IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA288/2016
[2020] NZCA 690

BETWEEN	RUSSELL JOHN TULLY Appellant
AND	THE QUEEN Respondent

Hearing:	8 October 2020
Court:	Miller, Venning and Katz JJ
Counsel:	Appellant in person M J Lillico and R K Thomson for Respondent CWJ Stevenson as Counsel assisting the Court
Judgment:	21 December 2020 at 3.00 pm

JUDGMENT OF THE COURT

A The application for leave to admit new evidence on appeal is granted.

B The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Miller J)

TABLE OF CONTENTS

[1] On the morning of Monday 1 September 2014, John Tully walked into the Ashburton office of Work and Income New Zealand (WINZ), wearing a balaclava and holding a sawn-off shotgun. He shot and killed two staff members, Peggy Noble and Leigh Cleveland. He wounded another, Lindy Curtis. He fired at Kim Adams but missed.

[2] At his trial in February 2016, Mr Tully represented himself after having dismissed seven sets of counsel. His most recent counsel appeared to assist the Court as amicus curiae, with a brief to advance a defence case. Mr Tully was excluded from the courtroom for much of the trial after persistently disrupting proceedings in an attempt to have the trial aborted.

[3] Mr Tully was found guilty of the murders of Ms Noble and Ms Cleveland, and the attempted murder of Ms Adams. He was also found guilty on two counts of unlawful possession of a firearm but acquitted on charges of attempting to murder Ms Curtis and of laying a trap for his pursuers as he fled the scene. He was sentenced to life imprisonment with a minimum period of imprisonment of 27 years.

[4] Mr Tully now appeals his convictions and sentence. He maintains that he was not mentally fit to stand trial, and that he had an available defence of insanity which the trial judge, Mander J, refused to leave to the jury. To that end he has adduced new evidence on appeal. He also says that he was denied his right to counsel and his trial was unfair, partly because he was absent for most of it after being removed for disrupting proceedings.

The facts

[5] The narrative facts are not now in dispute, but it is necessary to recite them because the Crown maintains both that the shootings were planned and organised, targeting victims against whom Mr Tully harboured a grudge, and that any mental impairment did not affect Mr Tully to the extent that he did not understand what he was doing or that his actions were wrong. Mander J found at sentencing that Mr Tully

had formed a plan to target WINZ employees and described the murders as premeditated and cold-blooded executions.[1]

[6] Mr Tully was raised in Ashburton and as an adult lived variously in New Zealand and Australia, working as a diesel mechanic but never holding a job for long. He returned to New Zealand permanently in 2012 and to Ashburton in 2014, when he was aged 48. At sentencing Mander J recorded that Mr Tully went into something of a downward spiral after returning to New Zealand. He was estranged from his family and believed he was dying of a skin condition, which he still treats with hydrogen peroxide. Medical reports indicate that he has no such condition, and that hydrogen peroxide would not be a suitable treatment, but Mr Tully believes he has such a condition, that it affects his brain, and that hydrogen peroxide alleviates it. He was and remains to this day assiduous in his attempts to have his self-diagnosis confirmed.

[7] After moving to Ashburton Mr Tully lived in variously rented accommodation and camping grounds. Sometimes he lived rough along the Ashburton River. He engaged with the WINZ office in Ashburton, seeking permanent accommodation in a sole-occupant residence and financial assistance. He sought food payments and money to treat himself, and money to purchase a mobility scooter (which he was denied) and a bicycle. He appears to have been afforded all the assistance available to him, but he was dissatisfied and adamant that he was being denied his entitlements. He was demanding and intimidating in his dealings with staff and frequently made complaints against them when they refused to accede to his demands. Ms Cleveland and Ms Adams had both dealt with his requests.

[8] On 7 August 2014 Mr Tully entered the WINZ office, where the receptionist, Ms Noble, spoke to him and reminded him that his appointment was for the next day and he had previously been asked to leave the office. He was eventually persuaded to leave, having been given $60 for food, $29 for hydrogen peroxide and $495 for a week's accommodation at a campground. He ripped the papers up when he saw that the grant he was being given was recoverable, and staff asked him to leave and

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1 *R v Tully* [2016] NZHC 1133 [Sentencing notes] at [9], [26], [28] and [31].

threatened to call the police. On the following day, 8 August, he was trespassed and required to deal with WINZ via its helpline. He continued to contact WINZ in that way. On 28 August he made an appointment via the helpline for the following day. A manager, Jamie Carrodus, called to tell him he was still trespassed and would need an agent to act on his behalf. He nonetheless came to the office on the 29th of August, which was a Friday, and was turned away by the security guard.

[9] Over the weekend Mr Tully made preparations for the attack. He dumped the contents of a storage locker that he had been renting, the contract having been terminated because he was suspected of living in the locker. He hid his two cellphones on trucks at the storage yard of a trucking company, evidently to provide himself with an alibi founded on the trucks' subsequent movements. He hid one of two bicycles he had been using along the Ashburton River, planning to switch bikes as he made his escape.

[10] On 1 September Mr Tully arrived at the WINZ office on his other bicycle. He was dressed in a green jacket and carried a backpack. Before going to the office he had bought, among other things, three bottles of hydrogen peroxide from his regular pharmacy. At the WINZ office he locked his bike and walked inside, wearing a balaclava and carrying a sawn-off pump action shotgun. Some of the cartridges contained solid shot rather than pellets. The time was 9.51 am.

[11] Mr Tully shot Ms Noble at the reception desk. The chest wound was immediately fatal. He moved into the offices and saw Ms Adams. He fired at her but missed. She fled through a door which led to an exit.

[12] Mr Tully then saw Ms Curtis and a male client of hers huddled under her desk. Ignoring the client, he shot her in the leg.

[13] Mr Tully moved about the office, looking for other staff. He noticed Ms Cleveland under her desk at the rear of the office. She begged for her life, but he shot her twice. He turned away, then returned — there was evidence that she had made a sound — and shot her once more, fatally.

[14] Mr Tully then walked calmly out of the premises, packed the weapon and balaclava in his backpack, unlocked his bike and left. Little more than a minute had elapsed since he entered the building. He was accosted by a member of the public as he left, which caused him to leave his helmet and bike lock behind, but he made his escape along a river path. The Crown alleged that he stopped at one point and strung a wire across the path at a height of about 170 cm as a trap for his pursuers. Along his route he disposed of the shotgun, which has never been recovered, and hid the bike, switching to the bike he had hidden earlier.

[15] At 5.30 pm police found Mr Tully hiding in a macrocarpa hedge about 12 kilometres from town. He had been spotted by a farmer. In his possession was another, disassembled, shotgun and a number of cartridges. His backpack contained a note stating "Discrimination Kim Adams, Leigh Cleveland".

[16] In his interview with the police, which was not adduced at trial in the face of his objections, Mr Tully commenced by insisting that he needed salt and he needed to treat himself or he would die. He then stated that he wanted his lawyer before he would talk and pointed out, when being told of his right to remain silent, that the interview was already being recorded. The interview was paused while counsel, Ms Aickin, was contacted and spoke to Mr Tully. When the interview resumed, with Ms Aickin present, Mr Tully agreed that he understood his rights and was willing to continue. He then explained that he remembered nothing between picking up his medication for his skin condition and being arrested. He professed to be unsure about the clothing he wore that day. He explained that he had being trying to get help from many sources but no one would help and he had been trespassed from various agencies or public spaces. He recounted his grievances with WINZ in some detail, including being trespassed and being required to repay his accommodation supplement. He said the Ashburton office would deny his rights even when they were written down in legislation. However, he made it clear that he was alert to the officer's evident purpose of establishing whether he had a motive to do WINZ any harm. He claimed that he could not name any of the staff he had dealt with (except a regional manager). He said he had turned up on August 29th because he had made an appointment and that meant WINZ was obliged to see him. When the officer directed the questioning toward the shootings, he maintained he had no memory of the day and stopped the interview.

[17] Mr Tully was charged with two counts of murder, two of attempted murder, one of setting a trap with intent to injure, and two of unlawful possession of a firearm. As noted above, he was acquitted at trial of the charge of laying a trap and the attempted murder of Ms Curtis. Mander J attributed the latter verdict to the absence of any prior dealings between her and Mr Tully and evidence that he may have aimed at her leg.[2] Ms Noble and Ms Cleveland were shot in the chest. The jury may have been unsure that it was Mr Tully who strung the wire across the track.

Mental state inquiries

Mr Tully initially found fit to stand trial

[18] After his arrest a forensic psychiatrist who had examined Mr Tully in custody recommended a psychiatric report pursuant to s 38(2)(c) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP). On 23 September 2014, Mr Tully was admitted to a secure mental health unit, Te Whare Manaaki, at Hillmorton Hospital for that purpose. Dr Julie Norris, a consultant forensic psychiatrist, prepared the report, which was dated 6 October 2014. After being advised of the purpose of the report and discussing the limits of confidentiality at some length, Mr Tully said that he wished to take legal advice and requested a list of all the questions Dr Norris would ask. He then politely declined to participate in a clinical assessment, saying he would obtain a private psychiatric report. Dr Norris spoke to his treating psychiatrist at the hospital, who reported that Mr Tully had been observed by staff and there had been no bizarre, disorganised or distressed behaviour. During her engagement with Mr Tully, Dr Norris found him able to listen and respond appropriately. There was no evidence of disorganised thought processes or abnormality of mood. He showed he could understand, process and comprehend information about participating in the assessment. Subject to the limitations imposed by his refusal to participate, Dr Norris found he appeared to display no mental impairment that would affect his ability to plead or participate in the proceedings. She was not able to say whether he had a defence of insanity available.

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2 At [10].

Mr Tully triggered CPMIP fitness inquiry

[19] In April 2015, shortly before his trial was to begin, Mr Tully wrote to the Court raising the question of his mental health both at the time of the incidents and presently. Mander J treated Mr Tully's request as an application to engage the fitness inquiry under CPMIP.[3] He noted that the offences were unusual, indicative in themselves of mental instability; Mr Tully's demeanour and his police interview might be considered troubling; four counsel had been appointed only to be dismissed in short order; Mr Tully's beliefs about his health needs and medical conditions were indicators of which the Court must be cognisant; and Dr Norris's report of 6 October 2014 had been written without access to medical records.[4] He observed that a psychiatrist, Professor Richard Porter, had been engaged by the defence and, despite successive dismissals of counsel, arrangements had been made to ensure the Professor completed the work. It followed that the trial date had to be vacated.

[20] The Court requested two reports under s 38(1)(a) of CPMIP. One was from Dr Sue Galvin, a clinical psychologist, but Mr Tully said he was unwell and refused to see her. She was accordingly unable to offer an opinion. The other was from Dr Norris. On her recommendation Mr Tully was again detained in Te Whare Manaaki on 17 June 2015 so the second report could be prepared. It was written by a consultant clinical psychologist, Craig Prince. A report by his treating psychiatrist, Dr Maxwell Panckhurst, was also produced during the s 14 hearing.

The expert reports

[21] All three experts were able to interview Mr Tully in mid-2015, though he was unwilling to discuss some subjects, such as drug use. It appears he had decided that his previous refusal to engage had been unhelpful for him. The experts obtained access to his extensive health files, including Australian records, and Dr Norris talked to Mr Tully's mother. The records contained evidence of his longstanding concern with his skin condition, for which there was no clinical evidence beyond a diagnosis of episodic mild dermatitis and rosacea before 2012. He was unable to explain the nature

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3 Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP), pt 2, subpt 1. See *R v Tully* HC Christchurch CRI-2014-009-8232, 1 May 2015.

4 The Judge cited *McKay v R* [2009] NZCA 378, [2010] 1 NZLR 441, in which this Court considered the threshold for raising fitness under CPMIP.

of his condition and he had declined to participate in a dermatological assessment. His prison records included evidence of malingering; he claimed to be unable to walk but moved normally when he thought he was not being observed. He had said he would feign symptoms to obtain admission to hospital.

[22] In the interviews Mr Tully was keen to convey information supporting a diagnosis of mental illness. He claimed to experience psychiatric difficulties when living in the community: he would hear voices in his head and see "dead pigeons" and animals which were "opaque" and was fearful of people following him and being spied on. He was concerned that a tracking device had been inserted in his tooth and that "autonomous dump trucks" had been imported into New Zealand. However, the experts expressed doubts about these accounts: Dr Norris could not elicit a detailed account of consistent clinical symptoms with associated paranoid or persecutory fears, and Dr Panckhurst found Mr Tully's account inconsistent and lacking in depth.

[23] Dr Norris concluded that there was "no current evidence indicative of hallucinations, bizarre beliefs, paranoia or persecutory beliefs" outside his concerns about his physical health, and nothing that would be considered consistent with a major mental, mood or anxiety disorder. It was possible that Mr Tully was misinterpreting or exaggerating bodily symptoms, but no psychiatric diagnosis had been made regarding his skin preoccupation. Even if he were diagnosed with a somatic (bodily) psychiatric disorder it would not be sufficient to qualify as a mental disorder under s 2 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (meaning a disorder that would qualify for compulsory treatment). He did display personality disturbance with antisocial and narcissistic features and there was a persistent account in his clinical files of a grandiose sense of entitlement. However, a more specific personality disorder had not been diagnosed. She found that he had been able to raise the question of fitness with the Court in a logical and coherent fashion and he exhibited a reasonably sophisticated understanding of the court process. He had demonstrated the ability to engage in interviews with lawyers and clinicians and he had the ability to make "clear" decisions about his options and appreciate the consequences. She concluded that he did not have a mental impairment that would affect his ability to adequately understand the nature or purpose or possible consequences of the proceedings, and that he was fit to stand trial.

[24] Mr Prince also found Mr Tully fit to stand trial. Mr Tully was logical and coherent and did not claim to be currently experiencing delusions. Although he had unusual beliefs about his skin condition, there was no evidence of delusional thinking. Mr Tully was less co-operative with Mr Prince than he had been with Drs Norris and Panckhurst, but equally firm that he was unfit to stand trial. Mr Prince noted that Mr Tully had not attracted a formal psychiatric diagnosis and so was not considered mentally impaired. His beliefs about his skin condition could attract a diagnosis, but it would be unlikely to affect his fitness to stand trial. His irritable and demanding behaviour likely reflected personality traits rather than an enduring mental illness. He appeared to understand the nature and purpose of proceedings and was able to communicate adequately with counsel for purposes of a defence.

The s 9 involvement hearing

[25] Four sets of counsel had been appointed and had withdrawn by this time. The Judge appointed one of them, Tony Greig, as amicus curiae with a brief to assist Mr Tully.[5] He was to explain the process and advise Mr Tully throughout the hearing, both as to the law and as to questions he may wish to ask witnesses. Counsel might question witnesses about matters that counsel thought relevant, but would not do so without first consulting Mr Tully, who was anxious to control the questioning. If Mr Tully would not accept assistance, then as amicus Mr Greig might independently question witnesses and advance such submissions as he thought appropriate in opposition to the Crown case.

[26] The trial having been adjourned, the Judge recorded that Mr Tully now had a further opportunity to instruct counsel.[6] A further counsel, Mr Rout, was appointed but shortly after the s 9 hearing had begun, on 9 June 2015, he too was given leave to withdraw. Mr Tully represented himself with Mr Greig as amicus.

