# *The Credibility and Reliability of the Evidence of a Witness with a Mental Condition: An Analysis of New Zealand Evidence Law*

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# *I Introduction, Definitions, Scope and Methodology*

## *A Introduction*

This dissertation examines New Zealand criminal cases in which one or more witnesses, other than the defendant, have a mental condition. The purpose of this research is two-fold. First, to provide the first comprehensive overview and analysis of High Court, Court of Appeal, and Supreme Court decisions in which the mental condition of a witness is discussed. What categories of legal issues are raised by this body of case-law, and what are the broad contours of the New Zealand judicial response to a witness with a mental condition? Second, this dissertation focuses on the more specific question of the mental condition of the witness as it relates to the credibility and reliability of the witness' evidence. What is the New Zealand approach to the impact of mental conditions on the credibility and reliability of the evidence of witnesses, and what does a review of international literature tell us about this approach?

An important starting point for this dissertation is the observation that mental conditions are common in New Zealand society today. The New Zealand Health Promotion Agency found in 2016 that about four in five adults (aged 15 years and over) have experience of mental distress either personally or among people they know.[1] In the 2018 and 2019 period, the Ministry of Health found that 19.8% of adults (aged 15 years and over) had experienced a diagnosed mood and/or anxiety disorder during their lifetime, while 8.2% of adults have experienced psychological distress in a particular four week period.[2] These figures suggest that mental conditions are prevalent not only in society generally, but also among witnesses involved in criminal trials. In addition, individuals with mental conditions are more likely to be victims of crime, which suggests the prevalence of mental conditions may be higher among witnesses in criminal trials giving evidence than in the population at large.[3]

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[1] Kvalsivig, A *Wellbeing and mental distress in Aotearoa New Zealand: Snapshot 2016* (Health Promotion Agency, 2018) at 3.

[2] Ministry of Health "Annual Data Explorer 2018/19: New Zealand Health Survey" (14 November 2019) <www.health.govt.nz>.

[3] Kevin M. Cremin, Jean Philips, Claudia Sickinger, and Jeanette Selhof "Ensuring a Fair Hearing for Litigants with Mental Illnesses: The Law and Psychology of Capacity, Admissibility, and Credibility Assessments in Civil Proceedings" (2009) 17(2) JL & Pol'y 455 at 465. See also Michael Barnett and Paul S. Appelbaum "Facilitating

Despite the prevalence of mental conditions in New Zealand society, there continues to be stigma surrounding mental conditions of all types. It is reasonable to assume that this stigma carries into the courtroom. Fact-finders and other decision makers in criminal trials, including judges and jury members, may have preconceived ideas, assumptions, and misconceptions about mental conditions. This is by virtue of being humans with inherent and often unconscious biases and prejudices.

One such assumption is that mental conditions can impact on the credibility and reliability of the evidence offered by a person with a mental condition. There are a breadth of mental conditions and some may impact certain factors relevant to the credibility and reliability of evidence; for example, by impacting the memory, honesty, perception, recall, confabulation, or suggestibility of the witness.[4] However it is not the case that all mental conditions necessarily affect credibility and reliability in all cases. Additionally, the severity of the mental condition fluctuates in the same way that physical conditions fluctuate. Therefore a mental condition may be pertinent at the time of the events in issue, at the time of the proceeding, or at some other relevant time. For these reasons, it is not possible to generalise as to the impact or lack of impact of a particular mental condition on credibility and reliability.

Notably, a range of procedural and evidentiary considerations are associated with the issue of witnesses with mental conditions. These include accommodating special needs in the courtroom; privacy; fairness to witnesses; the defendant's right to a fair trial; and ensuring the fact-finder has access to relevant and non-prejudicial evidence.

Against this backdrop, an important question is how New Zealand evidence law approaches evidence given by a witness with a mental condition. The provisions of the Evidence Act 2006

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Testimony of People with Mental Illness" (2010) 61(10) Psychiatric Services 958 at 958; Louise Ellison "Responding to the needs of victims with psychosocial disabilities: challenges to equality of access to justice" (2015) 1 Crim LR 28 at 28; Mind *Achieving Justice for Victims and Witnesses with Mental Distress: a Mental Health Toolkit for Prosecutors and Advocates* (Mind, London, 2010) at 7; and Vanessa Lee and Corrine Charles *Research into CPS decision-making in cases involving victims and key witnesses with mental health problems and/or learning disabilities* (Crown Prosecution Service, London, 2008) at 2.

[4] Neta Ziv "Witnesses with Mental Disabilities: Accommodations and the Search for Truth-The Israeli Case" (2007) 27(4) Disability Studies Quarterly at 7.

recognise and emphasise the broad range of factors which may affect reliability, including mental conditions.[5] However, there is no one provision outlining the legal approach to be taken when a witness who is not the defendant has a mental condition that may impact the reliability and credibility of their evidence. This makes sense in light of the inability to generalise about mental conditions but raises the question of how judges have employed the general Evidence Act provisions to address issues of credibility and reliability. To that end, the first aim of this dissertation is to set out an overview and analysis of case-law and literature which details the different evidentiary issues. There does not appear to have been this kind of overview published to date.

The results of the comprehensive review of cases are set out in Chapters II and III, divided as follows. First, Chapter II details cases in which the mental condition of a witness is relevant but is not raised directly in relation to the question of the credibility and reliability of the evidence of the witness. The following categories were identified: eligibility and compellability of the witness with the mental condition; the unavailability of a witness for the purpose of admissible hearsay statements; alternative ways of the witness giving evidence; the general admissibility provisions; and counsel access to the medical records of the witness. Although these cases do not directly deal with credibility and reliability, this survey is important context for the remainder of the dissertation.

Chapter III sets out cases dealing with the more specific question of credibility and reliability of evidence in relation to the mental condition of a witness. The methodology detailed in this Chapter led to 12 cases in which the credibility and reliability of the evidence of a witness with a mental condition was at issue. From analysis of those cases, three important areas for discussion were identified: leaving the assessment of reliability and credibility to the fact-finder; the use of judicial reliability directions; and the use of expert evidence.

[5] Elizabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters New Zealand Ltd, Wellington, 2018) at 179. See, for example, s 28 on the exclusion of unreliable statements of the defendant.

Chapter IV critically reviews the New Zealand approach to the reliability and credibility of evidence given by a witness with a mental condition, with reference to literature from both New Zealand and international sources. Each of the three areas discussed in Chapter III are analysed.

The approach is necessarily exploratory and preliminary, in that the broad contours of the topic are raised based on a comprehensive case review. What are the key considerations and concerns with the current NZ approach? Where is further research and discussion most needed, when it comes to our treatment of evidence offered by witnesses with a mental condition?

### *B Defining Mental Condition*

I have adopted the term "mental condition" in this dissertation. It should be noted that a number of other terms are used across a variety of New Zealand statutes, and in the case-law and literature. The range of terms used is a symptom of the difficulty of defining phrases relating to mental illness and health in the legal context.[6]

For example, 'mental disorder' is defined in the Mental Health (Compulsory Assessment and Treatment) Act 1992.[7] The legislation restricts mental disorders to conditions of such a degree that they "pose a serious danger to the health or safety of that person or of others; or seriously diminishes the capacity of that person to take care of himself or herself".[8] This definition is too restrictive for this dissertation as an individual may have a mental condition that is not this severe yet the condition may be relevant in a criminal trial.

The Criminal Procedure (Mentally Impaired Persons) Act 2003 uses the term 'mental impairment' but without providing a definition.[9] The use of 'impairment' implies that there is a detrimental effect on a person's ability. An important premise is that a witness may have a mental condition

[6] James H. Hardisty "Mental Illness: A Legal Fiction" (1973) 48(4) Wash L Rev 735 at 735.
[7] Section 2.
[8] Section 2.
[9] Section 4.

but that does not necessarily mean the credibility and reliability of their evidence, nor the individual's functions and abilities, are affected.

The term 'mental condition' is neutral in that it does not imply impairment. 'Mental condition' is also non-euphemistic, and aligns with the current wording of the Evidence Act 2006.[10] 'Mental condition' will be used in this dissertation as largely synonymous to other terms used throughout legislation, commentary, and case-law including 'mental disorder', 'mental health', 'mental impairment', and 'mental illness'.

The Evidence Act 2006 provides no definition of mental condition. For this dissertation, 'mental condition' includes a broad range of conditions, for example, anxiety, depression, personality disorders, psychotic disorders, post-traumatic stress disorder, and intellectual impairments. As stated in *Alovili* "mental condition can embrace a wide range of conditions from somebody who is simply distressed or depressed, to somebody who is in a catatonic stupor".[11]

### *C Defining Credibility and Reliability*

The term reliability refers to whether the fact-finder is able to rely upon the evidence as proof of something. Credibility is one aspect of reliability. *Black's Law Dictionary* refers to credibility as "the quality that makes something (as a witness or some evidence) worthy of belief".[12] Credibility may be impacted by a number of disparate factors: for example, where a witness has a mental condition which impairs their perception of the events of relevance.[13]

A lack of credibility may result from the possibility of the witness being in error or being untruthful.[14] However a witness may believe they are telling the truth and being honest, but be mistaken. In the context of mental conditions, credibility and reliability become, arguably, even more difficult concepts, especially in their application in trial. For example, a witness with a

[10] See ss 16, 18 and 29.
[11] *R v Alovili* HC Auckland CRI 2007-404-162, 27 June 2008 at [26].
[12] Bryan A Garner (ed) *Black's Law Dictionary* (10th ed, Thomson Reuters, 2014) at 448.
[13] Law Commission *Evidence Law Character and Credibility* (NZLC PP27, 1997) at [9].
[14] Law Commission, above n 13, at [9].

psychotic condition may hallucinate that they saw the accused during the events in question. The witness may firmly believe they saw the accused and be telling the truth but since the accused was not actually present, the witness is also mistaken. Therefore it should be kept in mind that the trier of fact should "cast a net anchored by three considerations": no one has a monopoly on truth, truth may be wedged beside falsehood, and a witness may actually believe their testimony to be true even if others disagree.[15]

### *D Scope of the Dissertation*

The focus of this dissertation is criminal cases. Discussion of witnesses with mental conditions in civil, family, or tribunal proceedings is excluded from the scope.

Additionally, the focus is on witnesses who are not also the defendant but rather are the complainant or another individual. Where the witness is also the defendant there are other important considerations which are beyond the scope of this dissertation and deserve their own comprehensive review. These considerations include culpability, the defence of insanity, fitness to stand trial, and fitness to plead. However it is acknowledged that substantial parts of the discussion in this dissertation could also be applicable where the defendant is a witness and has a mental condition.

The scope of this dissertation does not extend to cases where evidence of mental behaviours is led at trial to show a behavioural change of the witness.[16] This kind of evidence focuses on the behavioural change of the witness in relation to assessments of whether or not the offending occurred. This quite specific circumstance deserves separate consideration.

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[15] Edd Wheeler "The Courting of Credibility, a Nervous Mistress" (1994) 14(2) Journal of the National Association of Administrative Law Judiciary 253 at 257 and 258.

[16] See, for example, *R v R* [2019] NZSC 87 at [9] – [48]. Evidence was introduced of the complainant self-harming and attempting suicide after the offending. The Court focused on whether the evidence was admissible because it "was proximate in time to the offending that something out of the ordinary was occurring in the complainant's life". The evidence was held to be admissible under the admissibility provisions as part of the context and as relevant to the complainant's credibility.

