendant Kara Roden: Dr SB McNicol, counsel. Adrian Castle, Office of Public Prosecutions.