[27] The s 9 hearing inquired into whether, on the balance of probabilities, Mr Tully had caused the act or omission forming the basis of the charges.[7] Mr Tully was

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5 *R v Tully* HC Christchurch CRI-2014-009-8232, 8 June 2015 at [11]–[13].
6 At [10].
7 Since amendment to the CPMIP on 14 November 2018, this 'involvement' determination follows a finding of unfitness per CPMIP, ss 10–12.

unco-operative and disruptive. The Judge recorded in a file note that Mr Tully said he had just come to eat his lunch and that he was going to read his Bible.[8] He declined to speak to Mr Greig, who had written to Mr Tully outlining the purpose of the hearing. As witnesses gave evidence, Mr Tully began to make loud comments. He then told the Judge that he was very sick and needed to lie down and was sensitive to noise. The Judge was aware of Mr Tully's complaints about his medical condition and his treatment in prison. He noted that although Mr Tully claimed to need a wheelchair he had been observed walking in his cell and that before he interrupted the hearing he had shown no sign of being in pain. The Judge accordingly ruled that the hearing would proceed. Mr Tully then spoke loudly, making a continuous noise designed to interrupt the proceeding, and was asked to stop. When he did not, he was removed. The Judge had him brought back into court later. A Corrections nurse who had accompanied Mr Tully to court found nothing wrong with him. Mr Greig explained that Mr Tully wanted hydrogen peroxide, which Corrections would not provide as there was no medical justification for it. Mr Tully told the Judge that he wanted this treatment. The Judge responded that it was not for him to intervene in Corrections' management of the issue, and the treatment would not become a bargaining chip to secure Mr Tully's co-operation. That caused Mr Tully to become violent and he was removed. The Judge was satisfied that that was Mr Tully's objective. After a brief adjournment for Mr Greig to speak to Mr Tully, the hearing continued, with Mr Greig instructed to take a partisan role representing Mr Tully's interests as he saw fit. Mr Tully chose not to return to the courtroom.

[28] In a judgment delivered on 16 June 2015, the Judge found on the balance of probabilities that Mr Tully had caused the relevant acts.[9] That conclusion was inevitable and it was not in issue before us; accordingly, we have not summarised all the evidence establishing that Mr Tully was the gunman.

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8 *R v Tully* HC Christchurch CRI-2014-009-8232, 15 June 2015 [File note of Mander J].
9 *R v Tully* [2015] NZHC 1365 [Section 9 decision] at [37].

The s 14 mental impairment hearing

[29] Next followed the mental impairment inquiry under s 14 of CPMIP.[10] It was held on 27 October. In the interim, new counsel, Philip Hall QC and Kerry Cook, had been briefed and then granted leave to withdraw, and at a pre-hearing video conference Mr Tully had refused to communicate and sat with his back to the camera. Mr Greig was re-engaged as amicus. At the hearing, however, Mr Tully did participate. He gave evidence, which was led by Mr Greig. Dr Norris and Mr Prince also gave evidence.

[30] The defence did not adduce evidence from Professor Porter (though Mr Tully mentioned a report from him at the hearing). We now have a copy of Professor Porter's report following a waiver of privilege for purposes of this appeal. He prepared a draft report dated 4 June 2015 and a final report on 6 July 2015. Professor Porter found no evidence that Mr Tully was insane at the time of the offences and concluded that he was fit to plead and to assist in his defence. We return to the report at [82] below.

The Judge's decision finding Mr Tully fit to stand trial

[31] The Judge recorded that he must decide whether Mr Tully was mentally impaired; and if so, whether due to such impairment he was unable to conduct a defence or instruct counsel.[11] With respect to mental impairment, the Judge followed the judgment of this Court in *SR v R*, in which it was held that mental impairment is not defined in the CPMIP and the term is not confined to mental disorder[12] or intellectual disability[13] or insanity; rather, it is referable to a mental state or a condition that impairs fitness to stand trial, making the defendant unable to participate adequately.[14] Participation includes but is not limited to pleading, understanding the nature, purpose or possible consequence of the proceeding, and communicating adequately with counsel to conduct a defence.[15] The assessment must be made in context, against the task expected of the defendant.

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10 This inquiry now occurs first, before a hearing as to the defendant's involvement in the offence, per s 8A.

11 *R v Tully* [2015] NZHC 2715 [Section 14 decision].

12 The threshold for compulsory treatment under the Mental Health (Compulsory Assessment and Treatment) Act 1992 depends on being mentally disordered: ss 2 and 27.

13 Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, ss 7 and 45.

14 *SR v R* [2011] NZCA 409, [2011] 3 NZLR 638 at [40].

15 Section 14 decision, above n 11, at [12] citing *P v Police* [2007] 2 NZLR 528 (HC) at [43] and *Solicitor-General v Dougherty* [2012] NZCA 405, [2012] 3 NZLR 586 at [56]–[57].

[32] Mander J recognised that Mr Tully might be mentally impaired by reason of a somatic psychiatric disorder concerning his skin condition, or a personality disorder, or intermittent psychosis.[16] He reviewed in detail the reports of Dr Norris and Mr Prince, along with that of Dr Panckhurst and reports of other medical professionals or Corrections or medical staff who had observed Mr Tully during the nine month period of assessment. He noted that the experts had all reached the view that Mr Tully was not mentally impaired and was fit to stand trial.[17]

[33] With respect to personality disorder, the Judge noted that the experts accepted that Mr Tully exhibits a number of traits consistent with narcissistic personality disorder: a grandiose sense of self-importance and entitlement, a lack of empathy, and arrogant behaviour. But some characteristics of that disorder were not present to the same degree, or at all. Dr Norris was not prepared to diagnose the disorder and Mr Prince was unable to. When asked whether Mr Tully's repeated dismissals of counsel evidenced such disorder, the experts responded that Mr Tully understood the importance of having counsel and was able to engage with them, and there may be a number of reasons, unrelated to mental impairment, why he might dismiss counsel. They considered that although he was a difficult client, Mr Tully could work with a lawyer if he chose to do so; he was able to absorb and evaluate information and respond logically to it. The Judge added that his own observations were to the same effect:

> [60] … At the commencement of the s 14 hearing, Mr Tully was extremely critical of Mr Greig, deprecating his involvement to date in the proceeding, and referring to his unsatisfactory dealings with Mr Greig, presumably both as his instructed counsel and also in fulfilling his role as amicus. Yet, in the afternoon, when Mr Tully was asked whether he wished to call evidence, he took the opportunity to consult with Mr Greig in private about that election, and was clearly happy to do so. …

[34] With respect to Mr Tully's skin condition, the Court was provided with a report of a consultant dermatologist, Dr Martin Keefe, who had examined Mr Tully in July 2015. Dr Keefe could find nothing to support Mr Tully's self-diagnosis. He suggested that Mr Tully may have Morgellons Disease, as to which medical opinion is divided:

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16 At [51].
17 At [96].

some consider it a physical condition, and others psychological.[18] Dr Norris considered that Mr Tully's condition is delusional, but that did not alter her opinion regarding mental impairment or fitness to stand trial. Rather, he has a somatic delusion with regards to his skin which causes some distress. Mr Prince preferred not to offer an opinion on whether Mr Tully had Morgellons Disease, but he accepted that Mr Tully is "obsessed" with his skin condition. From his own interactions, Mr Tully was not so focused on his skin condition that he was unable to discuss any other topic. In evidence, Mr Tully himself maintained that he would probably be unable to get through a month-long trial and would need constant treatment and rest and breaks to treat himself.

[35] With respect to delusional psychotic behaviour, Mr Tully gave evidence about what he maintained were psychotic episodes going back to 2002. He referred among other things to hearing voices, his belief that a tracking unit had been implanted in a tooth, and "autonomous dump trucks" that were a threat to New Zealand. The Judge noted an inherent contradiction in Mr Tully relating these events as evidence of psychosis while maintaining that he still believed they happened or were true.[19] Mr Tully also gave evidence of occasions on which he had suffered head injuries, which he maintained the experts had not sufficiently taken into account. The Judge rejected that contention. He noted that Dr Panckhurst had expressed apparent scepticism about Mr Tully's claims to have experienced historic psychotic episodes, and had remarked on Mr Tully's keenness to provide background information to demonstrate the existence of mental illness.[20]

[36] The Judge concluded that there was no evidence of a psychotic disorder or delusions,[21] nor was any expert prepared to diagnose Mr Tully as having a personality disorder although some traits were present.[22] He accepted that Mr Tully had a preoccupation with his skin condition, which he maintained extended to his joints, affected his mobility and caused him pain. However, none of those difficulties was sufficiently severe to prevent Mr Tully from adequately communicating and

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18 At [67].
19 At [76].
20 At [92].
21 At [96].
22 At [100].

instructing counsel; that being so, Mr Tully was not mentally impaired.[23] Notwithstanding his afflictions, Mr Tully had demonstrated his ability to engage in the court process during the s 14 hearing, asking appropriate questions and examining the health assessors and giving evidence himself.[24] He engaged with Mr Greig to facilitate representation in a competent way. The Judge concluded that:

> [109] … I am satisfied that Mr Tully has the ability to plead, to adequately understand the nature, or purpose, or possible consequences of the proceedings, and to communicate adequately with counsel (should he choose to do so) for the purposes of conducting a defence. He has himself demonstrated an ability to represent himself. I have also had regard to the additional factors which supplement the statutory definition of fitness to stand trial.
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> [110] I have no reason to doubt that Mr Tully understands the charges and the evidence that is to be adduced at trial. I do not consider him to be unable to actively and appropriately participate in his trial because of any mental impairment. He has demonstrated an ability to communicate adequately with the Court and with amicus, and I consider, should he so wish to do so, any instructed counsel he wishes to engage and retain. In my view, as he has demonstrated, he has an ability to relate his version of events, and I do not consider him to be suffering from any mental impairment which prevents him from mounting any defence on his behalf.

[37] Mr Tully was accordingly found fit to stand trial.

Adjournment of trial scheduled for November 2015

[38] Mr Tully's trial was scheduled to begin on 23 November 2015. He was to be self-represented and had been given the appropriate information. He sought an adjournment. A hearing was held at which Mander J heard from Mr Tully, Mr Greig and the Crown. Mr Tully advanced two grounds: his health and his desire to be represented at trial. The adjournment was granted.[25]

Mr Tully's health

[39] The Judge recorded that Mr Tully had consistently complained of skin problems and arthritis, problems with his left ear, lesions in his skull and brain, weakness in his legs, and blindness, all of which he attributed to an infection that must

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23 At [103].
24 At [108].
25 *R v Tully* [2015] NZHC 2914 [Adjournment decision].

be treated with hydrogen peroxide. He also complained of pain. He had gone on hunger strike, saying that he needed an MRI scan for lesions and pain. He wished to consult with an independent doctor and sought to resume use of hydrogen peroxide to allow self-medication of the undiagnosed skin disease.

[40] The health centre manager at Christchurch Men's Prison had sworn an affidavit explaining that an MRI scan had been done, revealing no significant intracranial abnormalities, and attached a report from a doctor, one of a team of general practitioners who had treated Mr Tully at the prison. Mr Tully had refused to allow a physical examination and all previous examinations had been essentially normal, not supporting a diagnosis of a systemic physical illness. His reports of pain were highly variable in presentation and seemed most obvious when he was stressed or in conflict. He had been asked to indicate his preference for an independent medical professional but had not responded. Hydrogen peroxide might be prescribed in the circumstances, given that it was Mr Tully's treatment of choice and would be relatively safe, and Corrections had accordingly made it available to him a week previously. Mr Tully could continue to take standard pain relief medications, and patients who report delusional pain beliefs sometimes respond to antipsychotic medications.

[41] Dr Norris was asked to prepare a further report about arrangements to facilitate Mr Tully's participation in the trial as a self-represented defendant. She confirmed that Mr Tully had been offered antipsychotic medication but had refused it. She noted that Mr Tully had previously told her that he would consider fabricating symptoms to secure his return to hospital, and inconsistent physical illness symptoms had been noted by the prison and documented previously. He had also used hunger striking previously to attempt to achieve his objectives, and he was not seen to be in any obvious acute physical distress during the lengthy court hearing on 27 October.

[42] The Judge concluded that:

> [74] The considered medical opinion favours a diagnosis that Mr Tully has a somatic condition. That he denies such a diagnosis is consistent with the disorder itself. There does not appear to be anything medically wrong with him. Mr Tully refuses antipsychotic medication which would likely successfully provide him with relief. His presentation in terms of being affected by physical pain is inconsistent and, notwithstanding the effect of his somatic skin condition, there are indications of malingering. Mr Tully himself

> has previously stated that he would deliberately fabricate symptoms in order to achieve his own demands and, as noted from various sources, his observed variable presentation is not considered consistent with genuine symptoms of pain.

[43] He recorded that Mr Tully's condition would not preclude the trial proceeding, on a self-represented basis, having regard to the steps taken by Corrections to respond to his concerns and meet his medical needs.[26]

Legal representation

[44] The Judge remarked that earlier, in November 2014, he had appointed Mr Greig as amicus because of a pattern of engagement and disengagement with counsel, leading to counsel seeking to withdraw. Mr Tully had dispensed with the services of six sets of counsel, and the Judge had seen no indication that this pattern of behaviour would change should the trial be adjourned; Mr Tully refused to retain the services of counsel and allow himself to be legally represented for any sustained length of time.

[45] It was now November 2015 and the Judge had little confidence that anything had changed. But Mr Tully assured him that Mr Rapley, who was willing to accept engagement but unable to appear on 23 November, was his lawyer of choice and would represent him at trial. He promised that he would co-operate with Mr Rapley as trial counsel. The Judge discussed the Supreme Court decision in *R v Condon*.[27] He recorded a submission of Mr Greig, as amicus, that the Court could not yet be sure that Mr Tully was manipulating the process to prevent the trial from going ahead. The Judge considered that Mr Tully's behaviour was well capable of leading to a legitimate conclusion that he had forfeited his right to counsel.[28] But the trial had been adjourned only once, to determine fitness to stand trial, and it had not previously been adjourned for legal representation reasons. Adjournment was burdensome for victims, but the next available trial date was 22 February 2016, just three months away. For these reasons, the Judge granted the adjournment application.[29] He warned that the trial would proceed then, come what may:

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26 At [75].
27 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300.
28 Adjournment decision, above n 25, at [67].
29 At [69]–[70].

> [71] Towards the conclusion of the hearing of Mr Tully's application for an adjournment, I told Mr Tully that whether he retained legal counsel or not, the trial would be proceeding at the next trial date with or without him being legally represented. I formally cautioned Mr Tully that his lack of cooperation with counsel will not be a factor which will affect his trial proceeding at the next trial date. It is intended that the trial proceed on that date whether he is legally represented or not, he having been provided with the opportunity to instruct counsel of his choice, Mr Rapley, to represent him. Mr Tully is therefore now on formal notice of the consequences of him disengaging counsel in terms of his legal representation at trial.

Decision to proceed to trial without own counsel

[46] The Judge's concerns about Mr Tully's willingness to be represented at trial were swiftly borne out. In January 2016 Messrs Rapley and Shamy sought leave to withdraw, citing Mr Tully's refusal to co-operate. Mr Tully confirmed that he wished to dispense with both counsel, but after hearing from him the Judge declined, having been unable to identify any issues which would warrant termination or prevent counsel from continuing to act.[30] Mander J recorded that he had little doubt but that this was a deliberate tactic. He directed that counsel should continue in their preparations for trial on the balance of Mr Tully's willingness to cooperate, and if their position became untenable a decision would be made as to the appointment of amicus. However, Mr Tully refused to speak with counsel, and as a result they made a further application on 29 January for leave to withdraw. Mr Tully maintained that they would not follow instructions and he would not say whether he wished Mr Rapley and Mr Shamy to continue to act. The Judge did not grant the application at that time.[31] He noted Mr Rapley's view that any new counsel would find themselves in the same position. He recorded that Mr Rapley and Mr Shamy were willing to appear as amicus, using their best judgement to test the Crown case, but would not feel comfortable cross-examining witnesses without instructions from Mr Tully.