The scope of this dissertation also does not extend to cases where a witness's veracity is challenged on the basis of the mental condition of a witness. Section 37 of the Evidence Act 2006 outlines that test for the admissibility of evidence on a person's veracity, where veracity means the disposition of a person to refrain from lying. The leading Supreme Court case of *Hannigan* clarified that the veracity rules are concerned with evidence pertaining to a witness' general or habitual honesty.[17] No cases were found where veracity, in the sense of the general honesty of the witness, as impacted by their mental condition, was directly in issue in the judgement or as part of an appeal.[18] This is despite commentary suggesting that a witness's mental condition can detrimentally affect a witness's veracity.[19] Analysis beyond this dissertation is needed to reconcile the lack of case-law with the commentary.

### *E Research Methodology*

A New Zealand case review was undertaken using *LexisAdvance* and *Westlaw*. The search term used through the advance search of New Zealand cases entry point was *"mental" /10 "witness" and "credibility" or "reliability"*. On *LexisAdvance* this search yielded 78 search results. On *Westlaw NZ* this search yielded 102 search results. Each individual case was then manually reviewed for relevance. Cases from both pre and post 2006 were included. Given time and resource constraints, non-criminal cases and cases from the District Court, were excluded from the sample. A large portion of the search results were excluded because it was the defendant who had a relevant mental condition. Additionally, a large number of results did not directly concern the mental condition of a trial witness but rather discussed other issues to which a mental condition was relevant.[20] A number of search results were excluded because they resulted from the direct

[17] *Hannigan v R* [2013] 2 NZLR 612 at [120].

[18] Only cases where it was indirectly discussed were identified. For example, *Police v Gibbs* [2015] NZDC 555 involved a complainant who was a long-term mental patient with conditions including suicidal tendencies, borderline disorder, PTSD, emotional dysregulation, hypervigilance, and flashbacks. The accused made an application for non-party disclosure of mental health records on the basis that if the complainant had a mental illness, her veracity would be impacted, and this would be highly relevant to the submission the allegations are false. Disclosure was not in the public interest and so the veracity challenge was not heard. See also *Kumar v R* [2019] NZCA 191.

[19] Evidence Act 2006, s 37(3); and McDonald and Optican, above n 5, at 294.

[20] For example, *Smith v Police* [2019] NZHC 2371 at [3] concerned whether the police officer had reasonable grounds to suspect Mr Smith was incapable of having proper control of firearms in his possession or under his control due to his mental condition.

quotation of sections of the Evidence Act, in particular s 16, in the judgement, without any other relevance to the current research.

Following close analysis of the remaining cases, the cases were categorised by legal issue. The more interesting question became the credibility and reliability of the evidence of a witness with a mental condition and the two closely associated issues of expert evidence and judicial directions on unreliability as set out in Chapter III. A number of surrounding issues were still important despite not directly concerning the credibility and reliability of the evidence of a witness with a mental condition. These are set out in Chapter II. Throughout the course of this research, further targeted searches, using more specific search terms relating to each of the categories outlined in both Chapter II and Chapter III, were carried out in order to ensure material cases had not been inadvertently omitted.

## *II Case Analysis Part I: Cases Concerning the Mental Condition of a Witness other than on Issues of Credibility and Reliability*

This Chapter canvasses the legal landscape in criminal trials in which the mental condition of a witness is raised in a way which does not directly relate to the credibility and reliability of their evidence. The cases are categorised as follows: (a) the witness' eligibility (and compellability) to give evidence, (b) the witness being "unavailable" for the purposes of admitting hearsay statements, (c) the general admissibility provisions of the Evidence Act, (d) alternative ways of giving evidence, and (e) the ability of counsel to access the medical records of a witness. Each is considered in turn, with the purpose of providing necessary context for the related issue of credibility and reliability discussed in Chapter III.

### *A Competence and Eligibility*

The mental condition of a witness has been treated historically as pertaining to their competence to give evidence. The competence test had two limbs: whether the person had a sufficient level of understanding or intelligence to give a rational account of past events, and whether the person understood the nature and consequences of an oath or promise.[21] For example, in *Harawira*, the court in 1989 held the witness was competent to give evidence despite being a committed mental patient, as the witness satisfied the competence test following consideration of the specific depositions and questions the judge asked the witness.[22]

However s 71, introduced by the Evidence Act 2006, provides that in a criminal proceeding any person is eligible to give evidence and a person who is eligible to give evidence is compellable to give that evidence. This section removed the requirement of competence.[23] The Law Commission recommended the competence requirement be abolished to increase the amount of relevant evidence available and allow fact-finders to assess credibility and reliability.[24]

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[21] The Honourable Justice Mathew Downs (ed) *Cross on Evidence* (10th ed, Lexis Nexis, Wellington, 2017) at 287.
[22] *R v Harawira* [1989] 2 NZLR 714 at 716 and 723.
[23] Law Commission *Evidence Code and Commentary* (NZLC R55, 1999) at 189.
[24] Law Commission *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996) at vii.

The Court of Appeal in *R v Tanner* confirmed the replacement of the concept of competency with the concept of eligibility.[25] This was affirmed in the context of a witness with a mental condition in *R v Jellyman*.[26] The complainant had learning difficulties but the court had no doubt that the complainant was eligible to give evidence after referring to *Tanner*.[27]

The eligibility section does not address the potential situation where a witness faces difficulties in giving rational and coherent testimony despite being eligible.[28] However the Act provides other provisions to allow courts to adequately address when this is the case, as discussed below in relation to hearsay statements and alternative ways of giving evidence.

The new starting point is that eligibility of the witness to give evidence is assumed whether or not there is a mental condition and whatever the nature of that condition. The Act is therefore now much more permissive in enabling witnesses to give evidence in situations when they may not have been able to previously.[29] Cases after 2006 involving witnesses with mental conditions now focus on the question of credibility and reliability, as discussed in Chapter III, rather than the legal threshold of competence as determined by the judge.

### *B Hearsay and Unavailability as a Witness*

The hearsay provisions provide an alternative to the witness giving testimony orally in court, by allowing (in limited circumstances) the out-of-court statement of that person to be offered by another witness. The provisions provide one option to address the situation where a witness faces difficulties in offering rational and coherent testimony despite being eligible to give evidence.

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[25] *R v Tanner* [2007] NZCA 391 at [23].
[26] *R v Jellyman* [2009] NZCA 532 at [30].
[27] At [30] – [32].
[28] McDonald and Optican, above n 5, at 547 –550.
[29] *Police v Morton* HC Wellington CRI-2009-485-51, 20 May 2009 at [42].

Section 17 provides that a hearsay statement is not admissible except as provided by s 18.[30] The circumstances relating to the statement must provide reasonable assurance that the statement is reliable, and either the maker of the statement must be unavailable as a witness or the judge must consider undue expense or delay would be caused if the maker of the statement was required to be a witness.[31] A person may be unavailable as a witness if the person is unfit to be a witness because of their mental condition.[32]

A detective with depression, in *R v Harmer,* was held not to be unavailable.[33] Chisholm J stated that having a mental illness will not automatically mean the witness is "unavailable as a witness" but rather it is only when the mental illness is "sufficiently incapacitating" that the hearsay provisions will apply.[34] Chisholm J discussed the possibility that a lower threshold would lead to opening the floodgates for claims of unavailability, and that it is contrary to policy to enable counsel to use the hearsay provisions to keep an unsatisfactory witness from giving evidence and being cross-examined as a tactic.[35] Although *Harmer* occurred before the introduction of the Evidence Act 2006, its fundamental approach has been confirmed following the introduction of the Act, in *Alovili*.[36]

*Alovili* involved a prospective witness who had severe treatment-resistant schizophrenia of the paranoid type, poor independent functioning, social phobia, and anxiety, all which could markedly worsen through giving evidence.[37] His capacity to give reliable evidence was viewed as greatly reduced.[38] The court, agreeing with the fundamental principles of *Harmer*, reiterated that there must be a high threshold before a person is unavailable as a witness because of a mental condition.[39] Wylie J noted that the quality of evidence is a matter for the jury and agreed with the

[30] Evidence Act.
[31] Sections 17 and 18.
[32] Section 16(2)(c).
[33] *R v Harmer* [2002] 3 NZLR 560 at [3], [7], and [24].
[34] At [15].
[35] At [17]. See also *R v Alovili*, above n 11, at [28].
[36] *R v Alovili*, above n 11, at [25].
[37] At [15] – [17].
[38] McDonald and Optican, above n 5, at 109 and 110.
[39] At [26].

court in *Harmer* on the possibility of tactical decisions to avoid cross-examination of unsatisfactory witnesses.[40] The witness was held to be "available" despite the schizophrenia, although the witness gave evidence through CCTV on agreement by counsel.[41]

The 2020 Supreme Court case *Anderson* provides an example of the mental condition of a witness rendering them unavailable for the purpose of admitting their hearsay statement.[42] The complainant was on weekend leave as an in-patient at a hospital mental health unit at the time of the alleged rape.[43] The complainant was committed to the hospital following a serious suicide attempt, and had post-traumatic stress disorder, social anxiety, major depressive disorder, and a dissociative disorder.[44] Judge Saunders in the District Court concluded that the complainant was unavailable as a witness with statements the complainant made to medical staff admissible as hearsay.[45] Medical experts submitted she was incapable of giving evidence because she could go completely mute, could become physically incapable of and moving or could become so distressed she would try to leave, and because giving evidence would likely raise her suicide risk to acute levels.[46] Appeals to the Court of Appeal and Supreme Court were unsuccessful.[47] The Court of Appeal discussed how the exceptional circumstances of this case, in light of the compelling medical evidence, met the high threshold held by the previous authorities.[48]

The hearsay provisions therefore provide one option to address the situation where a witness faces difficulties in offering rational and coherent testimony despite being eligible to do so. However the high threshold means this option will rarely be available and so in most cases the witness with the mental condition will be giving evidence themselves rather than having hearsay statements admitted. Regardless of whether the witness gives evidence themselves or whether hearsay

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[40] At [28].

[41] At [34], and [37] – [39]. See also *N (CA19/2013) v R* [2014] NZCA 167 at [57] where the Court of Appeal found the trial judge was entitled to hold the witness was not so incapacitated as to be unreliable for the purposes of hearsay despite being a moderately intellectually disabled 11 year old.

[42] *Anderson v R* [2020] NZSC 56.

[43] At [4].

[44] *Anderson v R* [2020] NZCA 106 at [2] and [35].

[45] *Anderson v R*, above n 42, at [3].

[46] *Anderson v R* (CA), above n 44, at [36] and [38].

[47] *Anderson v R* (SC), above n 42, at [15] and [16]; and *Anderson v R* (CA), above n 44, at [54].

[48] At [53].

statements made by the witness are admitted as evidence, the question of the credibility and reliability of the evidence of the witness is raised by virtue of the witness having a mental condition.

### *C The General Admissibility Provisions of the Evidence Act*

Despite the assumption of the eligibility of the witness, the Judge retains a discretion to exclude testimony under the general admissibility provisions.[49] When the Law Commission proposed to abolish the competency requirement, it noted the general admissibility rules as an option where testimony is so affected by a mental condition and cannot be improved through other provisions including alternative ways of giving evidence.[50]

Section 8 gives a general exclusion where the probative value of the evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding.[51] If a witness is mentally unfit to give clear and coherent evidence at the trial such that a section 8 exclusionary argument is raised, the "probative value must be so low that to admit it carries the appreciable risk of unfair prejudice" in order for that argument to succeed.[52] If a s 8 argument succeeded, the evidence of the witness would be inadmissible, and there would be no question of the credibility and reliability of the evidence.

*N v R* is illustrative of the possibility of the argument. The court found the moderately intellectually disabled 11 year old was not so severely incapacitated as to be incapable of giving evidence for the purposes of hearsay, and was an eligible witness.[53] The court noted there remained the safeguard of the ability of the court to exclude evidence under s 8.[54] However no submissions were heard on it.[55]

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[49] *R v Tanner*, above n 25, at [24].
[50] Law Commission, above n 24, at vii.
[51] Evidence Act.
[52] *R v Eruera (No 6)* [2015] NZHC 3220 at [31].
[53] *N (CA19/2013) v R*, above n 41, at [1] and [50].
[54] At [1] and [50].
[55] At [54] and [57].