[47] On 11 February counsel filed a further request for leave to withdraw. They had prepared advice for Mr Tully and had gone to the prison to meet him, but he refused to cooperate and became aggressive and confrontational. They were adamant that the relationship with Mr Tully was fractured and there was no possibility they could remain as his defence lawyers. At a conference on 15 February Mr Tully voiced

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30 *R v Tully* HC Christchurch CRI-2014-009-8232, 25 January 2016.
31 *R v Tully* HC Christchurch CRI-2014-009-8232, 17 February 2016 at [5].

complaints about counsel, complaining that they had refused to process an application for leave to appeal the Judge's finding that Mr Tully was fit to stand trial. In fact they had not refused to do so, though they had advised him that they did not think there were grounds for an appeal. He also complained that they had conspired with the prosecution to have "tainted" evidence removed. The Judge discussed matters with Mr Tully, trying to impress upon him the need to be legally represented and to cooperate with counsel, but he claimed he intended to take proceedings against them. The Judge concluded that he had no option but to allow counsel to withdraw.[32] He immediately appointed them as amicus, on the same basis that Mr Greig had previously been appointed. Mander J recorded that:

> [28] I have no doubt that should the trial be again adjourned to enable Mr Tully the opportunity to instruct what would be his ninth lawyer, the Court would find itself in exactly the same situation again with Mr Tully refusing to engage with counsel for the purpose of trial preparation and making unreasonable demands in relation to collateral matters which counsel would not be able to advance. I take the view that Mr Tully is deliberately manipulating the criminal justice process in order to avoid being placed on trial. As I observed in my judgment of 20 November when I vacated the previous trial Mr Tully's actions to date are well capable of leading to a legitimate conclusion that he has by his actions forfeited his right to counsel, and I am firmly of the view that this is the case.

[48] Mr Tully was subsequently again given the usual information for a self-represented defendant. In that advice the Judge recorded that Messrs Rapley and Shamy had been appointed to assist the Court and instructed to assist Mr Tully should he choose to make use of their services. Mr Tully might ask counsel to provide him with advice at any time or ask them to make submissions or to question witnesses. Decisions as to the conduct of the defence were Mr Tully's to make, and he would be given the opportunity to talk with counsel about them. Any discussions between Mr Tully and counsel would be confidential and privileged and no one else in the Court, including the Judge, would know the content of the discussion. The Judge added that amicus had been given a mandate to act in a partisan way to challenge and test the Crown's case, which would require them to exercise their professional judgement as they would have if engaged as defence counsel. He was free to discuss them the approach to be taken, but they were not bound to follow his wishes.

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[32] At [25].

[49] The Judge confirmed the nature of counsel's instructions in a minute in which he cited *Solicitor-General v Miss Alice* and *Moodie v Lithgow* for the existence of a discretionary jurisdiction to appoint counsel to assist a court by presenting argument which a defendant cannot or will not present for themselves, where necessary to ensure a trial is fair.[33] He recorded that:[34]

> (a) Counsel is to be available to explain and assist Mr Tully regarding the procedure of the trial. Mr Tully is encouraged to contact and confer with either Mr Rapley or Mr Shamy or both regarding what tasks, if any, he may wish them to perform on his behalf.
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> (b) Counsel are to assist Mr Tully with any questions he may have about the evidence, including whether Mr Tully should be asking questions of particular witnesses. They should attempt to discuss tactical or strategic calls with Mr Tully in relation to his trial, and help him prepare cross-examination. It should be noted that if the question is impermissible, or if I consider the way in which the cross-examination is being conducted by Mr Tully is inappropriate, I will intervene.
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> (c) Mr Tully may prefer counsel to ask questions on his behalf. He may advise counsel of the questions or topics of cross-examination he wishes to cover.
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> (d) Mr Tully's right to directly cross-examine witnesses is subject to any application the Crown may wish to make under the Evidence Act regarding the appropriateness of Mr Tully personally questioning particular witnesses, other than through counsel assisting. They are to be available to explain to Mr Tully the witnesses in respect of which such potential applications may be made.
>
> (e) Counsel are to assist Mr Tully on any evidential, procedural or legal issues. They are to assist Mr Tully in any applications it may be considered appropriate for the defence to make.
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> (f) Counsel are to assist the Court in liaising with Mr Tully regarding procedural matters and the smooth running of the hearing. Counsel are to endeavour to ensure Mr Tully understands the trial processes and the reason for certain procedures.
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> (g) If Mr Tully needs to discuss matters with counsel that cannot be done in the courtroom, the Court will adjourn to allow such discussions to take place. Where Mr Tully is seeking advice and assistance such discussions will be confidential.
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> (h) Counsel are to make themselves available to Mr Tully to assist with the empanelling of a jury. It may be that Mr Tully prefers to allow either Mr Rapley or Mr Shamy, who have experience with that type

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33 *R v Tully* HC Christchurch CRI-2014-009-8232, 16 February 2016 at [14]–[15], citing *Moodie v Lithgow* HC Wellington CIV-2006-405-1732, 1 September 2006; and *Solicitor-General v Miss Alice* [2007] 1 NZLR 655 (CA).

34 At [22].

> of trial procedure, to take responsibility for the empanelment of the jury.

Mr Tully's presence at trial

[50] The trial began on Tuesday 23 February 2016. At a pre-trial conference held the preceding Friday, the Judge found it necessary to remove Mr Tully from the courtroom. He had been abusive and persistently interrupted others. On Monday 22 February a hearing was held to deal with admissibility of identification evidence. Mr Tully was again disruptive, claiming that he was unwell and unfit to stand trial. He spoke over the Judge and demanded that he be permitted to lie down, and he repeated his demands while counsel was speaking. When asked whether he would permit the hearing to continue, he said that he would not. Mander J then advised him that a room had been set up with closed-circuit television which would allow him to view the proceeding from outside the courtroom. Mr Tully complained that he had a hearing problem and the noise would hurt his ears. The Judge adjourned so counsel could speak with Mr Tully, but he would not engage with them. He also threatened to smash the equipment in the CCTV room. The Judge accordingly had him removed to a holding cell and proceeded with the admissibility argument. Mander J concluded that:[35]

> [19] It is very clear from Mr Tully's conduct that he has embarked on a strategy whereby he effectively is boycotting his own trial. He refuses to participate. Mr Tully has deliberately taken steps to thwart any attempt to facilitate his participation. He clearly does not wish to hear the evidence relating to the allegations of his actions on 1 September 2014 and it has not become apparent what defence to the charges, if any, he has available to him.

[51] In a minute issued after the 22 February hearing the Judge gave his reasons for continuing with the trial.[36] He found that Mr Tully well knew the trial would proceed in his absence and there was no likelihood that his attitude or conduct would change if the trial was adjourned.[37] Mr Tully was unrepresented, but that was by choice. Counsel had been appointed to assist the Court and would be able to protect Mr Tully's interests. Mr Tully would be at a disadvantage,[38] which potentially extended to being

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35 *R v Tully* HC Christchurch CRI-2014-009-8232, 25 February 2016 [Adjournment minute of 25 February 2016].

36 Adjournment minute of 25 February 2016, above n 35.

37 At [28] and [30].

38 At [40]–[45].

unable to give his account of events, but it was not apparent what explanation or possible defence he could advance on the proposed evidence. The interests of the public and the victims favoured continuing with the trial, which had been adjourned twice previously. Any adverse inference which the jury might draw from Mr Tully's absence could be overcome by firm directions. The Judge accordingly ruled that the trial would proceed.

[52] In a separate minute dated 23 February the Judge recorded that he had reviewed various complaints made by Mr Tully about his health and medical care and satisfied himself that Corrections had responded appropriately to Mr Tully's concerns.[39] By that time Mr Tully was on hunger strike, as he had been prior to the November 2015 trial date. The Judge made arrangements to receive regular updates about his condition. Throughout the trial a doctor was in attendance and the Judge received reports from Corrections, the consistent theme of which was that Mr Tully was not unwell and not unable to participate. In this minute the Judge also dealt with complaints about disclosure from Mr Tully, satisfying himself that disclosure and material provided by counsel had in fact been made available to Mr Tully.

[53] Mr Tully was nonetheless given the opportunity to appear and to consult counsel when the trial commenced. Because of his pre-trial behaviour he wore restraints. The Judge recorded that he was satisfied, under section 37(3) of the Criminal Procedure Act 2011, that Mr Tully had been informed of his rights to legal representation, understood those rights, and had had a reasonable opportunity to exercise them.

[54] Anticipating difficulty, the Judge had split the jury panel. Half of the panel was in court when the charges were put. Mr Tully disrupted proceedings, saying that he was unwell and needed to lie down and would not represent himself. He repeatedly refused to be quiet and talked over Mander J, preventing the Judge from delivering introductory remarks to the jury panel. Mr Tully spoke loudly over him, repeatedly saying "thank you Your Honour". He was then removed. The prospective jurors seated in the courtroom were released, and the remainder of the panel were brought in

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[39] *R v Tully* HC Christchurch CRI-2014-009-8232, 23 February 2016 [Minute (No. 2) of Mander J].

and a jury empanelled in the absence of Mr Tully. Counsel could not challenge jurors for Mr Tully, but the Judge allowed them to raise with him any concerns they had about any particular juror, indicating that he would stand the juror aside if satisfied that was appropriate. It appears that one or two may have been stood down at the suggestion of amicus. The charges were read and Mr Rapley told the jury that Mr Tully was deemed under s 41 of the Criminal Procedure Act to have entered not guilty pleas. Throughout this process Mr Tully insisted, from his cell, that he did not want to participate.

[55] The Judge delivered opening remarks to the jury in which he noted the absence of the defendant, explained that the law provided for such cases, and advised the jury that he had decided that it was appropriate that the trial proceed. He directed the jury that they should not speculate about Mr Tully's absence and no adverse inference could be drawn from it. He explained the role of counsel assisting the court.

[56] At the beginning of the second day of the trial, the Judge gave Mr Tully an opportunity to be present, to determine whether he was willing to participate. In the presence of the jury, but before either the Judge or counsel had spoken, Mr Tully immediately demanded in a loud voice to know what he was doing there. He would not remain silent but persisted in talking over the Judge. He was removed. The Judge directed the jury to disregard the exchange they had just witnessed and reminded them of the directions he had given not to speculate on Mr Tully's absence.

[57] Throughout the trial, the Judge and/or counsel assisting enquired of Mr Tully whether he was willing to participate and advised that he would be permitted to do so if he did not interrupt the proceedings. Mr Tully's response, generally, was to refuse or to reiterate complaints about his medical treatment and health. As noted above, the Judge also received regular reports from Corrections or medical staff about Mr Tully's condition and his behaviour in the cells. He monitored Mr Tully's demands for medication and took advice from medical staff, with whom Mr Tully frequently refused to cooperate. During one in-chambers exchange with Mr Tully early in the trial, the Judge recorded his own view that Mr Tully was capable of participating:[40]

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[40] *R v Tully* HC Christchurch CRI-2014-009-8232, 1 March 2016.

> [4] Mr Tully addressed me at some length. It was apparent from his presentation and his representations to me, which went on for some considerable time, that he clearly had the ability to engage with the Court, to make submissions and present argument. It was apparent to me from his presentation and interaction in answer to my questions that there was no apparent reason why he could not be present in Court, nor was it apparent to me that he was unfit to be in Court.

[58] On Monday 29 February the Judge again invited Mr Tully to be present in the courtroom, provided he did not interrupt. As soon as the Judge addressed the jury Mr Tully intervened and spoke over him, preventing the first witness from taking his place and being heard. He was removed. The Judge again directed the jury to disregard Mr Tully's behaviour and not to speculate about the reasons why the Judge had elected to continue

[59] As the trial progressed Mr Tully's behaviour improved somewhat. He stopped his hunger strike and engaged with medical staff. He also engaged with counsel, while maintaining that he was not willing to have them act for him and wanted to engage other counsel. He opposed admission of his video interview with the police and the Crown elected not to adduce it. The Judge sought to give Mr Tully ample opportunity to discuss with counsel whether he would give or call evidence.

Mr Tully's election not to give evidence

[60] After assuring the Judge that there would not be any repetition of "the type of outbursts" previously seen, Mr Tully returned to the courtroom on 3 March, the eighth day of the trial, and participated as the Crown led its final witnesses. The Judge explained to Mr Tully that he would be put to his election to give or call evidence and reminded him of the advice previously given about that. Mr Tully initially elected not to give or call evidence.

[61] On the following day, a Friday, the Crown closed its case. Mr Tully again refused to co-operate with the court and made it clear, by silence, that he did not wish to engage in the trial. The Judge was given to understand that Mr Tully would not give or call evidence.

[62] Over the weekend, however, Mr Tully had something of a change of heart. On 7 March when the Court reconvened the Judge was advised that Mr Tully was contemplating giving the closing address and also giving evidence, which would be led by Mr Rapley. Mr Tully was told that there was no impediment to him giving evidence, notwithstanding his previous election. Mr Tully explained to the Judge that would need a bit of time with amicus to work through some topics. The Judge gave him an opportunity to consult counsel for some hours.

[63] After lunch the Judge held an extended chambers discussion about Mr Tully giving evidence. In this section of the judgment we explain what the trial Court record had to say about the hearing. At [105] below we summarise the evidence Mr Rapley gave about it at the hearing before us.

[64] Mr Rapley told the Judge that he had gone through key topics with Mr Tully and debated bullet points written by Mr Tully, who felt able to give evidence. Mr Tully did not wish to re-engage amicus as his lawyers, saying that he remained concerned about their independence, but it was evident that he had accepted their assistance.

[65] The Judge was concerned that Mr Tully should not be under any illusions about what he would be permitted to say in evidence. He checked with Mr Rapley whether counsel had discussed the subject with Mr Tully; in particular, his evidence could not include topics such as disclosure or legal representation or similar issues that had previously been raised in the absence of the jury. Mr Rapley confirmed that Mr Tully had taken that on board.

[66] The Judge then enquired of Mr Rapley whether counsel had traversed with Mr Tully the relevance of any matters he may raise about his health at the time of the incident, stating that "in the absence of independently verified evidence, any evidence relating to blackouts or amnesia will not be sufficient to raise defences such as insanity or automatism".[41] Mr Rapley advised that he and Mr Shamy had discussed that topic with Mr Tully. The Judge explained that Mr Tully should appreciate that while he could talk about his health, he needed to understand that such evidence alone would not be sufficient to trigger any directions to the jury relating to an insanity defence or

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41 *R v Tully* HC Christchurch CRI-2014-009-8232, 14 March 2016 [Election minute] at [20].

automatism, and he needed to understand that before he decided to give evidence. The Judge recorded that he was concerned that Mr Tully not expose himself to cross-examination and raise issues about his health or medical condition which would not assist him in terms of any issue the jury had to decide.[42] Mr Rapley noted that such evidence would go to the question of intent.

[67] After a further adjournment, Mr Rapley reported that Mr Tully did not wish to give evidence. The Judge stressed to Mr Tully that he did not wish to dissuade him from giving evidence. The Judge's observations had been intended to ensure he was properly informed and understood the limitations of his evidence. Mr Tully confirmed that he did not wish to give evidence. He was given the opportunity to reflect on that decision overnight.

[68] In a minute recording these exchanges, the Judge explained that the information he had provided to Mr Tully about the possible relevance of insanity or automatism was based on the following analysis:[43]

> [40] Whenever evidence before the Court raises the issue of insanity and automatism, the defence may be left to the jury, even though a defendant may disclaim it. This approach as outlined by the Court of Appeal in *R v Cottle* is reflected in s 20(4) of the Criminal Procedure (Mentally Impaired Persons) Act 2003. That section provides that where it appears from the evidence the defendant may have been insane at the time of the commission of the offence, the Judge may ask the jury to find whether the defendant was insane within the meaning of s 23 of the Crimes Act 1961, even though the defendant has not given any evidence as to his or her insanity or put the question of his or her insanity in issue. Mr Tully never sought to raise insanity.
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> [41] The approach in *R v Cottle* is consistent with the general rule that requires an adequate direction by the Judge to the jury on all matters, whether of fact or law, which upon the evidence are reasonably open to the jury to consider in reaching their verdict. I did not consider either automatism or insanity were reasonably open to the jury on the state of the evidence, nor could I envisage how on Mr Tully's evidence alone such defences could reasonably be available.

[69] Having regard to the evidence, and material canvassed in relation to the issue of Mr Tully's fitness, and his videoed statement, and other material gleaned by the Judge over the course of the proceeding, the Judge held that there was no basis on

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42 At [22].