No cases were found where the general admissibility provisions in s 8 were argued to exclude the evidence of a witness based on a mental condition. This suggests the use of the general admissibility provisions is largely untested for witnesses with a mental condition. This could be because it is not a well known option for argument in this context, or perhaps because other options, including alternative ways of giving evidence or hearsay provisions, are preferred. The lack of use and discussion of the general admissibility sections for witnesses with mental conditions means more emphasis is placed on the question of credibility and reliability.

### *D Alternative Ways of Giving Evidence*

Another option for the situation where a witness faces difficulties in offering rational and coherent testimony because of their mental condition, is for the witness to give evidence in alternative ways. Section 103(3)(b) of the Evidence Act provides that directions about alternative ways of giving evidence may be made on the basis of intellectual, psychological or psychiatric impairment, where either a party has applied for such direction or the judge by their own initiative makes the direction. However there is no special or particular approach for witnesses with these impairments.[56] Section 105 outlines the alternative ways of giving evidence.[57]

The use of alternative ways of giving evidence by a witness with a mental condition is demonstrated in *R v S*.[58] The complainant witness had suicidal tendencies, panic attacks, and self-harm issues.[59] The court ordered the use of supplementary questions and CCTV.[60]

The Court in *Eruera* found that potential unfairness may arise from the witness giving evidence because of her mental state, including, for example, agreeing to have made statements without recalling them.[61] The witness had severe depression, a psychiatric disorder, and difficulty with

[56] McDonald and Optican, above n 5, at 696.
[57] Evidence Act.
[58] *R v S* [2015] NZHC 2471.
[59] At [5] – [9].
[60] At [16].
[61] *R v Eruera*, above n 52, at [40] and [42].

reading and memory.[62] The court held the potential unfairness could be mitigated through the use of alternative methods of giving evidence which would improve the capacity of the witness to give reliable responses.[63]

New Zealand courts have demonstrated a willingness to order a witness with mental condition to give evidence in an alternative way because the provisions on alternative ways of giving evidence may improve a witness' ability to give credibility and reliable evidence. The question of the credibility and reliability of the evidence of the witness is raised regardless of whether the witness gives evidence in the ordinary way or in an alternative way.[64]

Commentators also note the use of alternative ways of giving evidence is an important option when otherwise the evidence would be inadmissible under s 8.[65] The alternative modes of giving evidence are likely to be used rather than holding the testimony of the witness to be inadmissible through the general admissibility provisions.[66] Therefore the question of the credibility and reliability of the evidence of the witness is raised, where it would not be if the evidence of the witness was inadmissible.

### *E Access to Medical Records*

In order to raise the issue of the credibility and reliability of the evidence of a witness with a mental condition at trial, counsel must know about the mental condition and its particulars. This raises the issue of access to the medical records of the witness. A number of cases in the review addressed this issue.

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[62] At [14] and [20].
[63] At [40] and [42].
[64] Compare s 83 of the Evidence Act on the ordinary way of giving evidence with s 105 of the Evidence Act on alternative ways of giving evidence.
[65] McDonald and Optican, above n 5, at 109 and 110.
[66] Evidence Act, ss 7 and 8.

For example, *Bushby* discussed access to the medical records of the complainant who had been treated for mental health problems, including bulimia, depression, and psychosis.[67] Counsel for the appellant alleged delusional thinking influenced the complainant's narrative on the sexual offending.[68] The Court notes the application is made under ss 24 and 25 of the Criminal Disclosure Act 2008 with the jurisdiction of the court to order disclosure found in s 398(a) of the Crimes Act 1961.[69] The court referred to *Polybank v R* which found that non-party disclosure should not be exercised lightly given the importance of finality of litigation, that only necessary inquiries for the appeal should be undertaken, the need for efficiency of court business, and the need to protect confidentiality and prevent harassment of victims.[70] Avoiding unnecessary re-victimising of the complainant through having medical records inspected was also a key consideration.[71] In applying these public policy considerations and the statutory provision, the Court found that the evidence the jury had about the mental condition was already extensive.[72] Further information would not materially assist the jury in considering the defence submission that the complainant was not credible and reliable, but rather made false allegations.[73]

Therefore there are strong public policy considerations, related to safeguarding the wellbeing of individuals, against disclosure of medical records. This is despite the possibility the medical records may contain information relevant to credibility and reliability. As such, disclosure applications are usually declined. However this is in part because the mental condition or medical information is already known to counsel and fact-finders. Counsel are able to adequately question the credibility and reliability of the evidence of the witness based on their particular mental condition.

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[67] *Bushby v R* [2016] NZCA 527 at [3]. See also *Kumar v R*, above n 18 (another example of an unsuccessful application in relation to a witness with schizophrenia, with the court finding the reasoning in *Bushby* applies).
[68] At [11].
[69] At [6] – [8].
[70] *Polybank v R* [2013] NZCA 208 at [10] – [11] as cited in *Bushby v R*, above n 67, at [9].
[71] *Bushby v R*, above n 67, at [15].
[72] At [14].
[73] At [14].

There remains the situation where little is known about a witness's mental condition but counsel nonetheless suspects the mental condition of the witness may be relevant to credibility and reliability. A court's approach to this situation was not illustrated in any New Zealand cases.

## *III Case Analysis Part II: Cases Concerning the Credibility and Reliability of the Evidence of a Witness with a Mental Condition*

Following the comprehensive review of all case-law identified by the methodology in Chapter I, the more significant and specific question of focus became the mental condition of the witness as it relates to the credibility and reliability of their evidence.

This chapter sets out a review of the case-law dealing with this particular focus. Twelve High Court, Court of Appeal, and Supreme Court cases were determined to be of direct relevance: *Harawira*, *Jellyman*, *N v R*, *Eruera*, *Garraway*, *Spittle*, *Greer*, *Kumar*, *S v R*, *R v Check*, *R v B*, and *R v L*.[74]

A review of these cases produced three key areas for analysis: (a) leaving the assessment of credibility and reliability to the fact-finder, (b) judicial directions on unreliability, and (c) expert opinion evidence. Each area is explored below with a view to understanding and critiquing (in Chapter IV) the New Zealand legal approach to the credibility and reliability of witnesses with mental conditions in criminal trials.

### *A Leaving to the Fact-Finder the Assessment of the Credibility and Reliability of the Evidence of the Witness*

It is a fundamental principle of our criminal justice system that questions of witness credibility and reliability are for the fact-finder to determine. Today, this principle also applies in the context of a witness with a mental condition. All of the 12 cases directly or indirectly discussed the principle of leaving the assessment of the credibility and reliability of the evidence of a witness with a mental condition to the fact-finder, and the consequences this principle has for the ability to appeal.[75]

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[74] *R v Harawira*, above n 22; *R v Jellyman* [2009], above n 26; *N (CA19/2013) v R* [2014], above n 41; *R v Eruera (No 6)*, above n 52; *Garraway v R* [2011] NZCA 522; *Spittle v R* [2017] NZCA 116 at [54]; *Spittle v R* [2017] NZSC 105; *Greer v R* [2016] NZCA 630; *Kumar v R* [2019] NZCA 669; *S (CA539/2014) v R* [2016] NZCA 518; *S v R* [2017] NZSC 43 *R v Check* [2009] NZCA 548; *R v B* [1987] 1 NZLR 362; and *R v L* (CA304/06) [2007] NZCA 246.

[75] Two decisions, which could be seen as similar to the credibility and reliability assessment for the fact-finder, remain solely for the judge. These two decisions are the admissibility of hearsay statements under s 18 and the general admissibility of the evidence of the witness under s 8 of the Evidence Act. For example, the court noted in *Anderson*

Four cases stated the principle directly. The Court of Appeal in *N (CA19/2013) v R* found that the trial judge was entitled to leave the question of the credibility of a moderately intellectually disabled 11 year old witness to the jury.[76] In *R v Jellyman,* the Court of Appeal expressed that what the jury made of the evidence offered by the witness with learning difficulties is for them.[77] The Court in *R v Eruera* emphasised that the quality of the evidence of the witness was a matter for the jury to decide.[78] The Court in *R v B* ruled evidence of an expert inadmissible in part because it involved the psychologist judging the complainant's credibility which the court held was for the jury to judge alone.[79]

The principle was implicit in the judgement in two cases. In *R v Check*, the court noted the mental conditions of the witness were matters for the jury.[80] This implies that the jury must take into account the mental condition of the witness in deciding whether or not to accept the evidence of the witness, in part because it is relevant to credibility and reliability. The principle was also implicit in *Garraway* because the Court mentioned the opportunity to direct the jury as to unreliability of the evidence, depending on how competent the witness appeared to give evidence.[81] This recognised that the jury, as the fact-finder in the case, was assessing reliability of the witness.

As the credibility and reliability of the evidence of a witness with a mental condition is an assessment to be made by the fact-finder, it must be considered what the consequences are for the

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*v R* (SC), above n 42, at [10] and [11] that after determining the unavailability of the witness, the court still had to satisfy the circumstances of the statements provided reasonable assurance of reliability (section 18) and the general admissibility provisions. However, *Adams v R* [2012] NZCA 386 at [25] as cited in *Nisha v R* [2015] NZCA 178 at [12,] the judge's assessment for the purposes of s 18 is quite different from the jury's role in assessing credibility and reliability. Additionally, as discussed in Chapter II, the judge has a discretion available under the general admissibility provision but the focus is the concepts of probative value and unfair prejudice rather than credibility and reliability. See *R v Eruera (No 6)*, above n 52 for a case example of these two decisions in operation.

[76] *N (CA19/2013) v R,* above n 41, at [57].

[77] *R v Jellyman*, above n 26, at [36].

[78] *R v Eruera (No 6)*, above n 62, at [30] (the witness had previously been severely depressed, had made little progress, was still on medication, was having difficulties with recall at times, was overwhelmed with anxiety and pressure from the court process, and had a psychiatric disorder impacting her ability to give evidence).

[79] *R v B,* above n 74, at 362 and 363.

[80] *R v Check*, above n 74, at [89] (a key crown witness had a number of mental health issues, including auditory hallucinations and schizophrenia).

[81] *Garraway v R*, above n 74, at [22] and [23].

defendant's ability to appeal the fact-finder's assessment. Two cases considered whether a fact-finder's assessment of credibility and reliability can be questioned on appeal where the fact-finder has sufficient evidence and information on the mental condition available to them. The Court of Appeal in *Harawira* held the complainant's mental condition, the fact of being a committed mental patient, and other factors which reflected negatively on his credibility, had been thoroughly explored during the trial.[82] As such, the jury was entitled to act on the complainant's testimony based on its assessment of his credibility, and find the accused should be convicted.[83] In *Spittle*, the court held the arguments that the complainant's mental condition "created a high risk of [the complainant] misinterpreting the appellant's behaviour" and that the complainant's "capacity for distortion and suggestibility...led her to making false complainants" had been raised and properly put to the jury at trial.[84] It was open to the jury to find the complainant was nonetheless credible and reliable.[85] The appeal was dismissed and the Supreme Court declined to hear it.[86]

*Harawira* and *Spittle* demonstrate that appellate courts are generally deferent to a jury assessment of credibility and reliability. "Unreasonable jury verdict" appeals are unlikely to succeed based on arguments that a jury, informed about a witness' mental conditions, nonetheless found the witness credible and reliable. However, the situation is different if the fact-finder was not given sufficient evidence and information on the mental condition at trial.[87]

For example, in *R v L* the Court concluded that the failure to properly engage with the complainant's mental condition at trial meant that there could not be confidence in the jury's

[82] *R v Harawira*, above n 22, at 716. The complainant had been diagnosed with organic personality syndrome, a disorder which in his case resulted in problems with impulse control, discerning moral right and wrong, and a tendency to exaggerate. Counsel for the accused appealed conviction, arguing inter alia that the jury's verdict was unreliable given weaknesses in the complainant's testimony. These weaknesses were submitted to include his status as a committed psychiatric patient and his mental condition, his general bad character and previous reputation for lying and making false complaints, and the manifest inconsistencies in his testimony.