43 Election minute, above n 41 (footnotes omitted).

which it could reasonably be open to the jury to consider the defences of insanity or automatism.[44] Moreover, no medical evidence was being proffered to support such defences.

[70] The Judge added that he had formed that view without reliance on the actual evidence which "simply did not admit" of any such defence.[45] He referred to the narrative facts, stating that they could not be reconciled with the actions of an automaton or a person rendered incapable of understanding the nature and quality of his acts or knowing they were morally wrong, at least in the absence of expert medical opinion. It was for that reason that he had explained the position to Mr Tully before the decision was made to give evidence.

The summing up

[71] Closing addresses were delivered on the following day. The defence address was delivered by Mr Rapley. Counsel had achieved some success in having evidence of identity excluded during the trial. The address focused on identity and intent, noting that the gunman had not actually shot Ms Adams and had shot Ms Curtis, with whom Mr Tully had had no prior difficulties, in the leg. It was submitted that the Crown had not proved that Mr Tully strung the wire across the track. The verdicts indicate that counsel made some headway with these submissions.

[72] The Judge's summing up on the law and the cases for each side is not in issue on appeal. He reminded the jury not to read anything into the security measures that had been taken in the trial, which included Mr Tully being restrained in his chair when in court, and that they must not form any inference against Mr Tully because of his absence from the courtroom for large parts of the trial. He reminded them that Mr Tully did not have a lawyer acting for him, and directed them that the reasons why that had come to pass again need not concern them. He reminded them that he had twice attempted to continue with trial in Mr Tully's presence, and on both occasions had had Mr Tully removed because of his interruptions. He repeated his direction that the jury must not take any of that into account when assessing the evidence and

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44 At [50].
45 At [51].

deciding whether the Crown had proved its case beyond reasonable doubt. He reminded them of the role of counsel assisting, stating that counsel had been available to Mr Tully should he choose to obtain advice and to assist in the conduct of his defence, and to assist the Court in the absence of Mr Tully in an attempt to mitigate the lack of representation, but counsel were not representing Mr Tully; they were assisting the Court and their role was to ensure that he received a fair trial.

The conviction appeal

The appeal process

[73] The pattern of Mr Tully instructing counsel only to dispense with their services continued on his appeal, which was filed as long ago as June 2016. He was variously represented by Shane Tait, Craig Tuck (who arranged a further psychiatric assessment by Dr Peter Dean), Barbara Hunt, and Nicolette Levy QC. From about 4 May 2020 Mr Tully was self-represented. In February 2019 Chris Stevenson was appointed as counsel to assist the Court. His brief was to advance any argument available to Mr Tully, with whom he liaised before the hearing.

[74] Because he had alleged error on the part of counsel who assisted him at trial, Mr Tully filed a waiver of privilege.[46] In due course the Crown filed an extensive affidavit from Mr Rapley, who had carefully documented his and Mr Shamy's interactions with Mr Tully. Mr Tully filed two affidavits of his own and one of Dr Dean. The Crown did not oppose the admission of Dr Dean's evidence, and it did not file evidence in response or require that he appear for cross-examination. Mr Rapley did appear and was cross-examined by Mr Stevenson and Mr Tully.

[75] Before the hearing of the appeal Mr Tully sought permission to have chromosomal testing undertaken for a condition called 47,XYY Syndrome. It appears that DNA testing done for purposes of the trial suggested that he might have this condition. It is a condition affecting males with an extra Y chromosome. It is associated with delayed development of speech, language and motor skills and it is said that it can lead to developmental conditions including learning disabilities,

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[46] As directed in *R v Tully* CA288/2016, 12 February 2019 [Minute of Kós P].

Attention Deficit Hyperactivity Disorder or Autism Spectrum Disorder. The testing was authorised, but it was not completed before the appeal was heard and we gave Mr Tully the opportunity to have it completed, and to make any submissions limited to its implications, afterward. We deal with the results of the testing at [199] below.

[76] At a late juncture Mr Tully sought to have the appeal adjourned, saying he was unwell and had been denied access to papers and to Mr Stevenson. The Court obtained a report from Corrections which sufficiently established that these claims were untrue. In any event, the Court had full submissions from Mr Stevenson and also written submissions from Mr Tully and the Crown. The adjournment was refused by Miller J at a pre-hearing conference and the application was not renewed at the hearing.

[77] At the hearing Mr Tully behaved appropriately and asked appropriate questions of Mr Rapley. He adopted the arguments made by Mr Stevenson and made brief oral submissions of his own.

The grounds of appeal

[78] Mr Tully's grounds of appeal appear in documents filed by counsel and by Mr Tully himself. There is a long list. We have organised and summarised the grounds as:

(a) Mr Tully was not fit to stand trial; he has intermittent mental health issues connected to his "longstanding organic infection", and which were not adequately addressed with the result that he lacked the mental capacity to conduct a competent defence. The medical assessments were deeply flawed because they were based on misinterpretation of evidence and insufficient reliable facts; this partly because he did not engage in the process due to his paranoia, psychosis and detachment.

(b) Because of his mental health he was not able to form criminal intent.

(c) A defence of insanity ought to have been left to the jury but he was denied the ability to advance it. Professor Porter's report ought to have been produced; Ms Levy presented this as being unable to choose the

defence based on delusional skin disorder because the disorder prevented him recognising it as an available defence.

(d) He was not able to participate at trial; he had serious physical health issues and was denied treatment and was held in harsh conditions which precluded him from engaging properly in the court process.

(e) He was incorrectly deprived of counsel despite "repeated requests for a competent lawyer" and could not defend himself.

(f) He was also "given incorrect advice by [his] lawyers leading into [his] trial". It is evident that the lawyers referred to were Messrs Rapley and Shamy. He says they did not advise him on matters such as giving evidence to explain his state of mind and "refused to change from amicus to defence". He also says that their role was never adequately explained and he did not instruct them to make any defence points.

(g) He had inadequate facilities to prepare his defence and still does not have full disclosure.

(h) There was no defence closing address.

(i) There was a systematic failure by Corrections pre-trial, and since, to have him referred for specialist testing and this failure had put his life at risk.

[79] There is no substance whatsoever to some of these grounds. The record demonstrates that Mr Tully has long been preoccupied with disclosure, seeming to take comfort in complaining about it, but there is nothing to suggest that anything was or is lacking. Mander J delivered a number of rulings to that effect.[47] Amicus considered Mr Tully's complaints but did not support them at trial. Nor do we accept that Mr Tully was denied access to counsel or documents or facilities to prepare. On

[47] *R v Tully* HC Christchurch CRI-2014-009-8232, 1 May 2015 at [18]–[23] and [27], 16 June 2015 at [8]; Minute (No. 2) of Mander J, above n 39, at [7]; and 25 February 2016 [Minute on health and disclosure] at [6]. See also *Police v Tully* [2015] NZDC 7008 at [19(e)].

the contrary, the Court went to extraordinary lengths to accommodate him and to verify that Corrections had done so. He was given reading glasses, a laptop (which he refused to use) and paper copies of disclosure. A skilled closing address was delivered by Mr Rapley in consultation with Mr Tully; it did not include mental health issues, but that was because the Judge had indicated that on the evidence he would not allow insanity or automatism to go to the jury. Mr Tully did not and does not have physical health issues that affected his participation at trial or on appeal — there is nothing to support that claim and there is abundant evidence to the contrary. (His mental health issues are another matter.) He was never denied the ability to participate and he was not held in conditions that precluded effective participation. (Whether his absence was prejudicial is another issue; we return to that below.) We say nothing more about these grounds.

[80] In our view the principal grounds are those ably developed by Mr Stevenson: whether Mr Tully was fit to stand trial in the first place; and if so, whether a defence of insanity or insane automatism was available and ought to have been left to the jury. It is also necessary to consider whether Mr Tully had a fair trial having regard to his self-representation and absence from the courtroom. The latter questions require that we consider the role played by counsel assisting the court at trial.

New evidence about Mr Tully's mental health

[81] Dr Dean is a consultant psychiatrist who has written two reports and sworn an affidavit. Attached was the 2015 report of Professor Porter, which we summarise before turning to Dr Dean's own reports.

Professor Porter's report

[82] Professor Porter reviewed previous psychiatric reports and other medical records and interviewed Mr Tully. As with other experts, Mr Tully reported amnesia with regard to the killings. He found that Mr Tully had a delusion with respect to his skin disorder; he was convinced despite evidence to the contrary that he suffers from a severe and ultimately fatal skin condition. This the Professor classified as a delusional disorder — somatic type. The Professor also assessed Mr Tully for narcissistic personality disorder. He found that Mr Tully exhibited a grandiose sense

of self-importance, a sense of entitlement, a lack of empathy, and arrogance. There was clear evidence for only four of the criteria for this disorder, so Professor Porter could not make a definitive diagnosis. But those traits were particularly strong, so he believed that further collateral history would likely support the diagnosis.

[83] With respect to insanity, the Professor believed Mr Tully's beliefs may have added to his stress and irritability but there was no evidence that he was in a state in which he was unable to discern that his actions were wrong or to anticipate their effects. There was no evidence that he could be classified as insane, and his reported amnesia did not imply that he was suffering from brain dysfunction at the time.

[84] With respect to fitness to plead, the Professor found that Mr Tully understood the nature of the charges and their severity, and he understood the nature of a trial and its objectives and the pleas available to him. He had a naive understanding of an insanity defence, but in Professor Porter's opinion he was able to understand what he was being told. He understood the defendant's role and appeared to retain the ability to make rational defence decisions. He was able to pay attention sufficiently and to evaluate evidence. His inability or unwillingness to give a clear account of the actual offending was not in itself unusual. Mr Tully found it intolerable that lawyers may not always do exactly as he wishes and may disagree with him, but in the Professor's opinion he retained the ability to work with a lawyer and had a degree of choice regarding whether he did or not. He concluded that Mr Tully was fit both to plead and to assist in his own defence.

Dr Dean's reports

[85] Dr Dean's first report, dated 11 June 2018, was based on one interview with Mr Tully and an examination of the evidence and trial, police disclosure and the earlier psychiatric reports. It appears that he did not see Professor Porter's report at that time. Dr Dean recognised the difficulties of making a diagnosis more than three years after the event and noted that Mr Tully had not co-operated with assessments made after his arrest.

[86] During interview, Mr Tully described his long-standing belief that he had contracted an infection that moved from the surface of his skin through his inner ear

and into his brain. He attributed a range of symptoms to this infection, including severe pain and screaming noise in his ear. It could lead to him passing out for periods of 12 to 13 hours. He claimed that he had experienced significant cognitive difficulties, confusion, pain and blackouts during his imprisonment and trial, and that this prevented him from actively participating in his own defence. He described the gradual onset of hearing voices over a period of years before his return to New Zealand from Australia, characterising this as paranoia. He was able to narrate events on the day of the killings but said he had suppressed what happened in the WINZ building and claimed he had no grievance with the victims. He said that he wanted to enter a plea of not guilty by reason of insanity, but his lawyer would not support this, saying there was no report suggesting the defence was available. Mr Tully said that his symptoms had now all resolved; he no longer experienced voices, confused thinking and paranoia. He attributed this to the successful treatment of his skin condition and did not believe that he required antipsychotic medications.

[87] Under the heading "Diagnostic Considerations", Dr Dean stated that:

> Mr Tully is clearly a challenging personality. He is querulous and litigious with a sense of righteous indignation. He appears to have a personality structure consistent with paranoid and narcissistic personality disorder. Features of paranoid personality disorder include a pervasive distrust and suspiciousness of others such that their motives are interpreted as malevolent. Mr Tully suspects, without sufficient basis, that others are exploiting, harming or deceiving him. He is pre-occupied with unjustified doubts about loyalty, is reluctant to confide in others because of unwarranted fear the information will be used maliciously, reads hidden demeaning or threatening meanings into benign remarks, persistently bears grudges, perceives attacks on his character that are not apparent to others, is quick to react angrily and has recurrent suspicions. Mr Tully has features of narcissistic personality disorder with a pervasive pattern of grandiosity and lack of empathy. He has a grandiose sense of self-importance, believes he is special, has a sense of entitlement, is interpersonally exploitative, lacks empathy, is often envious and shows arrogant, hoity behaviours and attitudes. These are longstanding personality characteristics that are likely lifelong, present prior to any psychiatric symptoms, but have become more overt and problematic as he has grown older.
>
> In addition, Mr Tully describes an unusual and bizarre belief about a skin infection. He believes he has contracted staph aureus, which tracks into his brain and causes brain swelling. He attributes this to causing psychotic-like symptoms and cognitive impairment. At times he believed his condition was such his life was in danger and he is pre-occupied by treating his condition, despite little medical evidence to support his treatment programme. He has expressed this view persistently across settings and this clearly pre-dated his offending. He has had various negative investigations and opinions but

> persists with his belief. His somatic belief is not in keeping with understood medical conditions and if refuted Mr Tully finds a way to justify his continued belief. His views are fixed and unshakable, even when there is evidence to the contrary. It is possible this delusional belief has arisen as an over-valued idea in the context of his personality disturbance. However, it is my opinion that this is sufficient for a diagnosis of delusional disorder.
>
> Mr Tully describes periods of exacerbation in auditory hallucinations, increasing persecutory beliefs and disorganised thinking. This has resulted in admission to psychiatric hospital in Australia. His behaviour has been bizarre at times and pre-occupied by religious beliefs. It is therefore likely he has had intermittent psychotic disorder. This may be triggered by use of substances, such as methamphetamine, or exacerbations of his delusional disorder in the context of severe psychosocial stress. These symptoms do appear to be intermittent. This would best be classified as psychosis not otherwise specified.
>
> In the past his psychotic beliefs and descriptions of his thought pattern have been considered to be inconsistent. He has often described these symptoms historically. I note his medical records refer to similar delusional ideas, although he denied current symptoms at that time. He has declined to accept mental health care, despite wishing to convince others he experienced psychotic symptoms. There is some suggestion of an attempt to malinger insanity. In combination with his personality dysfunction and sense of entitlement it is likely he has at least intermittently malingered or exaggerated symptoms. However, it is also equally likely he has minimised and hidden symptoms at times. Malingering and exaggeration of symptoms can co-exist with genuine psychotic disorders, as can malingering of mental stability.

[88] Dr Dean acknowledged that it was difficult to assess insanity long after the fact. He recognised that Mr Tully had been assessed by several psychiatrists following the alleged offending and was not assessed as suffering from psychotic symptoms. Mr Tully said he was not listened to and his symptoms were not accurately recorded by the assessors, but it was also possible that he had retrospectively attributed symptoms to his behaviour. The lack of contemporaneous support for his assertions was problematic for Mr Tully in proving a defence of insanity.

[89] Dr Dean's own assessment was that Mr Tully "does appear to have a delusional disorder with intermittent periods of psychosis not otherwise specified". Psychosis would usually be accepted by a court as a disease of the mind for purposes of an insanity defence. It was difficult to be entirely certain whether Mr Tully was experiencing symptoms of psychosis, but there was ample evidence to support the presence of his somatic delusion at the time of the offending. Accordingly, Dr Dean concluded that he was labouring under a disease of the mind at the time of the killings. He observed that Mr Tully's psychiatric defence was not helped by his lack of recall

of the specific events and added that it is not uncommon for defendants to report amnesia for serious violent offending. Amnesia is not synonymous with being unable to understand the nature and quality of one's actions or of their moral wrongfulness.

[90] Dr Dean considered that Mr Tully's somatic delusion about his skin condition would not in itself be sufficient for an insanity defence, but in conjunction with his personality structure it could explain him developing a grudge against WINZ officials. His delusional belief may have caused him some distress at the time, but it would not have prevented him from understanding the moral and legal wrongfulness of his actions:

> Mr Tully's belief about his skin condition, although a somatic delusion, would not in itself be sufficient to be considered as an insane delusion. In combination with his personality structure it may explain him developing a grudge against WINZ officials for failing to provide him with accommodation, transport and help to treat his condition. His delusional belief at the material time may have caused him some distress but would not have prevented him from understanding both the moral and legal wrongfulness of entering a WINZ office and shooting employees there. He does appear to have been indignant about his treatment by WINZ, having contacted the local newspaper about his homelessness and failing to appreciate his own contribution to his circumstances, due to his sense of entitlement and querulousness. This provides a potential motive for his actions, despite the extreme nature of the offending.

[91] Dr Dean added that Mr Tully described hearing a voice telling him to go to the WINZ office and "sort them out", appearing to confirm that he was aware of the nature and quality of his actions. He concluded that in his opinion Mr Tully "will find it difficult to prove he was labouring under a disease of the mind to such a degree he was either unaware of the nature and quality of his actions or he was unaware of the moral wrongfulness of his actions, having regard to commonly held standards of right and wrong".

[92] In a further report dated 11 December 2019, Dr Dean expanded on his opinion at the request of Ms Levy, then counsel for Mr Tully. In particular, he reviewed the question of fitness to stand trial and the impact of Mr Tully's condition on sentencing. He reviewed the previous reports, including that of Professor Porter. Dr Dean stated that:

Opinion on Diagnosis and Mental State

> At the time of his trial, Mr Tully had not been diagnosed with a major mental illness or psychotic disorder in the reports instructed by the court. However, he did have a privately instructed report diagnosing delusional disorder, somatic type, which is a psychotic disorder and could be considered a disease of the mind for the purposes of a psychiatric defence of insanity. In my report, I too have favoured a diagnosis of delusional disorder. I believe his beliefs about his skin condition is a fixed, abnormal belief, which is intensely held and unshakeable despite evidence to the contrary, in other words a delusion. The court appointed health assessors who saw him before his trial diagnosed his condition as somatic symptom disorder rather than delusional disorder. I have come to that conclusion due to the persistence of his preoccupation, continuing to treat himself with Hydrogen Peroxide, well after his legal matters have been completed, and the persistence of the symptoms over a number of years. Although our diagnostic conclusions may be different, at the time the reports were written this abnormal belief was recognised and reported on. This view is consistent with the diagnosis of Professor Porter. Professor Porter hypothesised the health delusion may have arisen as a result of early bowel issues and his father's death from cancer when he was 14. This appears to be a plausible explanation of the development of such a delusional system.
>
> Mr Tully has an evident litigious and querulous personality, resulting in oppositional and obstructive behaviour during the course of court ordered psychiatric and psychological assessments. He did not trust legal advice and wished to defend himself on grounds that at face-value appeared unreasonable. These features persisted with a psychiatrist instructed by his counsel and his suspiciousness of the psychiatric profession remained when I saw him. These decisions arose primarily as a result of his personality rather than due to a mental illness per se. He did not have an assessment supporting a defence of insanity and similarly, in my report in June 2018, I did not believe a defence of insanity was likely to succeed. He did wish to consider a defence of insanity but on the grounds his mind was affected by a severe skin infection, causing him confusion and psychosis, so he could not recall the offending.
>
> It was my opinion that even if the Court accepted he had delusional disorder or even a somatic symptom disorder, which would most likely constitute a disease of the mind, it is unlikely such an argument would excuse his subsequent behaviour and lead to a defence of insanity.

[93] With respect to fitness to stand trial, Dr Dean noted that Mr Tully has no insight into the fact that he has no actual physical skin condition and so was unable to consider this as constituting a potential defence of insanity. Rather, he wanted to run insanity and/or unfitness on the basis of the brain effects of a terminal skin condition. The Court could conclude that he was not able to make a competent decision to put a defence of insanity based on his delusional disorder:

> In my opinion, Mr Tully displays impaired insight regarding his delusional disorder, although not to a degree he has required treatment subject to the Mental Health (Compulsory Assessment and Treatment) Act 1992. Therefore

> the court could consider he was not able to make a competent decision to put a defence of insanity to the jury on the basis he had a disease of the mind (delusional disorder) and allow the jury to make the ultimate decision as to whether this was sufficient to render him incapable of knowing the moral wrongfulness of his actions. Rather Mr Tully wanted to run a defence of brain dysfunction due to physical illness, for which there was no credible medical evidence. The matter before the court is therefore whether his lack of knowledge about his mental condition, despite there being no expert evidence supporting a defence of insanity, is sufficient decisional impairment to prevent him from running this as a potential defence of insanity, regardless of the expert opinion regarding the ultimate question before the court.

[94] Dr Dean's opinion was that Mr Tully's delusion caused him to focus intensely on this as an excuse for his conduct. He was able intellectually to understand that a guilty plea may mitigate sentence, but his fixation on his skin condition, and his personality characteristics, made him unwilling to consider a guilty plea. Dr Dean did not conclude, however, that Mr Tully was unfit to stand trial. He noted that some of the symptoms of the skin condition were suspected of having been malingered, which would be consistent with Mr Tully's personality structure, and consistent with paranoid and narcissistic personality disorder. These features of his personality were a significant contributor to the alleged offending.

> **Opinion on the Relationship Between Psychiatric Condition and the Alleged Offending**
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> Mr Tully has a personality structure consistent with paranoid and narcissistic personality disorder. This includes a pervasive distrust and suspiciousness of others, such that the motivations are interpreted as malevolent. He believes that others are exploiting, harming or deceiving him. His narcissism gives him a sense of grandiosity and self-importance, which leads to entitlement and lack of empathy. These features reflect his personality style and attitudes and are a significant contributor to his alleged offending. Psychiatrists would not consider personality structure as constituting a mental illness per se rather reflecting a combination of temperament and development.
>
> As discussed in my previous report, he has presented with consistent abnormal beliefs of having a skin infection. The other symptoms he has reported have been inconsistent and there has been suspicion at least some have been malingered. This would be consistent with his personality structure.
>
> I would hypothesise that his delusional disorder arises from his underlying persecutory and narcissistic personality, preventing him from accepting other perspectives and in combination with his sense of entitlement. Mr Tully, however, was abnormally and intensely focused on his skin condition and the need for this to be recognised by the welfare, social and health systems. His preoccupation became overwhelming. In my opinion he genuinely believed he had a medical condition and was frustrated by his perception of ill-treatment by the system and the system's inability to respond to his perceived needs. He became overwhelmed with a sense of injustice and a

> failure of social services and health services to recognise his medical condition.
>
> Although this in my view was not sufficient to reach the threshold of insanity, as described in my previous report, his delusional belief interacted with his personality structure to result in an extreme response to his frustration. Therefore, his delusional disorder, although not entirely leading to his offending, played a role in the lead up to and behaviour subsequent to the offending. It is unlikely the circumstances leading to his offending would have arisen but for his delusional belief about his health.

[95] Dr Dean recorded that psychiatrists would not consider personality structure as constituting a mental illness per se, rather reflecting a combination of temperament and development.

[96] We mention for completeness that Mr Tully attached affidavits of his own to his submissions on appeal. Some of this material related to events before trial, and some to the conduct of the trial or preparation for the appeal. For the most part, it elaborated on his beliefs that he has a skin condition which has not been diagnosed or treated and that he was denied access to material and facilities and counsel. We have already rejected these grounds of appeal.

New evidence about the trial

[97] We have referred to Mr Tully's grounds of appeal, most of which emerge from affidavits he has sworn. Generally, he complains that he was denied counsel and that the Court appointed as amicus lawyers he did not trust and had dismissed. He says that he never instructed them to represent any of his defence points, that their role was confusing, and that their work was prejudicial to his case.

[98] In his affidavit, Mr Rapley detailed his and Mr Shamy's dealings with Mr Tully, which were documented in detailed file notes. He first saw Mr Tully on 24 November 2015, as his defence counsel. Mr Tully focused on his mental health and whether he was fit to plead and/or insane at the time of the killings. Mr Rapley obtained the file which contained all his mental health reports and reviewed them. He subsequently advised Mr Tully that there was no ability to argue that he was unfit to plead or participate in the trial, and that a number of psychiatrists and psychologists

had assessed him and concluded that while he may have been delusional and suffering from various mental health issues, he was not insane at the time of the offending.

[99] Mr Tully was not receptive to this advice. He dealt with Mr Shamy over succeeding weeks, refusing on one occasion to speak to Mr Rapley. They next met on 4 February 2016, Mr Tully having confirmed that he still wanted Mr Rapley to act for him. At that meeting Mr Tully was hoping that the trial would be adjourned so his fitness to plead could be reviewed. Counsel told him that would not happen. He wanted counsel to appeal the decision that he was fit to plead. They told him they did not think were any grounds for such an appeal. They also advised him that there was no evidence to support an insanity defence. He was unwilling to cooperate with them in going through potential evidential challenges and discussing cross-examination points and evidence. At a subsequent meeting on 11 February, Mr Tully was angry that they would not provide him with grounds for appeal and said that he wanted to engage a new lawyer. That led to their eventually successful application for leave to withdraw and to their appointment as amicus.

[100] We note that although Mr Tully did make an accusation against counsel, saying that they had been working with the Crown, we do not accept that he had any doubts about counsels' integrity. The real reason for his dissatisfaction was their advice that there were no grounds to challenge or revisit his fitness to stand trial, or to advance a defence of insanity, or secure an adjournment. As we have noted above, all the experts at that time had agreed that Mr Tully was fit to stand trial and, despite psychological difficulties, could not show he had a disease of the mind rendering him incapable of understanding right from wrong at the time of the shootings.

[101] Mr Rapley deposed to the steps taken at trial to challenge the Crown case and attempts to engage Mr Tully, who was provided with a summary for each of the Crown's witnesses along with a note of possible lines of cross-examination. Throughout the first week Mr Tully refused to participate and would not speak with counsel when they went to see him on multiple occasions each day. Messrs Rapley and Shamy also wrote to him summarising the evidence and cross-examination, with an explanation of how their work fitted into their strategy of putting the Crown case to the test. Mr Tully met with them on Monday 29 February, at the beginning of the

second week of the trial, but did not take up their offer to go through the summaries they had prepared of the evidence of the final Crown witnesses.

[102] On Thursday 3 March, counsel saw Mr Tully, and spoke to him about giving and calling evidence. Mr Tully enquired whether it might be a better idea for him to stay silent and preserve his position for an appeal. Counsel told him that he would be cross-examined on some very difficult issues, such as the fact that a unique symbol that he used to identify himself was found on the shot gun shells and the bike found at the scene. At this point Mr Tully said he felt it would be better for him not to give evidence and to appeal, because he would then get legal representation. It was apparent to counsel that Mr Tully's attitude towards them had changed. He asked to see them later that day and they discussed his police statement. Mr Tully did not want his statement produced. On the following day there was a voir dire about the statement, at which Mr Tully delivered his own argument. In preparation for closings, counsel prepared a closing address and gave it to Mr Tully, who noted that it contained a reference to evidence that the Crown had subsequently agreed not to adduce. On the tenth day of trial, Mr Tully appeared in court and indicated that he wished to speak to counsel during the evidence of one of the final Crown witnesses. Mr Tully had questions which he wanted counsel to ask. He also wanted to know whether providing this information to counsel would affect his ability to appeal. Counsel told him that it would not, and the questions were asked.

[103] There were discussions between counsel and Mr Tully about their closing address. Mr Tully marked up a copy of the address. The draft mentioned that the CCTV footage showed the gunman was right-handed. Mr Tully did not want counsel to mention that, saying the jury would have seen him writing with his right hand. Mr Tully was also alive to the fact that the attempted murder charges required a specific intent to kill. He drew counsel's attention to the Crown suggestion that Ms Curtis was shot in the leg because she had moved, noting it was inconsistent with Ms Curtis's own statement. These discussions were amicable and in counsel's opinion Mr Tully showed a good understanding of what was happening.

[104] Mr Tully discussed giving evidence with counsel before finally making his election on Monday 7 March. Counsel found him alert and talkative. He said that he

did not want counsel to assist him because he was unrepresented, but then asked their advice. They gave him the advice they would give any defendant about it being his decision, and they discussed whether it would help or hurt his case. They advised him that the Crown case was strong, gave examples of topics that the Crown would likely cross-examine him on, and offered some strategies for answering the questions. Some practice questioning was done. Mr Tully wrote out topics that he would cover in evidence and discussed them with counsel. He wanted to produce documents, one of which was Professor Porter's report. Counsel told him he could not do so because the report was hearsay and he would have to call the Professor, and in any event it would not help because the Professor said that he was not insane. During these discussions counsel found Mr Tully very aware of what was happening, and observed that he asked insightful questions. When told how things he might say could be used against him, he agreed not to pursue that line and would adjust and adapt. It was clear that Mr Tully had prepared himself and knew the disclosure intimately. At 2 pm Mr Tully told counsel that he was fine and ready to go. He said he had no need to deliver an opening address.

[105] Mr Rapley explains that Mr Tully changed his mind after the Judge convened the chambers hearing which we have mentioned at [63] above, telling Mr Tully that while he could give evidence about his health on the day of the shootings, the evidence could not trigger any directions to the jury about the defences of insanity or automatism. The Court adjourned while Mr Tully considered his position. Mr Rapley explained that the Judge had taken that position because Mr Tully could not diagnose himself as insane; he needed a psychiatrist to say that. Nonetheless, his mental health issues went to intent and whether he had the ability to form intent, so he could give evidence about his health issues. He was warned that the Crown would cross-examine him in an attempt to show that many of his actions were calculated. Mr Tully asked how giving evidence would affect his appeal and said that he owed "you guys an apology" and wanted to engage them for the appeal and a retrial at which they would get a psychiatrist. He was told that if he were able to get a psychiatrist to say he was insane at the time then he would have a good defence of insanity.

[106] Mr Rapley deposes that when they returned to court Mr Tully told the Judge he did not want to give evidence because he had not had time to prepare and did not

want to put the cart before the horse in terms of an appeal for fitness. The Judge suggested he consider it again overnight, which gave Messrs Rapley and Shamy the opportunity to review the law on insanity and automatism to satisfy themselves that the Judge's indication was correct. They concluded that it was; Mr Tully could not give his own evidence to lay a basis for an insanity defence. When they resumed the following morning Mr Tully confirmed that he did not wish to give evidence, nor did he want to deliver his own closing address. He was concerned that if he did so it might affect his ability to appeal. Counsel continued to liaise with Mr Tully during the closing addresses, picking up points that Mr Tully wanted to deal with. When it was over Mr Tully thanked Mr Rapley for the quality of his address.

[107] Overall, the evidence of counsel tends to confirm that Mr Tully was behaving strategically during the trial, exploiting his absence from the courtroom and his self-representation to preserve for appeal his contentions that he was unfit to stand trial and/or insane. When Mr Tully did engage with counsel, it was apparent that he was following the trial closely, had a good grasp of the issues and was capable of making intelligent decisions. This does not preclude mental impairment, as we explain below, but it does tend to support the Judge's conclusion that Mr Tully had the necessary capacity to participate.

Was Mr Tully fit to stand trial?

The test

[108] The law regarding fitness to stand trial was restated by this Court in 2017, in *Nonu v R*.[48] The Court considered the legislative history of the relevant CPMIP provisions and explained that the Act's requirements are designed to protect a defendant's rights to a fair trial and to present a defence; to ensure that defendants are held accountable only if they understand the reasons why they have been prosecuted, convicted and punished; and to enhance society's interest in not placing on trial defendants who, through lack of fitness, are unable to advance an available defence.[49] The Legislature chose not to limit the concept of mental impairment to those who are mentally disordered and accordingly susceptible to compulsory assessment and

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48 *Nonu v R* [2017] NZCA 170.
49 At [26].

treatment.[50] The concept includes persons who are mentally impaired through, for example, an intellectual disability, a personality disorder or a neurological disorder.