[83] At 716.

[84] *Spittle v R* (CA), above n 74, at [8], [52] and [53].

[85] At [52] and [53].

[86] *Spittle v R* (CA), above n 74, at [54]; and *Spittle v R* (SC), above n 74, at [10].

[87] See *R v Eruera (No 6)*, above n 52 (the court held that in order for the jury to properly understand the witness's cognitive limitations and assess her reliability, direct evidence of her mental condition and ability must be raised at the subsequent trial).

verdict.[88] Similarly, the failure to cross-examine on the mental condition led to a successful appeal in *Kumar*.[89] The Court held that the conduct of cross-examination amounted to an error when viewed in the context of the mental condition, that the witness had not been taking her medication, and that trial counsel had raised the issue of the mental health of the witness.[90] Although the jury knew of the schizophrenia diagnosis, there was no basis on which the jury could draw a conclusion on what, if any, significance it had, especially when the case turned substantially on the reliability of the witness.[91]

Therefore where there is not sufficient evidence and information on the mental condition, a court is more willing to allow an appeal because the jury's assessment of credibility and reliability may be impaired. Two cases, *Greer* and *S v R*, appear to directly contrast with this deduction.

In *Greer* the lack of cross examination on the mental condition did not lead to a successful appeal, unlike in *Kumar*, because of the performance of the witness in giving evidence.[92] The witness was reported pre-trial to have impaired cognitive performance, low intelligence, post-traumatic stress disorder, anxiety and depression.[93] Counsel submitted that the witness should have been cross-examined at trial on her mental state in order to show her to be unreliable.[94] However the court held there was nothing before the court to indicate that the jury would have been in any way misled as to the reliability of the witness, because the jury members heard her give evidence and could form their own assessment.[95]

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[88] *R v L*, above n 74, At [6] – [13], [41], and [42]. The appeal was premised on the complainant being devoid of credibility leading to a miscarriage of justice. One reason for this argument was that the witness had received psychiatric care previously and had a psychiatric illness at the time of making the complaint of sexual abuse. In addition, during the trial it became evident the witness was on medication for depression and psychotic symptoms. These conditions may lead to a person's loss of connection with reality, and the belief and perception of things as real or true when they are not. See also *R v Eruera (No 6)*, above n 52 (where the court held that in order for the jury to properly understand the witness's cognitive limitations and assess her reliability, direct evidence of her mental condition and ability must be raised at the subsequent trial).

[89] *Kumar v R*, above n 74, at [2].

[90] At [38] – [40].

[91] At [38] and [41].

[92] *Greer v R*, above n 74, at [28] – [33].

[93] At [28].

[94] At [28].

[95] At [30].

*S v R* involved a convicted applicant applying for leave to appeal on the basis that the medical records relating to the complainant's mental health at the time of the incident would have been relevant to the jury in assessing her credibility and reliability.[96] The Supreme Court found that given the issue of the trial was consent, the Court of Appeal was not in error when it found the medical records were not relevant, especially when the matters raised by the appellant as possibly raising doubt on the jury's verdict were before the jury at trial.[97] The Court of Appeal had denied the application on the basis that medical treatment or medical symptoms at the time of the sexual offending were not relevant to the key issue of whether or not she consented to sex with the applicant.[98] The Court stated that to put the information to the jury "would have incited them to engage in illegitimate reasoning about the reliability of complainants in sexual cases who have health problems. This risks perpetuating harmful misconceptions about consent and sexual offending".[99] The judge appears therefore to be saying the evidence about the mental condition is not even to go to the jury because it could lead to illegitimate reasonings, even though the mental condition could be relevant to their assessment of credibility and reliability.

*Greer* and *S v R,* both of which are recent decisions, perhaps indicate there is some confusion or uncertainty in the case-law when it comes to the defendant's ability to appeal a fact-finder's assessment of credibility and reliability. In particular the question is whether a possible failure to engage with the mental condition of the witness makes the fact-finder's assessment impaired? This uncertainty needs judicial exploration.

### *B Judicial Directions on Unreliability Under s 122 Evidence Act 2006*

Despite the fundamental principle of leaving the assessment of credibility and reliability to the fact-finder, there is the option of providing guidance to a jury about potentially unreliable evidence by judicial directions. This recognises that the evidence of a witness with a mental condition can

[96] *S v R* (SC), above n 74, at [7].
[97] At [8].
[98] *S v R* (CA), above n 74, at [6].
[99] At [6].

be admissible and yet still unreliable.[100] Of the 12 appellate cases identified, five discussed judicial directions on unreliability.

Prior to the Evidence Act 2006, New Zealand law had a "piecemeal approach" to judicial directions.[101] The Evidence Act 1908 allowed for directions to the jury where the complainant was over 17 years of age and 'mentally handicapped', but directions on the basis of unreliability of evidence were not explicitly stipulated in the section.[102]

The common law approach prior to 2006 is demonstrated in *Harawira*.[103] The Court of Appeal had to determine whether "the Judge had failed to direct the jury adequately or at all as to the need for proper caution in relying on the evidence" in view of the witness' "status as a committed psychiatric patient and/or his mental condition".[104] The trial judge emphasised in summing up that the credibility of the evidence was for the jury who had to decide worth, reliability and weight.[105] The trial judge then stated:[106]

> You will have made your own appraisal of each witness as he or she gave evidence. You will consider that evidence against all the other evidence, facts and circumstances - including in respect of Mr Matthews the fact that he is a mental patient, so far as you consider that material.

The trial judge on three other occasions in the summing up emphasised the special position of being a committed mental patient.[107] The Court held the trial judge adequately directed the jury as to the need for care in relying on the complainant's evidence.[108] The direction was adequate because the jury must have understood that they had to give appropriate weight to the potential unreliability of the complainant arising from his mental status, condition and history.[109]

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[100] *Taylor v R* [2010] BCL 311 at [49].
[101] *Taylor v R*, above n 100, at [44].
[102] Evidence Act 1908, ss 23C and 23H.
[103] *R v Harawira*, above n 22.
[104] At 722.
[105] At 723 and 724.
[106] At 724.
[107] At 724.
[108] At 716.
[109] At 716.

Following a number of New Zealand Law Commission Reports, it was recommended that there be an overarching general statutory provision on judicial directions.[110] In particular this provision was to implement a discretion for judges when evidence is potentially unreliable with specific provisions for particular kinds of evidence which warrant special attention.[111] This took the form of section 122 of the Evidence Act 2006, with associated specific provisions.[112] Section 122 states that if the Judge is of the opinion that any evidence given which is admissible but may nevertheless be unreliable then the Judge may warn the jury of the need for caution in deciding whether to accept the evidence and the weight to be given to the evidence.

Despite the introduction of this section, *Harawira* continues to be seen as a reminder of first principles of judicial directions on reliability despite the court feeling it was unnecessary to express a concluded view as to the approach that should be taken with regards to judicial directions in the situation where a person with a mental disorder gives evidence.[113] *Harawira* gives a guide to assessing when a direction is required:[114]

> The fundamental question must be whether the summing up met the justice of the particular case...what is essential in such a case is to bring home to the jury the need for care in relying on that evidence.

Therefore a court in considering an appeal will determine whether the justice of the case was met by the jury direction.

The justice of the case may not be met by virtue of the content of the direction given. For example, *N (CA19/2013) v R* is an unsuccessful appeal on the ground of jury directions.[115] The trial judge was held to have strongly directed the jury as to the need for caution about the witness's

[110] Law Commission, above n 23, at 243; and *Taylor v R*, above n 100, at [45] – [48].
[111] Law Commission, above n 23, at 243; and *Taylor v R*, above n 100, at [45] – [48].
[112] See Evidence Act, ss 121, 123, 125, 127 and 127.
[113] *R v Harawira*, above n 22, At 726.
[114] At 726 as cited in *Taylor v R*, above n 100, at [65].
[115] *N (CA19/2013) v R*, above n 41, At [59].

evidence.[116] In particular the trial judge stated in summing up that the mental age assessment of the witness, an intellectually disabled girl, was 6.2 years, and then invited the jury to consider how reliable the memory of a six year old child is.[117] The Court of Appeal said the direction was, if anything, generous to the defence because the trial judge did not say that the witness could still give reliable evidence.[118] This case suggests that an appropriate judicial direction balances informing the jury of the mental condition and how that may affect the witness' reliability, while still making it clear that the witness may nevertheless still be credible and reliable.

The justice of the case may also not be met where there was no judicial direction when there should have been. In *R v L* the appellate court held that the trial judge should have directed the jury on the reliability of the evidence of a witness.[119] Robertson J cited *Harawira* in concluding that the appeal should be allowed with a new trial ordered, but "found this matter troubling".[120] Robertson J's reasoning included that this was not simply a case of the witness being depressed or impaired by mental health; the mental condition of the witness was only implicitly covered in relation to reliability and credibility, and the judge did not refer to the condition independently or objectively and so the jury had no direction on it.[121] However the judge also reasoned that the witness' complaint was not made for 25 years after the event and at the same time as the witness sexually assaulted a three year old.[122] Robertson J stated that only by a narrow margin did the failure in the trial to engage with the mental condition aspect mean that there was no confidence in the jury's verdict.[123] The judge put the failure down to inconclusive actions of the counsels of both sides implying that it was not surprising the Judge did not give a specific direction.[124] This case suggests that the absence of a judicial direction may not lead to a successful appeal where counsel and the trial judge have adequately engaged with the mental condition in relation to credibility and reliability at other points in the trial prior to summing up.

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[116] At [58].
[117] At [44] to [45].
[118] At [58].
[119] *R v L (CA304/07)*, above n 74, at [5].
[120] At [40].
[121] At [41].
[122] At [41].
[123] At [42] and [43].
[124] At [42] and [43].

*Garraway* suggests that whether giving a judicial direction is necessary for the justice of the case may depend on whether the particular mental condition is seen to have affected the performance of the witness in giving evidence.[125] In *Garraway* the judge noted that depending on how the witness gave her evidence, there might have been an opportunity to direct the jury under s 122.[126] However the complainant gave evidence competently despite the mental condition, so there was no need for such a reliability direction.[127]

*Greer* develops *Garraway* by suggesting a judicial direction will only be necessary where the judge considers the mental condition to have substantially affected performance or reliability to such an extent that a special direction, beyond what the judge would normally give in any case, is necessary.[128] On appeal, the judge held that a s 122 direction is discretionary and the judge's usual direction on credibility and reliability was sufficient in the case.[129] This was especially so since the performance of the witness in giving evidence did not appear to be that of an impaired person.[130] The court did not articulate what the usual direction on credibility and reliability was.[131]

Therefore whether a judicial direction is given is a discretionary decision for the judge in the circumstances of the case, but the key question is whether the justice of the case is met. Whether the justice of the case is met will depend on whether a direction should or should not have been given, or whether the content of a direction given was sufficient. Factors such as the performance of the witness, and how the mental condition of the witness has been engaged with throughout the trial, will be relevant to whether the justice of the case is met. Both judges and legal counsel will play a key role in the trial in relation to the use of judicial directions. It is interesting that only five cases discussed judicial directions. District Court decisions could shed light on the prevalence of judicial directions in this context.

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[125] *Garraway v R*, above n 74.
[126] At [23].
[127] At [23].
[128] *Greer v R*, above n 74.
[129] At [32].
[130] At [30].
[131] No source could be found that stipulated or discussed the use of a usual direction on credibility and reliability in criminal trials.

### *C Expert Opinion Evidence Under s 25 Evidence Act 2006*

Expert opinion evidence is another option available to assist the fact-finder in their assessment of the credibility and reliability of the evidence of a witness with a mental condition. Expert opinion evidence is admissible through s 25 of the Evidence Act 2006 if the fact-finder is likely to obtain substantial help from the opinion. Of the 12 cases identified, 9 judgements specifically mentioned expert evidence raised either at the trial or as relevant to the appeal.

Expert opinion evidence on mental conditions may be admitted for a number of different purposes.[132] Although the expert evidence may not have specifically been introduced to give information pertinent to credibility and reliability, it is likely to inform the fact-finder in its assessment of such if it contains relevant information on the mental condition.

More importantly, expert opinion evidence may be admitted in order to provide information about the mental condition, and therefore the credibility and reliability of the witness' evidence. The evidence could detail likely symptoms and experiences of the witness, in addition to the severity of the witness's condition and the witness's mental history. For example, in *Harawira* psychiatric evidence on the diagnosis of organic personality disorder and the witness's ability to discern between right and wrong was available to the jury.[133] In *Jellyman*, the Crown's witnesses at trial included an educational psychologist who gave evidence about the complainant's disability.[134] In *N v R* a child psychologist report expressed an opinion that the witness was of moderate intellectual disability and discussed how this impacted the cognitive functioning age, adaptive functioning, suggestibility, and ability to speak intelligibly of the witness.[135] The appellate court in *Greer* noted the defendant could have called the psychologist who had given evidence pretrial to be a witness

[132] See, for example, *R v Eruera (No 6)*, above n 52, at [13] – [22] where expert evidence from medical staff provided information on how a witness' mental condition affected her ability to give evidence in court. See also, *Greer v R*, above n 74, at [29] where the trial judge used a psychological report to determine that although the witness had psychological and intellectual impairments, the witness could still be cross-examined by the defendant.
[133] *R v Harawira*, above n 22, at 721.
[134] *R v Jellyman*, above n 26, at [9].
[135] *N (CA19/2013) v R*, above n 41, at [15] – [24].

if he wished to attack the reliability of the witness.[136] Therefore expert evidence can provide guidance to the fact-finder on the mental condition and how it relates to factors and vulnerabilities pertaining to the credibility and reliability of the witness' evidence. However, the expert evidence in the four cases did not go so far as to include the expert's own opinion on the credibility and reliability of the witness' evidence. The assessment of credibility and reliability thus once again is the responsibility of the fact-finder.

This aligns with *R v B,* which demonstrated that not all expert opinion evidence will be admissible.[137] The District Court judge had ruled child psychologist evidence inadmissible because the purpose of raising it was to bolster the credibility of the complainant by, in effect, stating that the expert believed her evidence.[138] This was seen as usurping the function of the jury.[139] The Crown appealed seeking to have an edited version of the evidence be admissible but the appeal was disallowed.[140] McMullin J commented that the sole purpose of the evidence was to enhance the view that the complainant was truthful, which included judging the witness's credibility instead of leaving that assessment to the jury.[141] The Court distinguished between evidence on the mental condition, which is admissible and helpful to the jury, and the opinion of the expert as to whether the complainant is telling the truth, credible, or reliable, which is inadmissible.[142] Once again, the principle of leaving the assessment of credibility and reliability to the fact-finder is reinforced.

Due to the usefulness of expert evidence in providing information about the mental condition of the witness, counsel for either party in the criminal proceeding may seek to have expert evidence admitted. Where both parties introduce expert opinion evidence, the evidence may conflict as occurred in *Spittle.*[143] The conflicting evidence was on the nature and extent of the impact of the complainant's mental conditions, including borderline personality disorder, memory,

[136] *Greer v R*, above n 74, at [33].
[137] *R v B,* above n 74.
[138] At 362.
[139] At 366.
[140] At 362 and 366.
[141] At 362 – 363.
[142] At 363.
[143] *Spittle v R* (CA), above n 74.

suggestibility, perception, dissociation, and transference.[144] The Court held that the matters raised were legitimately left for the jury in determining the central issue of the case of whether the complainant was credible and reliable.[145] The court held it was open to the jury to prefer the complainant's evidence, in light of the supporting expert evidence, rather than the appellant and their expert.[146] Crucially, the competing expert positions were carefully explained in summing up and closing.[147]

*Spittle* demonstrates that judges recognise there may be conflicting views of expert evidence about mental conditions in trials. There is the inherent possibility of different medical assessments by different practitioners. The court is unlikely to prevent the admissibility of conflicting evidence but rather will leave it to the fact-finder to determine which evidence is favoured after providing an explanation outlining the different views. The focus on the fact finder's assessment of different expert opinions on a mental condition aligns with the focus on the fact-finder's assessment of the evidence given by a witness. It is for the fact-finder in our adversarial system to determine what evidence to accept and the weight to be given to that evidence.

Notably, the absence of expert opinion evidence may not lead to a successful appeal where the fact-finder is still provided with sufficient information on the mental condition. For example, in *Check,* the judge heard evidence in voir dire from a number of people, including a forensic psychiatrist.[148] Although it appears no expert evidence was adduced for the jury, the witness was cross examined about his mental health so there was sufficient evidence already.[149] Similarly, in *Kumar,* the court found that there was no trial counsel error in failing to adduce expert evidence about the schizophrenia experienced by the witness because there was adequate evidence for the jury to use already.[150] A doctor who saw the witness after the alleged rape had given evidence about the medical examination, together with the general presentation of the witness at the time of

[144] At [25] – [27].
[145] At [52].
[146] At [53].
[147] At [29].
[148] *R v Check*, above n 74, at [89].
[149] At [89].
[150] *Kumar v R*, above n 74, at [42].

the alleged rape, and given evidence about the nature of schizophrenia and likely effect of a failure to take medication.[151] *Check* and *Kumar* demonstrate expert opinion evidence is not the only way to provide information on a witness's mental condition. The key question on appeal is therefore whether there was sufficient evidence on the mental condition for the fact-finder to assess credibility and reliability, regardless of whether that information was provided by experts.

[151] At [15] and [22] – [25].

## *IV Using International Literature and Research to Examine the New Zealand Approach*

This Chapter explores the three areas of the case analysis in Chapter III using both New Zealand and international literature and research. Section A is on leaving the assessment of the credibility and reliability of the evidence of the witness to the fact-finder and the problems of stigma, misconceptions, and lack of knowledge and understanding in the minds of fact-finders. Sections B and C detail whether the two options, which assist fact-finders in their assessment of credibility and reliability, of judicial directions and expert opinion evidence are useful to address these problems.

In order to inform this analysis, an international literature review was completed using the same key search terms as for the case analysis. The databases used were *NZLII*, *Heinonline*, *LegalTrac*, *LinxPlus* and *Google*. The literature included books, journals, online resources, and government materials.

### *A The Fact-Finder's Assessment of Credibility and Reliability and the Problems of Stigma, Misconceptions, and a Lack of Knowledge and Understanding*

The case analysis in Chapter III demonstrated the fundamental principle of leaving the question of credibility and reliability to the fact-finder in our adversarial system.[152] Notably, the fact-finder may be the judge where it is not a jury trial.[153]

[152] In addition, a fact-finder's determination on credibility and reliability will not usually be called into question by appellate courts where sufficient evidence is raised in accordance with law.

[153] Criminal Procedure Act 2011. Notably, judges play an integral role in all steps in the trial process which may affect the determination of the credibility and reliability of the evidence of a witness with a mental condition. For example, judges determine whether the witness is unavailable under s 18, whether the witness can give evidence in alternative ways, what evidence is admitted, the permitted questions to the witness during trial, counsel's access to medical records of the witness, whether to give jury directions on unreliability, and what an expert is permitted to give evidence on. Both Chapter II and Chapter III detailed many of these judicial decisions.

It is important that fact-finders make decisions through legitimate and fair reasoning in the first instance.[154] Since evidence is admitted as proof potentially leading to the conviction of the defendant, a fact-finder's assessment of evidence is crucial given the consequences for the outcome of the trial, and therefore whether justice is done. There exists a significant modern debate on the usefulness, appropriateness, and adequacy of fact-finders to make determinations on matters such as credibility and reliability.[155] More specifically, for the purposes of this dissertation, the legitimacy of the fact-finder's assessment of credibility and reliability where a witness has a mental condition must be considered.

One potential problem in fact-finder assessment of credibility and reliability is that when psychiatric evidence and evidence on the existence of a mental condition is raised, it often invokes stigmas and stereotypes in fact-finders.[156] About nine out of ten people with mental distress experience stigma and discrimination which shows the widespread nature of myths and stereotypes within society.[157] It is reasonable to assume that this stigma carries into the courtroom. Fact-finders therefore may have definite and incorrect ideas or misconceptions about mental health and these could affect jury reasoning and conclusions.[158] The societal misconceptions, prejudices and stigmas which surround those with mental illnesses are also possible in the minds of judges by virtue of them being human.[159] As a result of stigma and bias, vulnerable witnesses with mental conditions may be "victims of negative ideologies and unhelpful societal assumptions".[160] Yet

[154] Law Commission, above n 13, at [57].

[155] For example, the Evidence Act relies on the optimistic view that jury members will use common sense and are able to assess evidence accurately (Feona Sayles "Manase and the Evidence Act 2006" [2007] NZLJ 413 at 416). This dependence on commonsense, intuition, and experience has been the subject of extensive criticism by literature (Steven I. Friedland "On Common Sense and the Evaluation of Witness Credibility" (1989) 40(1) Case W Res L Rev 165 at 165 and 166). This dissertation does not have the capacity to adequately address this broader controversial debate. The focus is on fact-finder assessments of the credibility and reliability of the evidence of a witness with a mental condition.

[156] Tess Wilkinson-Ryan "Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant" (2005) 153 U Pa L Rev 1373 at 1375. See also Louise Ellison "The use and abuse of psychiatric evidence in rape trials" (2009) 13(1) E&P 28 at 34.

[157] Mind, above n 3, at 9.

[158] Wilkinson-Ryan, above n 156, at 1390; and Friedland, above n 155, at 179.

[159] Sareen K Armani "Coexisting definitions of mental illness: legal, medical, and layperson understandings paving a path for jury bias" (2017) 23 Review of Law and Social Justice 214 at 233.

[160] Diane J Birch "A better deal for vulnerable witnesses?" [2000] Crim LR 223 at 224.

many individuals have a mental condition and are treated for that condition without any effect on their credibility or reliability.

For example, a common misbelief is that treatment for mental health is uncommon despite statistics which indicate its prevalence.[161] Additionally, if a witness is questioned about mental problems, the natural implication is that the witness is 'unbalanced' or 'crazy' which directly impacts their apparent credibility.[162] Other stereotypes affecting credibility include a belief that people with a mental condition may be unable to distinguish fact from fiction, and are more likely to make up stories or to lie because of a lack of appreciation of the seriousness and consequences of criminal proceedings.[163] Further, a misrepresentation is that those with mental conditions cannot recover. Therefore, in court, a witness who has had a mental condition in the past is likely to be viewed as affected at the time of the events at issue and/or at the time of giving evidence.[164]

Certain diagnoses also have particular connotations or stereotypes.[165] Studies suggest that witness accounts which are lacking in detail, which can be the result of a mental condition like post-traumatic stress disorder or depression, are viewed with greater scepticism in relation to credibility.[166] Research also indicates that decision makers respond differently to different types of mental evidence, with jurors being more believing of the existence and effect of a mental condition where an individual has an intellectual disability and less believing when the individual has psychological impairments.[167]

In addition to the influence of stigma on the decisions of fact-finders, fact-finders are also expected to use their own knowledge of the world in recognising issues, making assessments, and reaching

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[161] Wilkinson-Ryan, above n 156, at 1390.