[109] The inquiry into a defendant's fitness to stand trial is not confined to functional competence: that is, the basic capacity to understand what is happening and to assist counsel. Multiple authorities indicate that it extends to decisional competence; the capacity for rational decision-making in the context of the particular trial.[51] The Court explained in *Nonu* that the defendant must be able to participate effectively in the trial.[52] This requires an assessment of the defendant's intellectual capacity to carry out relevant trial functions. These functions are not confined to the statutory list of capacities in s 4 of the CPMIP:[53] capacity to plead, to adequately understand the nature or purpose or possible consequences of the proceedings, or to communicate adequately with counsel for the purposes of conducting a defence. The inquiry must be addressed to the context of the particular defendant's trial, which may be simple or complex.[54] The Court emphasised that "[t]he ultimate assessment of a defendant's ability to effectively participate in his or her trial is a judicial decision informed by expert evidence".[55]

[110] It remains the case that the autonomy of a competent defendant must be respected; for that reason, the inquiry is into their capacity to make rational decisions, not whether the decisions they make will be in their best interests.[56]

[111] As noted at [36] above, Mander J recognised that a mental impairment can include a personality disorder that is sufficiently severe to affect a person's ability to adequately participate in a trial; and if so, the Court must inquire into whether that impairment renders the defendant unfit to stand trial.[57] The expert evidence did not

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50 At [25].

51 *R v Roberts (No 2)* HC Auckland CRI-2005-092-14492, 22 November 2006 at [54]; *P v Police*, above n 15, at [23] and [25]–[26]; *Tuira v R* [2018] NZCA 43 at [71]–[73]; *SR v R*, above n 14, at [157]–[159]; and *R v Kingi* [2017] NZHC 2765 at [9]–[10]. See also *R v Cumming* [2006] 2 NZLR 597 (CA) at [38]. But see *Solicitor-General v Dougherty*, above n 15, at [40].

52 *Nonu v R*, above n 48, at [29].

53 At [27].

54 At [31].

55 At [31].

56 See *R v Power* CA187/96, 22 October 1996 at 8; *R v Cumming*, above n 51, at [43]–[45]; *R v Roberts (No 2)*, above n 51, at [56]–[57]; and *Solicitor-General v Dougherty*, above n 15, at [40] and [46]–[60].

57 Section 14 decision, above n 11, at [10] citing *SR v R*, above n 14, at [157], in which this Court

find Mr Tully mentally impaired, but the Judge correctly held that the formal diagnosis was secondary to the question whether Mr Tully's personality traits were sufficiently severe to prevent him from communicating and instructing counsel, and so amounting to mental impairment.[58] He considered Mr Tully's personality traits, delusional skin disorder and alleged psychosis, and closely reviewed the evidence about Mr Tully's decisional competence.

Mr Tully was not unfit on the evidence before Mander J

[112] Mander J's assessment was informed by expert evidence and his own opportunity to observe Mr Tully before and during trial. The expert evidence identified Mr Tully's delusional disorder regarding his skin, and also diagnosed some traits of a personality disorder. However, it fell short of establishing mental impairment. Further, Dr Norris and Mr Prince were of the opinion that Mr Tully was able to participate in his trial. He could absorb information and consider advice, weigh it up and make rational decisions. Both experts found him a difficult personality, but able to engage with counsel. The Judge's own observations bore that out, as we have explained above. He found that Mr Tully had demonstrated his understanding of proceedings and was able to ask appropriate questions of witnesses and give evidence himself. Mr Tully demonstrated that he could co-operate closely with counsel when he considered it in his interests to do so, resulting in competent self-representation. The Judge's findings matter; although informed by expert evidence, the assessment is ultimately one of fact and judicial judgement. By the time the fitness hearing concluded the Judge had observed Mr Tully as he engaged with the court process for a year. We consider that Mander J was correct in his assessment as the evidence stood before and at trial.

The new evidence tends to confirm mental impairment

[113] However, we now have the evidence of Professor Porter and Dr Dean, which we admit for purposes of the appeal. The evidence is not fresh, but it is credible and cogent, and its admission is in the interests of justice.[59] The appeal must be allowed

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approved the approach to fitness taken by Fogarty J in *R v Roberts (No 2)*, above n 51.

58 At [101].

59 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].

if Mr Tully were mentally impaired and unfit to stand trial in February 2016.[60] We also have the evidence of Mr Rapley, which is relevant to the question of impairment. We accordingly admit that evidence.

The argument for Mr Tully

[114] Relying on the new evidence, Mr Stevenson argued forcefully that Mr Tully was not fit to stand trial. He cited Dr Dean's opinion that Mr Tully suffered from a delusional disorder and submitted that this impaired Mr Tully's decision-making capacity by precluding him from advancing an available defence of insanity. Mr Tully insisted that his condition was physiological in origin, a claim for which there was no medical evidence. Professor Porter also diagnosed the delusional disorder and observed a complete lack of insight into whether the disorder could lead to a defence of insanity. Mr Stevenson cited the judgment of this Court in *Tuira v R*, in which insanity was the only defence available but the appellant, who understood the nature and implications of an insanity plea, was unable to accept that he suffered from a mental disorder.[61]

[115] Mr Stevenson also argued that Mr Tully's delusional disorder prevented him from engaging rationally with counsel. He cited a file note of Mander J dated 15 June 2015, in which the Judge recorded that amicus (Mr Greig) had attended on Mr Tully and found that he appeared to be in pain and said he could get through a court sitting only if he was allowed access to hydrogen peroxide. We have referred to this document at [27] above. Counsel noted that Mr Tully became extremely upset when the Judge refused to allow him to use hydrogen peroxide as a bargaining chip to secure his co-operation, and referred to a number of minutes, judgments and file notes of Mr Rapley in which Mr Tully insisted on talking about his skin condition. Mr Stevenson submitted that Mr Tully became increasingly frustrated by what he saw as a lack of concern about his condition, which was almost certainly exacerbated by

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60 *Tuira v R*, above n 51. In that case the guilty plea resulted in a miscarriage of justice for purposes of s 232(4)(b) of the Criminal Procedure Act 2011. Further, in Mr Tully's case the defence never adduced medical evidence. These features of the case distinguish it from *Tu v R* [2019] NZCA 632 at [36] and *Sami v R* [2019] NZCA 340, (2019) 29 CRNZ 252 at [37], in which post-trial medical evidence was ruled inadmissible. See also *Cumming v R* [2008] NZSC 39, [2010] 2 NZLR 433 at [12]–[13].

61 *Tuira v R*, above n 51, at [71]–[72].

Corrections staff withholding hydrogen peroxide for a period. Counsel argued that Mr Tully could not be distracted from this obsession other than for short periods. Ultimately, despite all the efforts of his lawyers and amicus, Mr Tully could not participate effectively in his trial.

Our conclusions

[116] We have noted that Professor Porter, who interviewed Mr Tully in January 2015, diagnosed a delusional disorder. He also found that Mr Tully strongly exhibited some of the criteria for narcissistic personality disorder: a grandiose sense of self-importance, a sense of entitlement, a lack of empathy, and arrogant behaviours or attitudes. Professor Porter was unable to make a definitive diagnosis, but he found those traits particularly strong and believed that further collateral history would likely support the diagnosis. Dr Dean's reports were prepared long after the trial, and so may not be a reliable guide to Mr Tully's condition at the time,[62] but his findings were consistent with those of Professor Porter.

[117] We accept that Mr Tully suffers from an obsessive and delusional disorder relating to his skin and has a personality structure with some strongly evident characteristics of narcissistic personality disorder. These characteristics were identified by all the experts who examined Mr Tully. Together they dominated his engagement with the court process, making him extraordinarily difficult to deal with. Whether or not the subject of a formal psychological diagnosis, they are capable of amounting to mental impairment. As Mander J recognised, the question is whether they impaired Mr Tully sufficiently to require that he be found unfit to stand trial by reason of mental impairment.[63] We are not persuaded that they did, for several reasons.

[118] First, the argument that Mr Tully lacked decisional competence confronts the difficulty that he embraced an insanity defence. He engaged fully in a hearing in which the Judge heard evidence from experts, and Mr Tully, about his antisocial and narcissistic personality traits, his skin condition and possible diagnosis of Morgellons

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62 *SR v R*, above n 14, at [58], citing *R v Walls* [2011] EWCA Crim 443 at [22].
63 Section 14 decision, above n 11, at [103].

disease, and psychotic or delusional difficulties. The substance of the evidence about the skin condition at that hearing was that it was a delusion. Mr Tully himself did not accept that, saying he was unfit to stand trial because his skin condition caused lesions in his brain which affected his thinking. But the evidence and argument make clear that he contended he was unfit. There is no evidence that he ever refused to advance an insanity defence on account of his belief that the skin condition is real either, and there is no reason why that belief could not co-exist with expert evidence that his belief evidenced a disease of the mind. We observe that in his first report Dr Dean described the skin condition as delusional, but Mr Tully nonetheless cooperated in Dr Dean's second report.

[119] Second, once the possibility that Mr Tully could not appreciate an available defence of insanity is put to one side, none of the experts found Mr Tully unfit to stand trial. Dr Dean did not otherwise address fitness (his opinion focused on insanity). Professor Porter concluded that he was fit to stand trial, as did Dr Norris and Mr Prince whose evidence we have already summarised. The Professor found that Mr Tully understood the nature and seriousness of the charges and the point of the trial and possible pleas, was able to pay attention and evaluate evidence, could make rational defence decisions, and was able to work with a lawyer.

[120] Third, experts aside, there is much evidence on the trial court record that Mr Tully was able to engage in the trial process and could make rational decisions about his defence. We have referred to a number of instances where he demonstrated the capacity to engage with counsel or the Court and represent himself.[64]

[121] Fourth, there is also a good deal of evidence that Mr Tully feigned symptoms to establish insanity or impairment, or to delay or disrupt the trial, or to otherwise get his way. The experts recognised this possibility, which was perhaps most evident in Mr Tully's claim to having experienced psychotic episodes. Their views were borne out by Mr Tully's conduct in connection with the proceeding. We have referred above to evidence that he fabricated symptoms of pain, hearing difficulties or illness, usually connected with his skin condition, at important junctures, while appearing capable and

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64 See [59], [62], [64], [67], [77] and [102]–[106] above.

well when it suited him. The Judge described this as a strategy and an attempt to manipulate the court process. The evidence of Mr Rapley tends to confirm the Judge's opinion, as we have noted. We recognise that, as Dr Dean put it, malingering or exaggeration of symptoms can co-exist with mental impairment. The point remains that Mr Tully's disruptive and un-cooperative behaviour before and during trial does not establish of itself that he was unable to participate in the trial.

[122] Finally, the argument that Mr Tully's conduct before and at trial evidenced unfitness rests on the implicit premise that such behaviour was not in his own interests. As noted above, however, the question is not whether Mr Tully's decisions were in his best interests but whether he had the rational capacity to make them. In our opinion Mr Tully's conduct was far from irrational in the situation he confronted. Insanity aside, he had no defence to the murder charges. The evidence of identity was overwhelming, and the killings were manifestly planned and carried out with intent both to kill and to escape. He had been found fit to stand trial. He wanted to preserve for appeal his argument that he was unfit and insane, and he wanted to argue that his trial was unfair. So it made sense to disrupt and disengage, citing ill-health. He was able to maintain his non-participation throughout the trial while having amicus advance, to some extent with his behind-the-scenes co-operation, successful defences to charges of attempted murder and setting a trap.

Conclusion: Mr Tully was fit to stand trial

[123] In our opinion Mander J correctly found Mr Tully fit to stand trial.

Was a defence of insanity available, and should it have gone to the jury?

[124] As noted at [68] to [70] above, Mander J ruled, before Mr Tully made his election, that the defence of insanity would not go to the jury.

[125] Mr Stevenson submitted that there was a legally available defence of insanity. He accepted that medical evidence is typically expected in respect of both limbs of s 23 of the Crimes Act, but insanity is ultimately a question for the jury, which will base its verdict on the available evidence, including the defendant's own narrative. Expert evidence is not determinative, particularly in a case, such as this, where the

defendant has been unable to co-operate with psychiatrists. There was evidence before the Court in this case that, at the very least, Mr Tully suffered from a delusional disorder. There was a great deal of evidence of Mr Tully's obsession with his skin in the trial record. Dr Dean's evidence confirmed that the delusional disorder meets the s 23 test of "disease of the mind". Mr Tully made it clear that he wanted to raise insanity. Counsel emphasised that it was because of the Judge's ruling that Mr Tully ultimately did not give evidence of his disorder.

[126] Mr Tully himself says that insanity should have been put to the jury on the basis of his brain infection, which if it existed might qualify as a disease of the mind. His grounds of appeal assert that he had a disease of the mind with "automatism scitso behaviour due to toxins".

[127] Mr Stevenson also submitted that Mr Tully's delusional disorder prevented him from raising the available defence of insanity. We have dealt with this argument above, under the topic of fitness to stand trial.

[128] For the Crown, Ms Thomson submitted that Mr Tully had no available defence of insanity though she accepted that Professor Porter and Dr Dean had diagnosed Mr Tully with a delusional disorder, in the form of beliefs about his body that are not founded on reality. She noted that Dr Norris might have reached the same diagnosis had she been able to interview Mr Tully for longer. However, that delusional disorder has no nexus to Mr Tully's offending because it does not affect his ability to understand the nature and quality of his acts or to perceive that they were morally wrong. She emphasised that neither of the defence experts were prepared to say he had an available insanity defence. Mr Tully's cognitive function is not impaired by his disorder and there is no suggestion that he was confused about the nature and quality of those acts or unaware that they were wrong. On the contrary, the narrative facts strongly indicate that he was aware that his acts were wrong. For these reasons, the Judge was not wrong to refuse to leave the defence to the jury.

Insanity

[129] Section 23 of the Crimes Act provides that:

> **23 Insanity**
>
> (1) Every one shall be presumed to be sane at the time of doing or omitting any act until the contrary is proved.
>
> (2) No person shall be convicted of an offence by reason of an act done or omitted by him or her when labouring under natural imbecility or disease of the mind to such an extent as to render him or her incapable—
>
> (a) of understanding the nature and quality of the act or omission; or
>
> (b) of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong.
>
> (3) Insanity before or after the time when he or she did or omitted the act, and insane delusions, though only partial, may be evidence that the offender was, at the time when he or she did or omitted the act, in such a condition of mind as to render him or her irresponsible for the act or omission.
>
> …

[130] A verdict of not guilty by reason of insanity is available in law where, at the time of the relevant act, the defendant laboured under a disease of the mind to such an extent so that he or she did not understand the nature and quality of the act or know that it was morally wrong, having regard to commonly accepted standards of right and wrong.[65] Mr Tully invoked both limbs of s 23(2) but emphasised subs (a), insane automatism. There are two elements to an insanity defence: the disease of the mind and its relevant effect. Both are gauged at the time of the act, but subs (3) allows the jury to rely on evidence of insanity before or afterward.

[131] Section 23 should be read with s 20(4) of CPMIP, which establishes that in some circumstances a Judge may put insanity to the jury, whether or not the defendant has put it in issue:

> **20 Finding of insanity**
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> …
>
> (4) In a case where it appears from the evidence that the defendant may have been insane at the time of the commission of the offence, the

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[65] The test of understanding and knowledge is subjective: *R v MacMillan* [1966] NZLR 616 (CA) at 622.

> Judge may ask the jury to find whether the defendant was insane within the meaning of section 23 of the Crimes Act 1961, even though the defendant has not given evidence as to his or her insanity or put the question of his or her sanity in issue.

When must an insanity defence be left to the jury?

[132] "Disease of the mind" is a legal rather than a medical or psychological concept, and the questions whether a condition qualifies as a disease of the mind, and whether it affected the defendant's knowledge or understanding for purposes of s 23(2) of the Crime Act are questions of law, to be answered by the trial judge.[66] A court ordinarily insists on expert evidence, without which it may decline to find that the evidence is capable of proving a disease of the mind or that the defendant lacked the requisite factual or moral understanding.[67] Absent such evidence the court may find there is an insufficient foundation to put the defence to the jury.

[133] The Judge may nonetheless put insanity to the jury where it appears from the evidence that the defendant may have been insane at the time of the offence. As Mander J noted in this case, that is consistent with s 20(4) of the CPMIP and the general duty of the trial judge to put defences for which there is an evidential foundation.[68] Similarly, the Judge may leave automatism to the jury where there is an evidential foundation for it.[69] The need for an evidential foundation can be especially important, and the decision for the Judge especially difficult, where the defendant does not want to pursue the defence and the Judge's decision about its availability may determine whether the defendant gives or calls evidence.[70]

Was there an evidential foundation for insanity?

[134] As noted, Mr Tully was anxious to advance insanity, but he did not seek to adduce expert evidence that he suffered from a disease of the mind that deprived him

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66 *Bratty v Attorney-General for Northern Ireland* [1963] AC 386 (HL) at 412 and 534 per Denning LJ; and *R v Cottle* [1958] NZLR 999 (CA) at 1028 per North J.

67 *Police v Bannin* [1991] 2 NZLR 237 (HC) at 241 and 242; and *R v Gorrie* CA372/01, 8 August 2002 at [28]–[29]. Expert evidence is necessary where the parties consent to a verdict of not guilty by reason of insanity: CPMIP, s 20(2).

68 *R v Tavete* [1988] 1 NZLR 428 (CA) at 431.

69 *Bratty v Attorney-General for Northern Ireland*, above n 66, at 413; and *R v Cottle*, above n 66, at 1025.

70 *Hemopo v R* [2016] NZCA 398 at [73] and [80].

of moral understanding or knowledge. The reason why he did not adduce expert evidence, it may safely be inferred, is that the report of Professor Porter which was commissioned by defence counsel did not support such a diagnosis and neither did the reports and evidence of Dr Norris or Mr Prince.

[135] In our view the Judge was correct to find that insanity was not available on the evidence as it stood when he made his ruling. There was no expert evidence that would have sufficiently evidenced a disease of the mind or a failure by Mr Tully to understand the nature and quality of his acts or to appreciate they were morally wrong. The reports and pretrial processes had made him familiar with Mr Tully's claimed delusions.

[136] The experts whose evidence was available to the Judge when he made his ruling focused on fitness to stand trial and offered no opinion on insanity, but the reports suggest that had the experts given evidence about insanity at trial they would have concluded Mr Tully was not insane. There was no evidence of an enduring mental illness at the time the reports were written:

(a) We have already mentioned Dr Norris's opinion that Mr Tully was not mentally disordered or impaired when she examined him. She also said Mr Tully had the ability to make decisions and appreciate their consequences. In her report dated 6 October 2014 she was unable to make a diagnosis regarding insanity in the absence of Mr Tully's unwillingness to discuss the shootings. When she delivered her report of 8 June 2015, she had had access to his clinical history, which included observations since his arrest. She found no evidence of an enduring mental illness or mood disorder, or of any sustained psychiatric phenomena that affected his ability to function. She was not prepared to diagnose narcissistic personality disorder. She considered that if Mr Tully was diagnosed with a somatic skin disorder it would not meet the criteria for compulsory treatment.

(b) Mr Prince noted that Mr Tully had not attracted a formal psychiatric diagnosis and opined that his irritable and demanding behaviour and lack of participation were not evidence of an enduring mental illness.

Mr Prince also noted no evidence of delusional thinking at the time he interviewed Mr Tully.

Was the Judge wrong to preclude insanity or insane automatism when he did?

[137] There remains a question whether the Judge wrongly pre-empted Mr Tully by ruling before the jury heard Mr Tully's evidence that neither insanity nor automatism would be left to the jury. There being evidence of some disturbance of the normal functions of the mind, the decision to leave a defence to the jury, or not, is ordinarily made on the whole of the evidence.[71] The Judge's ruling affected the course of the trial. We find on the evidence of Mr Rapley that the ruling likely resulted in Mr Tully electing not to give evidence. We further think it probable that but for the Judge's decision to rule out insanity and automatism Mr Tully would have sought to persuade the jury that he was insane at the time of the shootings and unfit at trial, telling them of his skin disorder and its supposed effect on his brain, and of his alleged psychotic episodes.

[138] The case has some parallels with *Hemopo v R*, in which the trial judge signalled before the defendant made his election that the judge might find it necessary to leave insanity to the jury under s 20(4) of CPMIP.[72] That prospect was enough to dissuade the defendant, who feared the consequences of such a verdict and disclaimed the defence, from giving evidence to advance his improbable claim that the victims had harmed themselves. In *Hemopo*, as in this case, the judge acted for fair trial reasons, wanting to ensure the defendant knew, before making his election, about defences that might be left to the jury. On appeal this Court held that a judge might properly caution a defendant in that way, though the decision to do so is a very delicate one.[73] The Court stated that there can be no general rule; the decision whether to give such a warning is one for the trial judge in the particular circumstances of the case.[74] On the facts, however, the Judge's decision in that case was found to have interfered with the defendant's fundamental right to choose whether to give evidence, for two key reasons: the defendant had not had advice about the advantages and disadvantages of

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71 *R v Cottle*, above n 66, at 1012 and 1018 per Gresson P.
72 *Hemopo v R*, above n 70.
73 At [78]–[80].
74 At [80].

giving evidence, which was a complex subject well beyond his ability to comprehend, and there was neither expert nor narrative evidence for insanity. The Court thought it unlikely that the evidence the defendant may have given would have triggered the trial judge's obligation to put the defence to the jury.

[139] It does not follow that Mander J was wrong to caution Mr Tully in this case. The question here was not whether the trial Judge might put insanity to the jury against the defendant's wishes, having found there was sufficient evidence to put it in issue. Rather, Mr Tully wanted to advance defences of insanity and insane automatism and the question was whether there was or would be evidence enough to allow him to do so. It was a question of law for the Judge. Mander J might have allowed Mr Tully to give evidence and left insanity to the jury, notwithstanding the absence of expert evidence of insanity. But he could do so only if satisfied, when the evidence closed, that there was sufficient evidence to put insanity in issue. He decided before the defence case opened that he was not satisfied about that, but he was already very familiar with Mr Tully's proposed defence, having conducted the fitness hearing and considered the reports of Dr Norris and Mr Prince in which Mr Tully recounted his delusions. It has not been suggested that he was wrong about evidence the defence might call. Critically, there was to be no expert evidence on insanity. The Judge accordingly knew that he would be able to rule, when the defence closed its case, that Mr Tully was not labouring under a disease of the mind rendering him incapable of factual or moral understanding or knowledge.

[140] As the Judge noted, his ruling was also consistent with the expert evidence he had heard before trial.[75] The Judge added that the narrative facts simply did not permit an insanity or automatism defence, but while that must have informed his view that the defence evidence would not assist Mr Tully he did not rest his decision on that point.

[141] Nor was Mr Tully's election insufficiently informed. He took advice from counsel about the implications of the Judge's ruling and worked through the evidence he might give and the likely lines of cross-examination. He was well prepared and

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[75] Election minute, above n 41, at [50]–[51].

asked intelligent questions of counsel. It was made clear to him that he could not lay the foundation for a defence of insanity himself but Mr Rapley explained that the ruling did not preclude Mr Tully from giving evidence of his health conditions for the limited purpose of showing the Crown had not proved intent.[76]

[142] We are not persuaded that Mander J was wrong to rule, before the defence case opened, that he would not leave insanity (or sane automatism) to the jury. We are also satisfied that his ruling did not compromise Mr Tully's fundamental right to choose to give evidence in his own defence, or his fair trial right. So far as the latter is concerned, Mr Tully would have been exposed to pointed cross-examination had he gone into the witness box. The prosecutor was armed with compelling evidence of careful planning and calculated action. Mr Tully likely would have been walked through the CCTV footage frame by frame. It could not have gone well for him. It was fair in the circumstances that he knew, before deciding whether to expose himself to cross-examination, that the defence he wished to advance in evidence would not be left to the jury.

Do the evidence of Dr Dean and the report of Professor Porter make a difference?

[143] Professor Porter, whose report was available at the time of trial but not provided to the Judge, considered that Mr Tully's account of delusional ideas was likely to be genuine and did not think his account had been fabricated to feign mental illness or facilitate a defence of insanity. He diagnosed a somatic delusional disorder with respect to Mr Tully's skin condition. He reported other delusions but was not able to diagnose any specific condition because it might be attributable to drug use and appeared to have resolved. He identified, as noted above, symptoms of narcissistic personality disorder. However, he could find "no evidence that [Mr Tully] could be classified as "insane" at the time of the alleged offence" and explained that Mr Tully's claimed inability to remember the event did not imply that he was suffering from brain dysfunction at that time. There was no evidence that Mr Tully was unable to discern that his actions were wrong or to appreciate their consequences.

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[76] See [66] and [104]–[106] above.

[144] Dr Dean's post-trial reports focused on insanity. He concluded, somewhat cautiously given that he was offering a diagnosis long after the event, that Mr Tully appeared to have a delusional disorder with intermittent periods of psychosis not otherwise specified. He considered that diagnosis would ordinarily qualify as a disease of the mind. However, the delusional disorder would not render Mr Tully incapable of understanding right from wrong or the nature and quality of his actions. He also diagnosed narcissistic personality disorder, finding that it may have explained Mr Tully's behaviour, but that disorder would not ordinarily be considered a disease of the mind.

[145] In short, Dr Dean's evidence does not assist Mr Tully. The most that can be said is that Dr Dean would characterise the delusional disorder relating to his skin as a disease of the mind. But he doubts that it rendered Mr Tully incapable of moral understanding. And he indicates that it may have been Mr Tully's personality disorder, which is not ordinarily considered a disease of the mind, that caused him to behave as he did.[77] That is why Ms Thomson, who argued this part of the case for the Crown, took the point that there is no connection between any disease of the mind and Mr Tully's actions.

Conclusion: the Judge was right not to leave insanity to the jury

[146] We conclude that Mander J was correct not to leave insanity to the jury, and that he was not wrong to make that decision when he did, before the defence case opened.

[147] We record, for the avoidance of doubt, that there is no evidential foundation for a claim of sane automatism. There is no evidence that Mr Tully suffered from a condition that did not amount to a disease of the mind but might cause unconscious involuntary action.[78]

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[77] Simester and Brookbanks in *Criminal Law – A to Z of New Zealand Law* (online ed, Thomson Reuters) at [20.10.3.3] say there is no consensus about whether a personality disorder is a disease of the mind, but authority is generally against it as the person typically retains moral understanding. See for example *R v Hamblyn* (1997) 15 CRNZ 58 (CA) and *French v R* [2014] NZCA 297. See also England and Wales Law Commission *Criminal Liability: Insanity and Automatism* (Discussion paper, 23 July 2013) at [1.90], [3.3] and [4.102]–[4.116]. But see *R v Dixon* [2007] NZCA 398, [2008] 2 NZLR 617 at [52].

[78] *R v Cottle*, above n 66, at 1020 per Gresson P.

Was Mr Tully denied his right to counsel at trial?

[148] Mr Tully maintained throughout that he wanted counsel of his choice and dismissed all seven trial counsel for good reason. He says that he was forced to go to trial self-represented because the Judge would not adjourn the trial to allow him to brief new counsel whom he could trust and communicate with.

[149] We have referred at [45] above to the adjournment granted in November 2015 and the Judge's warning that the trial would proceed in February 2016. When Mr Tully again refused to co-operate with counsel, the Judge characterised his behaviour as a deliberate tactic to avoid being placed on trial.

[150] In his evidence before us Mr Rapley explained that Mr Tully was unhappy about his advice that on the expert reports an insanity defence was not available and he was fit to stand trial. Nor did Mr Tully appreciate being told that he had received disclosure, or that the trial would not be adjourned, or that there did not appear to be good grounds for an appeal against the finding that he was fit.

[151] This advice was unwelcome and in other circumstances it might reasonably have caused Mr Tully to seek alternative counsel. In this case, however, Mr Tully must have known that he would get the same advice from any lawyer. We do not have evidence from the other counsel who had represented him, but we infer from his complaints about their alleged refusals to do what he wanted that they had given him similar advice. The Judge had also told him clearly in November that the trial would not be adjourned again. In the circumstances it made no sense to dispense with the services of counsel unless, as the Judge found, Mr Tully wanted to delay and disrupt his trial, creating grounds for appeal. It is that rather than any genuine loss of confidence in counsel that caused him to dismiss Messrs Rapley and Shamy. We are satisfied that his complaint about them conspiring with the Crown (see [47] above) was a tactic to force the Judge to allow them to withdraw; he made a joke of it when talking to counsel in private. We are also satisfied that he was given the opportunity to re-engage them.

[152] Mr Rapley's evidence invites the inference that disruption was indeed Mr Tully's strategy. It demonstrates that Mr Tully appreciated he was very likely to

be found guilty and wanted to preserve grounds for an appeal, including the conduct of the trial and the role of counsel. He then behaved strategically, accepting their advice where he thought it would assist him without jeopardising his prospects on appeal.

[153] It is not in dispute that s 30(2) of the Sentencing Act 2002 was satisfied. Mr Tully was told repeatedly from an early stage of his right to counsel and to legal aid. He was given repeated opportunities to exercise that right. The Judge found that he was trying to sabotage his trial and by his conduct had forfeited his right to appear by counsel. We agree that he must be deemed to have waived his right to appear by counsel.[79] It was a decision that, as we have already found, he was competent to make, and he cannot now complain about it. There was no breach of his fair trial right in the circumstances.[80]

Did Mr Tully's exclusion from the courtroom make his trial unfair?

[154] Mr Tully argues that his trial was unfair by reason of his absence. His evidence and argument focus on his health; he says he had serious health issues that compromised his preparation and he was too unwell to conduct his defence. We have already rejected these claims. It remains necessary to consider whether Mr Tully's fair trial right was breached by his absence from a trial at which he was self-represented.

[155] Under the Criminal Procedure Act a defendant has the general right to be present in court during any hearing in relation to the charge against them,[81] and they must be present at any hearing for which they have been remanded to appear, as was the case here.[82]

[156] However, the right to appear is qualified; it does not apply where the defendant so interrupts the hearing as to make it impracticable to continue in their presence. Section 117 of the Act provides that:

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79 *R v Condon*, above n 27.
80 At [80].
81 Criminal Procedure Act, s 117.
82 Section 118.

> **117 Defendant generally may be present at all hearings**
>
> (1) The defendant may be present in court during any hearing in relation to the charge against him or her.
>
> (2) Subsection (1) does not apply if the defendant interrupts the hearing to such an extent that it is impracticable to continue in his or her presence.
>
> (3) The court may permit the defendant to be out of court during the whole or any part of a hearing on any terms the court thinks fit.

[157] Similarly, the obligation to appear when the defendant has been remanded to do so does not apply where the defendant so disrupts the hearing that it is impracticable to continue in their presence:

> **118 Hearings at which defendant must be present**
>
> (1) A defendant must be present at any hearing if he or she—
>
> (a) is on police bail, or has been summoned, to attend that hearing; or
>
> (b) has been remanded in custody, or on bail or at large, to attend that hearing.
>
> (2) Subsection (1) does not apply if—
>
> (a) the court excuses the defendant from attending the hearing or any part of the hearing; or
>
> (b) the court orders that the defendant be removed from the court for interrupting the hearing to such an extent that it is impracticable to continue in the defendant's presence; or
>
> …

[158] It cannot be doubted that, as the Judge found (at [50] above], Mr Tully so disrupted his trial as to make it impossible to continue in his presence. That was his objective, and he succeeded. It follows that s 118(2)(b) authorised the Judge to continue in his absence. Nor can it be doubted that he was given every opportunity to return to the courtroom if he would allow the trial to continue. Mr Tully was not in the courtroom, but he did not cease to be a participant. He continued to engage with the Court and counsel as he saw fit.