[162] Wilkinson-Ryan, above n 156, at 1391.

[163] Janine Benedet and Isabel Grant "Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases" (2012) 50(1) Osgoode Hall LJ 1 at 9.

[164] Armani, above n 159, at 218.

[165] Thomas G. Gutheil and Pamela K. Sutherland "Forensic Assessment, Witness Credibility and the Search for Truth Expert Testimony in the Courtroom" (1999) 27 J Psychiarty & L 289 at 300.

[166] Louise Ellison and Vanessa E. Munro "Taking trauma seriously: critical reflections on the criminal justice process" (2017) 21(3) E&P 183 at 188; and Mind, above n 3, at 12.

[167] Leona Deborah Jochnowitz "Whether the Bright-Line Cut-off Rule and the Adversarial Expert Explanation of Adaptive Functioning Exacerbates Capital Juror Comprehension of the Intellectual Disability" (2018) 34(2) Touro L Rev 377 at 385.

decisions. However fact-finders may lack the necessary knowledge and understanding to consider the credibility and reliability of the particular witness in relation to the particular mental condition.[168] Not all fact-finders will have experience with all the different kinds of mental conditions. Therefore the witness may have no, or very little knowledge about the particular mental condition relevant in the trial. The potential unreliability of a witness with a mental condition will not always be obvious to the fact-finder.[169] In addition, it may be problematic for jury members to even recognise or evaluate the effect of mental conditions on credibility and reliability, particularly where a seemingly unaffected witness gives evidence in court.[170] Individuals with mental conditions may also have experiences that those without mental illnesses are likely to find unbelievable or impossible by virtue of it being outside the fact-finder's experiences.[171] In addition, some jury members may have a familiarity with certain mental illnesses because they themselves have experienced a mental condition or because someone they know has. However this may be harmful as no mental condition results in individuals having the same experience, symptoms, severity or effect on credibility and reliability.[172] Therefore the mental condition of the witness can be misunderstood by fact-finders for a whole variety of reasons, yet the fact-finder is expected to decide what relevance, if any, the mental condition has on the credibility and reliability of the evidence of the witness.[173]

When the judge, rather than a jury, is the fact-finder, a lack of knowledge and understanding may still be present. Justice Brennan in the High Court of Australia, cited in *Harawira*, emphasised that officials in courts have no scientific or special knowledge, any more than that of the general public, on the dangers of acting on evidence influenced by mental disorders.[174] The Court of Appeal articulated that "judges are not necessarily gifted with special insight into mental illnesses and human behaviour not shared by jurors".[175] For example, judges do not necessarily have complete

[168] Dora W. Klein "Memoir as Witness to Mental Illness" (2018) 43 Law & Psychol Rev 133 at 134.
[169] *R v Harawira*, above n 22, at 726.
[170] Edward L. Volk "Psychiatric Examination of Victim-Witnesses of Sexual Offences" (1968) 44(1) Ind LJ 106 at 107.
[171] Klein, above n 168, at 135.
[172] Wilkinson-Ryan, above n 156, at 1376.
[173] Cremin, Philips, Sickinger, and Selhof, above n 3, at 487.
[174] *Bromley v R* (1986) 161 CLR 315 as cited in *R v Harawira*, above n 22, at 725.
[175] *R v Harawira*, above n 22, at 726.

knowledge of the unique circumstances when a person has a mental condition. In *Alovili*, the judge considered the psychiatric evidence on the condition of the witness and stated that it seemed many of the stresses the witness would be subject to if he gave evidence would be stresses shared by most persons required to give evidence in a criminal trial, despite the witness's social phobic symptoms.[176]

Research also indicates the judiciary are as likely to intervene during the questioning of a general member of the public as they are to intervene during the questioning of an adult with an intellectual disability.[177] Yet in the second kind of witness, arguably, there are special considerations and circumstances that may result in the need for increased intervention. This suggests that judges may not be attentive to the special needs of particular witnesses, needs which in some cases may warrant a higher level of judicial guidance to prevent inappropriate questioning or other procedural problems impacting on the fact-finder assessment of the witness's evidence. It also suggests that judges, just like jurors, are unlikely to have a complete knowledge or understanding of every mental condition which may be relevant at trial.

The problems of stigma, misconceptions, and lack of knowledge and understanding, are further complicated because no mental conditions, nor an individual's experiences of a particular mental condition, are the same.[178] There are a wide range of diverse mental conditions with various symptoms, and different levels of severity. The severity of a mental condition also fluctuates at different times in an individual's life.[179] Some mental conditions, in some cases, at some times, are more likely to be relevant to the question of credibility than others.[180] It is impossible to make generalisations on an individual's ability to provide credible and reliable evidence based simply on a diagnosis or mental health history.[181] It is also not possible to be prescriptive about the likely effect on the individual's ability to interpret, recall, relate, or remember events as in some

[176] *R v Alovili*, above n 11, at [27].
[177] Phoebe Bowden, Terese Henning and David Plater "Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: an impossible triangulation?" (2014) 37(3) MULR 539 at 566.
[178] Mind, above n 3, at 8.
[179] Mind, above n 3, at 8 and 11.
[180] Tara Collins and John R. Chamberlain "Can a Witness Be Required to Produce Mental Health Records or to Submit to a Psychiatric Examination" (2012) 40(2) Legal Digest 291 at 293.
[181] Cremin, Philips, Sickinger, and Selhof, above n 3, at 459.

individuals there will be varying degrees of affected ability while there will be no effect in others.[182]

Despite the difficulties of stigma, misconceptions and lack of understanding and knowledge, the fact-finder is expected to make rational, fair, consistent and legitimate decisions on the effect and relevance of the mental condition to reliability and credibility. These difficulties when a witness has a mental condition can result in a prosecutor viewing a case as inherently unpredictable, particularly when the credibility and reliability of the evidence is an important feature of a case. In these circumstances, prosecutors are less likely to prosecute.[183]

Individuals with mental conditions may also fear they will not be taken seriously, not be believed, or that harmful assumptions will be made about them, including that they are unable to cope with the process of criminal trials.[184] In addition, a witness may feel humiliated by the discussion of their mental condition. Yet fairness to witnesses is an important purpose of the Evidence Act.[185] If we are taking this purpose seriously in evidence law and criminal procedure, the problems identified in fact-finder assessments of credibility and reliability are significant and should be addressed to reduce the potential for fear, harm and humiliation to individuals with mental conditions. The potential for fear and humiliation leads to a wider concern that the witness may be less likely to come forward to report a crime or give information on a crime because they may then have to be a witness.

The concerns about harm, humiliation, and fear, in addition to the effect on the number of prosecutions, and the potential for illegitimate decisions made at trial by the fact-finder, may result in fewer convictions, and therefore justice not being done in cases which involve a witness with a mental condition.[186] This further reiterates the significance of the problems identified in this

[182] Mind, above n 3, at 11.
[183] Birch, above n 160, at 2.
[184] Patrick E. Robertshaw "R. (FB) v DPP: the prosecutor and the bookmaker" (2009) 2 Arch Rev 4 at 5. See also National Policing Improvement Agency *Guidance on responding to people with mental ill health or learning disabilities (*ACPO, London, 2010) at 77; and Ellison, above n 3, at 43.
[185] Evidence Act 2006, s 6(c).
[186] Ellison, above n 3, at 43.

Chapter and the need for both academic and judicial minds to engage with the focus of this dissertation.

An effective strategy to mitigate the issues identified could involve challenging both the law and our society.[187] Improvements could come from within society by reducing the stigma and misconceptions present. Changing rules of evidence law may also encourage positive changes to this problem.[188] Some scholars propose that the accuracy and completeness of evidence by witnesses with mental conditions can be altered and improved if particular court environments are used along with suitable questioning and examination.[189] These actions could improve the credibility and reliability of the evidence itself. The use of alternative ways of giving evidence discussed in Chapter II is one such action New Zealand courts are already taking, especially given the preference for witnesses to give evidence themselves.

A different approach could be to argue that any evidence of a mental condition itself is not relevant and should not be before the fact-finder because it only serves to invoke stigma and bias. For example, Tess Wilkinson-Ryan argues that most jurisdictions are too permissive in allowing psychiatric evidence to be admitted when it should be inadmissible because relevance is substantially outweighed by the prejudicial effects on the witness and on the trial given the likelihood of misunderstanding the mental condition and its impacts.[190] This is a much more drastic possible solution for which legal and political appetite is unlikely.

Alternatively, Chapter III discussed two options to help the fact-finder in their assessment of credibility and reliability: expert opinion evidence and judicial directions. It could be that changing the use of these two options could substantially improve the impacts of misconceptions, stigma, prejudice and lack of knowledge on credibility and reliability assessments. These two options are considered in the remainder of this Chapter.

[187] Birch, above n 160, at 224 and 234.
[188] Birch, above n 160, at 234.
[189] Ziv, above n 4, at 7.
[190] Wilkinson-Ryan, above n 156, at 1375.

Further research is also needed to inform the discussion. An important first step would be increasing scientific and sociological research into how the existence of mental conditions, evidence on mental conditions, stigma and bias, and lack of knowledge and understanding influence the decision making of fact-finders in criminal trials.[191]

Critically, the cases analysed in Chapter III showed that there is little meaningful judicial engagement, since *Harawira* in 1989, on the problems identified. None of the cases appeared to discuss the potential for stigma, bias, assumptions, misconceptions and misunderstandings to affect the fact-finder's assessment of the credibility and reliability of the evidence of the witness. The cases simply stated and upheld the principle that the assessment of credibility and reliability is for the fact-finder. The extensive engagement in international literature and research with the problems identified in this Chapter suggests it is time for considerably more judicial engagement in this context. This is especially so given the significant developments in the understanding of psychology since 1990 when *Harawira* was before the court.

### *B Judicial Directions on Unreliability*

Judicial directions are one option discussed in Chapter III which is available to assist the fact-finder in their assessment of the credibility and reliability of the evidence of a witness with a mental condition. Judicial directions have been a topic of debate in relation to many different kinds of evidence that can be admissible in criminal trials.[192]

Appropriate judicial directions could help to avoid some of the pitfalls discussed about the fact-finder determining the credibility and reliability, which in turn would help to preserve the integrity of the judicial system.[193] Judicial directions may help the fact-finder understand the relevance of the mental condition of the witness to the assessment of reliability and credibility.

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[191] Ellison, above n 3, at 45.

[192] This is a broader debate with which this dissertation does not have the time or capacity to adequately consider. The focus is on judicial directions on the potential unreliability of evidence of a witness with a mental condition.

[193] Gutheil and Sutherland, above n 165, at 308.

Birch describes judges as the "heroes at last" who can make the necessary adjustments to improve reception of the testimony of vulnerable witnesses.[194] Armani argues mandatory jury instructions can increase juror awareness and mitigate bias.[195] If judges demonstrate they are serious about addressing the problems of stigma and bias against mental conditions through judicial directions, the jury are likely to follow the judge's lead.[196] In addition, a jury should be encouraged to engage in groupthink to follow the directions of a judge to combat the problem rather than allow groupthink to propel bias.[197]

A study on the influence of judicial instructions in countering misconceptions in child sexual abuse cases could be informative as to whether judicial directions can counter misconceptions of a witness with a mental condition.[198] In the study, information given through judicial directions enhanced the perceptions of the victim's credibility, especially where the judicial instruction was provided in summing up.[199] This suggests that directions do have the ability to improve the perception of credibility though it is not clear whether this was the direct result of countering bias, misconceptions, stigma and/or lack of knowledge.

On the other hand, some scholars argue jury instructions are not an effective remedy to problems such as bias, stigma and lack of knowledge, as doubt is cast on the ability of jurors to understand and properly apply jury instructions.[200] Research also suggests stigma on mental conditions is immune to instructions limiting the use of evidence to only particular purposes.[201] In addition, directions may cause the juror to unintentionally pay more attention to information the judge

[194] Birch, above n 160, at 249.
[195] Armani, above n 159, at 213.
[196] Armani, above n 159, at 241.
[197] Armani, above n 159, at 241.
[198] Jane Goodman-Delahunty, Anne Cossins and Kate O'Brien "A Comparison of Expert Evidence and Judicial Directions to Counter Misconceptions in Child Sexual Abuse Trials" (2011) 44(2) Aust & NZ J Criminology 196.
[199] Goodman-Delahunty, Cossins and O'Brien, above n 198, at 196.
[200] Sandra Guerra Thompson "Judicial Gatekeeping of Police-Generated Witness Testimony" (2012) 102(2) J Crim L & Criminology 329 at 362.
[201] Deidre M. Smith "The Disordered and Discredited Plaintiff: Psychiatric Evidence in Civil Litigation" (2009) 31 Cardoza L Rev 749 at 819.

directed them to disregard or to apply in a particular way than if that was not specifically brought to their attention.[202]

New Zealand case-law indicates a lack of desire to require mandatory judicial reliability warnings and a hesitancy to give warnings. As stated in *Taylor*, "[m]ost judges will tread cautiously in determining whether to give a reliability warning" as such warnings have the potential to influence the jury and their deliberations.[203] *B (CA58/2016) v R,* after referring to *Harawira,* stated reliability can be one of many issues or a collateral issue, while sometimes the context raising reliability will be outside the knowledge or understanding of ordinary people.[204] It is only where the second is true that the Court of Appeal found a reliability direction is likely to be of assistance to the jury.[205]

The New Zealand Law Commission has stated that although the effectiveness of jury warnings is problematic, directions are an appropriate compromise between admitting evidence which may be unreliable but still useful to the fact-finder, and excluding the evidence completely.[206] The case-law in this dissertation demonstrates the courts prefer not to exclude the evidence altogether and so directions seem appropriate.

However the Law Commission noted in 1997 that New Zealand courts do not take a categorical stance.[207] The case analysis in Chapter III supports a continuation of an absence of a categorical stance on the usefulness and effectiveness of jury directions within the minds of the judiciary. The absence of a categorical stance could have arisen because no express mention is made of the evidence of a witness with a mental condition as a type of evidence where the Judge must consider whether to give a reliability direction.[208] The Law Commission, when discussing the codification of New Zealand evidence law, stated it would be useful to have a general provision similar to the equivalent Australian provision.[209] The Australian provision explicitly includes evidence the

[202] Armani, above n 159, at 234.
[203] *Taylor v R*, above n 100, at [64].
[204] *B (CA58/2016) v R* [2016] NZCA 432 at [60].
[205] At [60].
[206] Law Commission, above n 13, at [52], [53], and [126].
[207] Law Commission, above n 13, at [129].
[208] Evidence Act 2006, s 122(2).
[209] Evidence Act 1995, s 165 (Aus); and Law Commission, above n 13, at [134].

reliability of which may be affected by mental ill health, as the kind of evidence which the judge is to warn the jury on if requested by a party, unless there are good reasons for not doing so.[210] However the New Zealand Law Commission found that extensive legislative guidance on s 122 warnings would not be helpful.[211] This was because whether a warning should be given is "so intimately connected to the dynamics of the trial process" along with being of trial specific nature, and there is a wide range of situations the section covers.[212] Yet extensive legislative guidance on warnings to inform the jury about the evidence of young children is included in the Evidence Regulations.[213] This somewhat undermines the Law Commission's claim that extensive legislative guidance on warnings is generally inappropriate. Children are considered vulnerable witnesses so there are extra precautions taken. Witnesses with mental conditions are also vulnerable witnesses and so perhaps extra precautions through extensive legislative guidance is appropriate. Targeted research into the use of judicial directions where a witness has a mental condition may be needed to prompt more clarity within the judiciary and legislature.

In terms of the content of judicial directions, these would need to be specific, given the aforementioned diversity of mental conditions, their severity and the range of symptoms that can be present in witnesses. The content may depend on the specific evidence admitted at the trial, particularly where there is expert opinion evidence on the mental condition. For example, for a witness with severe depressive disorder, the appropriate judicial direction may discuss how the condition can result in a lack of detail in the evidence because the witness has difficulty remembering precise dates or times or recalling peripheral details.[214] A potential area for research would be the receptivity of fact-finders to tailored directions available for each type of mental condition similar to what we have for child witnesses. This could be compared to the receptivity of directions based on the specific evidence given in a trial.

It could also be the case that it is necessary to have a judicial direction which explicitly discusses and addresses stigma, misconceptions and lack of knowledge and understanding. For example, a

[210] Evidence Act 1995, s 165 (Aus).
[211] Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 240.
[212] At 240.
[213] Evidence Regulations 2007, reg 49.
[214] Ellison, above n 3, at 33.

potentially critical part of a judicial direction presumably would be stating that the existence of a mental condition, or of mental symptoms, does not necessarily mean that the witness is less credible or reliable. For example, the study on child sexual abuse cases used a direction which included a summary of the scientific findings on children's responses to sexual abuse, followed by a direction that the child could still provide reliable accounts.[215] For the severe depressive condition example, the direction may need to state that a lack of detail does not make the witness or their evidence inherently unreliable. This sort of caveat would address the particular misconception discussed in this Chapter that a mental condition inherently makes the evidence unreliable or incredible.

In addition, there may be specific words, phrases or concepts which, if included in directions, can mitigate the more general problems of stigma, misconceptions and lack of knowledge. Psychological research to determine if there are such words, phrases or concepts would be necessary. In addition, Armani distinguished between a direction which merely discusses the use of misconceptions and stigma in deliberations, and one which also gives clear strategies on how to combat bias during the whole process.[216] What, if any, strategies are useful if included is once again a specific area for research.

Overall, psychological research on the content of judicial directions on mental conditions is significantly lacking. It would be a useful first step to inform what, if any, changes to evidence law or common judicial practice is needed in relation to judicial directions in cases where a witness has a mental condition.

### *C Expert Opinion Evidence*

Expert opinion evidence was one option in Chapter III available to assist the fact-finder in their assessment of the credibility and reliability of the evidence of a witness with a mental condition. As noted in *R v Makoare,* in relation to the use of expert evidence on mental abnormalities, "as the study of the mind progresses the Courts have been increasingly, if cautiously, willing to allow

[215] Goodman-Delahunty, Cossins and O'Brien, above n 198, at 205.
[216] Armani, above n 159, at 240.

appropriate evidence so that the jury will have the advantage of a greater understanding of human responses".[217] The question is whether expert evidence where a witness has a mental condition is desirable and useful given the problems of stigma and lack of knowledge discussed.[218]

Thomas J in a dissenting judgement of *R v Griffin* made an interesting observation on expert evidence of mental conditions.[219] He stated, "having regard to complexity of most facets of modern life, evidence of expert witness in civil and criminal trials is both inevitable and valuable. Indeed, in many cases, it is indispensable".[220] Certainly, given the problems of stigma, bias, prejudices and lack of knowledge, it could be said that expert evidence is extremely useful where a witness has a mental condition. The case-law in Chapter III demonstrates the courts consider expert opinion evidence useful where a witness has a mental condition.

Expert evidence allows the jury to be educated about the mental condition of a witness and how it may impact credibility and reliability, rather than leaving the fact-finder to their own devices in making such assessments.[221] A fact-finder left to their own devices is much more likely to make assessments and decisions which are improper, incorrect or unfair by virtue of stigma, bias, prejudices and lack of knowledge. The Court in *R v B* expressed that there are advantages in allowing opinion evidence when there is evidence of someone under a disability and truthfulness or reliability may not be within the ordinary experience of the jury.[222] This addresses the lack of knowledge the jury may have with regard to the particular mental condition. Therefore, the risk of

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[217] *R v Makoare* [2001] 1 NZLR 318 at [22].

[218] Notably, there are a number of criticisms and concerns with the use of expert opinion evidence generally. For example, the current system leads to bias by lawyers placing experts under a great deal of pressure to have reports favourable to the side that instructs them. Counsel is only going to bring expert evidence to court if it favours their argument. Parties with greater resources can be advantaged as experts are often paid for their contribution to the case. Additionally, the conflicting evidence of experts can confuse jurors and waste time at trial. As articulated by Thomas J in *R v Griffin* [2001] 3 NZLR 577 at [114] "But the perceived lack of objectivity of expert witnesses poses difficulties... The disparities in the evidence of experts within the same discipline is notorious, ineluctably favouring the party who has instructed them. Evidence suggests that the courts should be prepared where appropriate to approach the evidence of experts with a healthy scepticism". These general issues are noted but not substantially engaged with for this dissertation. The focus is on expert evidence on the mental condition of a witness where the reliability and credibility of their evidence is in question.

[219] *R v Griffin*, above n 218, at [114] and [115].

[220] At [114].

[221] Birch, above n 160, at 235; and Cremin, Philips, Sickinger, and Selhof, above n 3, at 467.

[222] *R v B*, above n 74, at 372.

uninformed fact-finders looking at evidence through misinformation or prejudice is arguably reduced and experts can provide the knowledge needed to evaluate evidence properly.[223]

Expert evidence could be especially useful given that the mental condition of the witness may often have no actual bearing on the credibility and reliability of their evidence at trial. Leslie et al argued it could be regarded as essential to have a clinical evaluation in order to identify psychological vulnerabilities which assist the fact-finder in determining the reliability of the individual and their account.[224] Similarly, a clinical evaluation could expose that there are no relevant psychological vulnerabilities or that the condition of the witness is not likely to affect their reliability or credibility. Where credibility has been called into question, expert evidence following a psychiatric examination could rehabilitate the testimony of the witness by showing the mental condition does not affect credibility.[225] In the study on the influence of judicial instructions in countering misconceptions in child sexual abuse cases, information given by expert evidence enhanced the perception of the victim's credibility.[226] This shows that expert evidence does have the ability to positively affect credibility.

The usefulness of expert evidence in this context may be questioned however. Gathering expert evidence can be intrusive, so arguably it should not always be assumed to be necessary.[227] Expert evidence could unduly influence the jury or could result in impermissible "bolstering" of the witness.[228] This view implies that it is not that expert evidence restores credibility and reliability to a neutral level but rather, expert evidence unnecessarily and inappropriately makes the witness seem more credible and reliable.

In response to these criticisms, it should be noted that ideally expert evidence is not about bolstering credibility but rather undoing any unfair bias against the witness when their credibility

[223] Lisa Gillespie "Expert Evidence and Credibility" (2005) 9 SLT 53 at 54; and Dora W. Klein "Memori as Witness to Mental Illness" (2018) 43 Law & Psychol Rev 133 at 134.
[224] Ophelia Leslie, Susan Young, Tim Valentine and Gisli Gudjonsson "Criminal barristers' opinion and perceptions of mental health expert witnesses" (2007) 18(3) The Journal of Forensic Psychiatry and Psychology 394 at 395.
[225] Collins and Chamberlain, above n 180, at 293.
[226] Goodman-Delahunty, Cossins and O'Brien, above n 198, at 196.
[227] Mind, above n 3, at 25.
[228] Gutheil and Sutherland, above n 165, at 297.

and reliability is being assessed by fact-finders. It ensures that fact-finders do not impermissibly discount the evidence of a witness by virtue of their mental condition when there is no legitimate basis to do so. This bias is exacerbated by the lack of knowledge and understanding the fact-finder may have, in addition to the prevalence of stigma inherent in the minds of humans who are asked to be the fact-finders in criminal trials. Arguably, it would be prejudicial to the witness themselves to not have experts to address the problems of stigma and lack of knowledge, in addition it could affect the efficacy and legitimacy of the criminal trial.

An interesting parallel can be made to counter-intuitive evidence. Counter-intuitive evidence is:[229]

> Evidence admitted in cases involving allegations of sexual abuse of young persons for the purpose of correcting erroneous beliefs or assumptions that a judge or jury may intuitively hold and which, if uncorrected, may lead to illegitimate reasoning.

As argued in this Chapter, expert opinion evidence on a mental condition can correct erroneous beliefs or assumptions in the minds of fact-finders to prevent illegitimate reasoning. The New Zealand courts have found that the use of counter-intuitive evidence is not to bolster credibility but rather to undo unjustified assumptions and correct erroneous beliefs in order to reset the complainant's credibility to zero or neutral.[230] By analogy therefore, expert evidence which undoes unjustified assumptions and corrects erroneous beliefs about the mental condition of a witness to reset the credibility of the witness to neutral rather than bolstering credibility.

Wilkinson-Ryan states a further criticism:[231]

> it is the job of the jury to determine whether or not the complainant is a credible witness, and the expertise and authority of a mental health professional, or simply the taint of clinical diagnosis, may supplant a jury's own determination

[229] Luke, Cunningham & Clere *Laws of New Zealand* Evidence: Part III Admissibility Rules (online ed) at [38].
[230] *M (CA23/2009) v R* [2011] NZCA 191 at [24]-[25] and [32] as cited in *DH v R* [2015] 1 NZLR 625 at [2] and [30].
[231] Wilkinson-Ryan, above n 156, at 1385.

The risk is that the jury will abdicate its responsibility because it will see the expert as being in a better position to answer the question.[232] The court in *R v B* also noted the criticism that expert evidence may inevitably lead to an expert's opinion on credibility and reliability becoming known when the assessment of credibility and reliability should be solely for the jury.[233]

These concerns seem somewhat unfounded when the expert opinion evidence does not express whether the witness was actually credible or reliable, as seen in the case analysis in Chapter III. Rather the expert evidence provides valuable information on the mental condition and the individual's experience of that mental condition. The jury is still left to decide on reliability and credibility, but with more useful information to help it make that decision.

Tess Wilkinson-Ryan makes an analogy to the reasoning behind the rape shield provisions to submit that it is the defendant who is on trial, so evidence should focus on the defendant's actions and not the character of someone else.[234] By the same reasoning, the focus should be on the subject matter of the case and not on the mental condition of a witness who is not on trial.[235] However, by virtue of evidence being introduced at trial as to the presence of a mental condition, in addition to information on the mental condition itself, part of the focus of the trial has inevitably become the credibility and reliability of the evidence of the witness because of the mental condition. It therefore follows that expert evidence should be permitted to give further information and understanding on the mental condition and its effect on credibility and reliability.

It could also be argued that expert evidence may not be able to cure the stigma associated with mental conditions.[236] A United States Capital Jury Project study on cases involving intellectual disability evidence found that jurors responded more strongly in countering stereotypes to lay testimony and evidence of the intellectual disability rather than to psychological evidence.[237] This was especially so as the jurors distrusted expert psychiatrists because they considered them to be

[232] Elaine D Inguilli "Trial by Jury: Reflections on Witness Credibility, Expert Testimony and Recantaton" (1986) 20(2) Val U L Rev 145 at 148.
[233] *R v B*, above n 74, at 372.
[234] Wilkinson-Ryan, above n 156, at 1377 and 1378.
[235] Cremin, Philips, Sickinger, and Selhof, above n 3, at 463.
[236] Wilkinson-Ryan, above n 156, at 1391.
[237] Jochnowitz, above n 167, at 425.

hired guns.[238] However the Capital Jury Project study was in the context of potentially mitigating intellectual disability evidence for the culpability of defendants of capital offences.[239] Therefore its usefulness in the context of the mental conditions of witnesses in relation to credibility and reliability of evidence is limited.

In addition, the existence of a relevant mental condition, the giving of evidence by a psychiatrist or psychologist, or the discussion of significant mental history could be so prejudicial in itself as to overshadow the content of the expert's evidence.[240] There are also concerns about the potential misuse of expert psychiatric evidence which unfairly discredits witnesses by tapping into common prejudices which could undermine the potential for fair and just outcomes.[241] For example, one party could introduce evidence of an expert on the mental condition which states the possible symptoms the witness could be having because of their diagnosed condition in order to attack credibility despite the fact that witness may not actually be exhibiting that symptom. Additionally, stigma can also be present in medical experts.[242]

However these do not provide reasons against the use of expert evidence where the witness has a mental condition. Rather it suggests that New Zealand evidence law needs to be, in its application and processes, as neutral and fair to all parties as possible. For example, a change to having neutral and independent experts giving evidence on the mental condition could protect jurors from unreliable expert testimony and prevent the misuse of expert psychiatric evidence to unfairly discredit a witness by tapping into common prejudices or stigma.[243] While a United Kingdom study evaluating criminal barristers' opinions of psychologists and psychiatrists as expert witnesses found the importance of quality training for experts as well as for legal professionals for instructing experts was emphasised by respondents.[244] This could reduce the stigma that could be

[238] At 385.
[239] At 386 – 388.
[240] Wilkinson-Ryan, above n 156, at 1391.
[241] Ellison, above n 3, at 44.
[242] Mind, above n 3, at 25 –27.
[243] Sara Gordon "Crossing the Line: Daubert, dual Roles, and the admissibility of Forensic mental health testimony" (2016) 37 Cardozo L Rev 1345 at 1395 –1398.
[244] Leslie, Young, Valentine and Gudjonsson, above n 224, at 407.

present in medical experts and legal counsel. This presents an area for future discussion and research.

## *V Conclusion*

It is imperative that New Zealand courts are a safe and fair place for witnesses. Where a witness has a mental condition, it is also important that the condition can be taken into account by the fact-finder if it is relevant to the proceedings. In light of this fundamental tension, the approach of judges applying evidence law must aim to strike an appropriate balance between treating witnesses fairly, upholding the defendant's right to a fair trial, and allowing the fact-finder to have access to relevant and non-prejudicial evidence. This upholds the legitimacy of our criminal process and ensures justice is done.

In light of the complexity of these issues at stake, this dissertation has provided the first comprehensive review of High Court, Court of Appeal, and Supreme Court decisions where a witness, other than the defendant, in a criminal case has a mental condition. The prevalence of mental conditions in New Zealand society means it is likely that many witnesses involved in criminal trials will have one or more of a range of different mental conditions. It is therefore important to understand the treatment of these vulnerable witnesses in New Zealand courts.

Despite the prevalence, there has been relatively little engagement in New Zealand case-law and literature with the diversity of evidentiary issues arising in relation to non-defendant witnesses with mental conditions. This dissertation is an important first step, in that it provides a holistic, and comprehensive categorisation of the evidentiary issues using an analysis of case-law. Although the sample size was small and excluded District Court decisions, it was possible to map the broad contours of the evidentiary issues arising and identify key areas for further research and discussion.

Looking at the survey of relevant cases, the most prominent issue relating to witnesses with mental conditions pertains to credibility and reliability. Following reforms in the Evidence Act 2006, judges no longer assess the competency of the witness to give evidence. Rather, evidence law provides that witnesses with mental conditions are prima facie eligible and compellable to offer admissible evidence. Evidence law is now much more permissive of witnesses giving evidence despite the possibility that a witness may not be able to give rational and coherent testimony. It is relatively common for witnesses with mental conditions to give evidence. As a result, the mental

condition is not relevant to an assessment of eligibility or competency, but rather in relation to questions of credibility and reliability, which are for the fact-finder to assess.

Therefore the overall schema of evidence law is to prefer witnesses with mental conditions give evidence in court and then issues of credibility and reliability will be considered at trial. Consistent with this approach, and as discussed in Chapter II, there is a high threshold for a witness to be unavailable under the hearsay statements test; a lack of use of the general admissibility provisions to exclude the evidence of a witness, and an emphasis on accommodating a witness through alternative ways of giving evidence rather than not allowing a witness to give evidence. The case-law on these evidentiary issues reflects the focus on the credibility and reliability of the witness' evidence.

As noted, the responsibility of assessing credibility and reliability is firmly with the fact-finder, whether the fact-finder be the judge or a jury in the case. The strength of this principle in the context of witnesses with mental conditions was highlighted in the case-law. In going back to the fundamental tension, we must ask whether the fact-finder is equipped to make the credibility and reliability assessments of evidence when a witness has a mental condition. Is the fact-finder able to make an assessment in a way that is both fair to witnesses and that also adequately takes into account the mental condition to the extent that it is relevant? Our legal system puts great faith in fact-finders generally to make complex assessments; credibility and reliability is one such complex assessment. Whether we put too much faith in fact-finders generally is a question which is beyond the scope of this dissertation.

Critically, however, we can examine the specific fact-finder assessment of the credibility and reliability of witnesses with mental conditions. Stigma, misconceptions, and lack of knowledge and understanding are possible in the minds of fact-finders when they are assessing the credibility and reliability of the evidence of a witness with a mental condition. These problems are further complicated by the inability to generalise on the experience, symptoms and severity of a witness' mental condition, nor on the effect the mental condition may have on credibility and reliability. There is extensive international literature exploring the problems of stigma, bias, misconceptions and lack of knowledge and understanding. Yet these complex problems were not meaningfully

explored in the New Zealand case-law analysed. There is also a lack of targeted scientific and sociological research, for example, into how the existence of mental conditions and evidence on mental conditions influences the decision making of fact-finders in criminal trials.

In addition, since the case-law has demonstrated that there is a strong preference for leaving the assessment of the impact of a witness' mental condition on the credibility and reliability of evidence, we must examine what safeguards and assistance to fact-finders are provided by evidence law. Are these adequate, and what does research and literature tell us about their adequacy? There are two important options already in evidence law to assist the fact-finder in their assessment of credibility and reliability: judicial directions and expert opinion evidence. Case-law demonstrates that there has not been sufficient engagement with the underlying issues within both the use of jury directions and expert opinion evidence. We need to have a more robust and research-based approach to expert opinion evidence and judicial directions when it comes to witnesses with mental conditions. The recent engagement with counter-intuitive evidence could be instructive here.

The problems of stigma, misconceptions and lack of knowledge and understanding, and lack of a strong New Zealand evidentiary engagement with these problems, call into question the legitimacy of fact-finder assessments. The problems may not only affect prosecutor decisions, and the likelihood of a witness to report or give information on a crime, but also whether justice is done in a case. We need to ask if we are balancing providing fact-finders with relevant evidence with treating witnesses fairly when there is the potential for fear, humiliation and harm to witnesses.

Therefore there is a need for significant judicial and academic engagement with the focus of this dissertation. New Zealand's evidentiary approach appears, at this time, unthoughtful, untested and unexplored for the specific context of witnesses who are not the defendant and who have a mental condition. Admittedly New Zealand is a smaller jurisdiction, with less experience with this issue, and a relatively small body of case-law. Yet it is still necessary to engage with the situation of witnesses with mental conditions given the importance of the issue to witness wellbeing and to the justice of the case. Given the novel nature of this analysis, the prevalence of mental conditions, and the tension between the importance of treating all involved in the criminal process fairly while

ensuring justice is done, future discussion and research by judicial and academic minds is both pivotal and necessary.

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