[159] The question remains whether the resulting trial was fair. As the Judge recognised, courts characterise the fair trial right as absolute and do not allow

defendants to waive it.[83] If in the circumstances of the trial as a whole that right was breached, the trial was unfair for purposes of s 232(4)(b) of the Criminal Procedure Act.

[160] We have referred at [51] above to the Judge's reasons. He analysed the issue by drawing an analogy to ss 121 and 122 of the Criminal Procedure Act, which govern the case where a defendant does not appear for trial (and accordingly were not strictly applicable here). Those provisions state, in substance, that the court may try the defendant in their absence where the defendant has no reasonable excuse for non-attendance and it is not contrary to the interests of justice to continue. Relevant considerations include the nature and seriousness of the offence, the likely length of any adjournment, the particular interests of victims and witnesses, and "any issues that the defendant has indicated are in dispute and the extent to which the defendant's evidence is critical to an evaluation of those issues". The Judge also cited *Kumar v R*,[84] in which this Court referred to the decision of the House of Lords in *R v Jones*,[85] in which considerations relevant to trial fairness included whether the defendant was represented, the risk of the jury drawing improper inferences from the defendant's absence, and the interests of the public generally. The House of Lords also held that the seriousness of the offence should be assessed from the perspective of the defendant, victims and the public.

[161] We agree with the Judge that no purpose would have been served by an adjournment. This was not a case in which an absent defendant might turn up at an adjourned hearing. Mr Tully had been given ample opportunity to co-operate and to appear by counsel. He had chosen to disrupt proceedings in the knowledge that the trial would continue. The offending occurred on 1 September 2014, some 17 months prior to trial, and the interests of the victims, witnesses and the public dictated that these extremely serious charges should be brought to trial. Mr Tully would have disrupted any future trial in the same way. The Judge recognised that Mr Tully would be at a disadvantage because he would be unable to give his version of events, but it

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83 See *R v Condon*, above n 27, at [38] and [77].

84 Adjournment minute of 25 February, above n 35, at [24], citing *Kumar v R* [2013] NZCA 77, [2013] 3 NZLR 201 at [21].

85 *R v Jones* [2002] UKHL 5, [2003] 1 AC 1 at [58].

is not clear what his defence might be. Mental state aside, he had not pointed to a defence for which his evidence was critical.

[162] As it turned out, Mr Tully eventually returned to the courtroom and, with the assistance of amicus, made an informed decision not to give evidence. Counsel were instructed to advance the defence case, and as we explain below, they did so as successfully as could be expected and without contradicting the case that Mr Tully wished to advance. He did not have, and does not now say that he had, a positive case that he was not the shooter. The jury were given appropriate directions throughout, and the mixed verdicts suggest they did not hold Mr Tully's absence against him.

[163] For these reasons we are satisfied that Mr Tully's absence did not cause his trial to be unfair.

The role played by counsel assisting the court

[164] We have referred at [49] above to the brief given to amicus curiae. To a substantial extent their brief corresponded to the role which this Court subsequently outlined for standby counsel in *Fahey v R*.[86] However, they had previously served as Mr Tully's defence counsel, a practice discouraged in *Fahey*, and they were permitted to advance what they judged to be the best case for the defence.

[165] Mr Stevenson focused on the first of these points, submitting that it was arguably inappropriate to appoint counsel with whom Mr Tully had fallen out. He submitted that the better approach, given Mr Tully's psychological characteristics, would have been to recognise a reasonable possibility that paranoia was a substantial cause of his problems in retaining counsel. Mr Tully confirmed that in his affidavit, saying that he was "operating from a place of paranoia and fear" and did not trust or fully brief counsel. He complains that he was concerned about their approach, but he does not go so far as to say that amicus advanced a defence inconsistent with his wishes. He says that proof of identity was not seriously in issue but "the mental elements were". He adds that the role of amicus was never clear to him, or to the jury.

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[86] *Fahey v R* [2017] NZCA 596, [2018] 2 NZLR 392.

[166] In *Fahey* this Court addressed the increasingly common practice of appointing amicus curiae to assist self-represented defendants. The Court responded to the bar's concern about conflicts of duty that may arise, especially where former counsel for the defendant is appointed in that role. It drew a distinction between the roles of counsel appointed to assist the court and standby counsel appointed to assist a self-represented defendant. Amicus briefs should be confined to the traditional role of assisting the court itself.[87] Standby counsel acts as an advocate for the defence and takes instructions from the defendant.[88] Citing one of Mander J's rulings in this case, the Court approved of standby counsel appointments where a court anticipates that a defendant will dismiss their own counsel during trial.[89] The Court offered general guidance about the brief that might be given to standby counsel:

> [82] …
>
> (a) Counsel should advise the defendant on the relevant law, trial process and courtroom etiquette.
>
> (b) Counsel should assist the defendant, especially one who is in custody, with resources and access to witnesses.
>
> (c) Counsel should assist as and when the defendant requests by conducting any trial processes from plea to verdict.
>
> (d) Counsel should be prepared to act as defence counsel, assuming the conduct of the defence in the ordinary way, if the defendant so decides.
>
> (e) So long as the defendant remains self-represented the appearance of self-representation should be maintained for the jury.
>
> …

[167] The Court discouraged but did not prohibit the appointment of a defendant's former counsel as standby counsel.[90] The Court accepted that the practice carries risks, one of which is that where there has been a loss of confidence such that counsel may not be able to discharge the role adequately. Where counsel seeks to withdraw at a late stage a court may inquire cautiously into the reasons to satisfy itself whether counsel could serve in a standby role.

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87 At [80].
88 At [81].
89 At [96].
90 At [92]–[95].

[168] The Court was invited in *Fahey* to hold that court-appointed counsel may be appointed to take control of the defence by advancing such defence as counsel thinks fit. The Court did not preclude that possibility, noting a principled argument for it and some support in the authorities, but it remained to be seen to what extent it was necessary to go so far.[91] In a companion case, *Fawcett v R*, the Court allowed an appeal where amicus had been given such a brief and had advanced a defence that was incompatible with the defendant's desired defence and for which, it appeared on appeal, there was an evidential foundation.[92]

[169] We have discussed the circumstances in which Messrs Rapley and Shamy withdrew and were appointed as amicus. The Judge did inquire into the circumstances and satisfied himself, correctly in our view, that counsel could serve in that capacity. The brief given to them was explained to Mr Tully and the jury, for whom the appearance of self-representation was maintained. It was essentially a standby role as this Court subsequently described it in *Fahey*.

[170] The brief departed from that of standby counsel in one important respect. Counsel were authorised to advance such defence as they thought best, and they were not required to act in accordance with Mr Tully's wishes. That might have occasioned difficulty, as happened in *Fawcett*, but the defence they advanced — identity and intent — was consistent with Mr Tully's preferred defence of insanity or automatism, which were precluded by the evidence and the Judge's rulings rather than anything counsel did.

[171] We do not accept that Mr Tully was confused by counsels' role or that his mental health prevented him from working with them. We have already explained that while he wanted to keep his distance from counsel he also worked co-operatively with them when it suited him. He did so as they briefed him about his evidence and when preparing the closing address.

[172] We are not persuaded that the work of amicus occasioned a miscarriage of justice.

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91 At [101]–[102].
92 *Fawcett v R* [2017] NZCA 597.

Conviction appeal result

[173] We grant leave to adduce further evidence on appeal. The conviction appeal is dismissed.

The sentence appeal

The sentencing

[174] Mr Tully was sentenced on 27 May 2016. He remained self-represented, with Messrs Rapley and Shamy appearing as amicus. The Crown had intimated that it intended to seek a life-without-parole sentence, but it appears that application was abandoned when it became clear that the Canterbury District Health Board wanted to have the necessary health assessments done elsewhere and the process would take some months. In the result there was no further health assessment and sentencing proceeded on a Corrections pre-sentence report which benefitted from discussions with Mr Tully's mother and sister. The report recounted Mr Tully's background and his explanation that he doubted he committed the offences, which may have happened during a blackout caused by a bacterial infection in his brain, and said that he was mentally unwell at the time. The report disclosed previous convictions for threatening to kill and presenting a firearm and opined that Mr Tully presented a high risk to others.

[175] At sentencing the Crown contended for a minimum period of imprisonment of 33 years. Mr Rapley accepted that s 104 of the Sentencing Act was engaged, meaning that the minimum period must be not less than 17 years. He emphasised that Mr Tully would be an elderly man when he became eligible for parole and pointed out that he is unlikely to be released if, in the opinion of the Parole Board, he remains a risk at that time. Counsel argued for a starting point of 23–25 years and a discount for mental health or diminished responsibility. Mr Tully maintained that he was not "in the correct frame of mind" at the time and argued that that had not been recognised by anyone who had reported on his condition.

[176] Mander J recounted the facts, finding that:[93]

…

[93] Sentencing notes, above n 1.

> [9] You set upon a plan to deliberately target WINZ employees who had dealt with you and with whom you had developed some form of grudge. You entered the WINZ office that morning with the intention of killing these people. You made the necessary preparations to carry out this plan, including arming yourself with a shotgun, disguising yourself and assembling your kit for the purpose of evading capture.
>
> …

[177] The Judge acknowledged the profound impact of the offending on Mr Tully's many immediate victims, and the wider impact on WINZ staff and others who deal with the public in circumstances that can be stressful and difficult. He identified that the relevant sentencing purposes were community protection, accountability and denunciation, and added that the sentence must serve as a general deterrent, to afford protection for others in occupations that expose them to the disaffected.[94]

[178] Turning to aggravating factors, the Judge noted that the victims were vulnerable in their open plan office and found the offending premeditated.[95] Mr Tully had carefully planned the crimes to ensure his escape. He rejected any suggestion of provocation, finding rather that Mr Tully's actions likely could be attributed to his deep-seated sense of entitlement.[96]

[179] The Judge turned to Mr Tully's personal circumstances.[97] He noted that while there had been reports of drug-induced psychosis in Australia, there had never been a diagnosis of an enduring mental illness. He accepted that Mr Tully had a persistent somatic preoccupation with his skin and his health in general. He also noted persistent accounts of Mr Tully having a grandiose sense of entitlement with features of narcissistic personality disorder which were likely associated with the offending. But there was no foundation for a finding of mental illness or impairment which would diminish culpability. The Judge found Mr Tully a man of considerable intelligence and did not accept that any personality disturbance affected his understanding of what he set out to do or caused him to misapprehend the wrongfulness of his actions:

> [35] … The cluster of anti-social and narcissistic personality traits no doubt were a contributing factor in your offending but I do not consider them

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94 At [22]–[23].
95 At [30]–[31].
96 At [32].
97 At [33]–[35].

> capable of mitigating the length of the minimum period of imprisonment; to the contrary, your innate personality traits underline the risk you present to the community.
>
> (Footnote omitted.)

[180] With respect to risk to the community, the Judge noted that the pre-sentence report recorded Mr Tully's continuing sense of injustice and found his attitudes not conducive to rehabilitation. Mr Tully's deep-seated grievances were capable of leading to murderous action. He appeared to have no remorse and no regard for the sanctity of human life.[98] Mander J concluded that:

> [40] Mr Tully I consider you to be a very dangerous person, clearly capable of very violent actions. Because of the high risk of harm you present there is a need for community protection which should be reflected in the length of the minimum term. I have already specifically observed the need for the length of the minimum period of imprisonment to adequately denounce your actions and in particular for the sentence to provide deterrence.

[181] The Judge found that previous convictions precluded any allowance for past good character but did not call for an uplift.[99] He arrived at a sentence of life imprisonment with a minimum period of 27 years.

[182] Mander J did not identify a starting point, but he did cross-check the figure of 27 years against a long list of comparable cases, including a number that involved multiple victims or other especially serious aggravating factors.[100] He concluded that the minimum period for the two charges of murder was 27 years imprisonment, meaning that Mr Tully would become eligible for parole at the age of 77. That minimum period was found appropriate having regard to comparable cases. The

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98 At [36]–[37].

99 At [38].

100 At [42] citing *R v Bell* CA80/03, 7 August 2003; *R v Howse* [2003] 3 NZLR 767 (CA); *R v Reid* [2009] NZCA 281; *R v Somerville* HC Christchurch CRI-2009-009-14005, 29 January 2010; *R v Reihana* HC Rotorua CRI-2005-070-7328, 29 June 2007; *R v McLaughlin* [2013] NZHC 2625; *R v Konia* HC Palmerston North CRI-2005-054-2095, 30 June 2006; *R v Ogle* HC Wellington CRI-2009-091-2763, 16 October 2009; *R v Maheno* [2013] NZHC 2430; *R v McKenzie* [2009] NZCA 169; *R v Samoa* CA85/04 CA138/04, 4 August 2004; *R v Cui* CA333/05, 20 June 2006; *R v Frost* HC Greymouth CRI-2010-018-344, 3 October 2011; *R v Lundy* (2002) 19 CRNZ 574 (CA); *Malik v R* [2015] NZCA 597; *R v Burton* HC Wellington CRI-2007-085-736, 3 April 2007; *Robertson v R* [2016] NZCA 99; *R v Dixon* HC Auckland CRI-2003-092-26923, 27 May 2005; and *R v Tarapata* [2015] NZHC 1594; and *R v Ying* (2004) 20 CRNZ 1078.

sentence for the charge of attempted murder was 11 years, and the sentence on each of the firearms charges was four years.[101]

Submissions

[183] Mr Stevenson submitted, citing *E (CA689/10) v R* and *R v Verdins*, that Mr Tully's delusional disorder is relevant to sentencing, for without that disorder it is unlikely the circumstances that led to the offending would have happened.[102] He reminded us of Dr Dean's opinion that:

> It is unlikely the circumstances leading to his offending would have arisen but for his delusional belief about his health.
>
> The court may consider this to be a mitigating factor when considering appropriate sentence should the court accept Mr Tully's appeal has merit on legal grounds.

[184] Mr Stevenson submitted that Mr Tully's delusional disorder mitigated culpability and the need for deterrence, and it may mean that his sentence is likely to bear more heavily upon him, emphasising that Mr Tully is adamant that he will die of his skin condition in prison. He further submitted that the same condition prevented Mr Tully from understanding his guilt and taking advantage of a credit for a guilty plea, in a case in which the prosecution evidence was very strong.

[185] In his affidavit Mr Tully concurred that the minimum period did not take into account his mental health but added that neither did it reflect his remorse for the victims. He acknowledged the hurt caused and the terrible pain inflicted. This is so far as we know the first expression of remorse. However, he did not take the opportunity to confirm it at the hearing before us. We are not prepared to accept that he experiences remorse. His position remains that he should not be held responsible.

[186] For the Crown, Mr Lillico submitted that Dr Dean's opinion that the offending would not have happened but for the delusional skin disorder is not entirely borne out in the evidence; Mr Tully was angry partly because he had not been given money for a mobility scooter or an expensive bicycle, and partly because food and

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101 At [44]–[45].

102 *E (CA689/10) v R* [2011] NZCA 13, (2013) 25 CRNZ 411; and *R v Verdins* [2007] VSCA 102, (2007) 16 VR 269.

accommodation money was to be treated as a loan. In other words, it was Mr Tully's sense of entitlement rather than his delusional disorder that likely caused his grievance with WINZ. A mental disorder that has no causal effect on culpability cannot mitigate sentence. Nor should Mr Tully's narcissistic personality disorder mitigate his sentence; it rather increases his risk to the community. It was not Mr Tully's delusional beliefs that prevented him from pleading guilty, but rather his insistence that he did not remember the offending and so should not be held responsible for it.

Analysis

[187] The appellate question is whether the minimum period of 27 years imprisonment is manifestly excessive. The Court is divided on the answer. Venning and Katz JJ consider that 27 years is appropriate. Miller J would reduce the minimum period to 25 years.

[188] We need not rehearse the several judgments of this Court dealing with the correct approach to setting a minimum period under ss 103 and 104 of the Sentencing Act. They are summarised in the Court's judgment in *Robertson v R*, which we cite for convenience:[103]

> [80] … There is a line of authorities in this Court explaining that a sentencing judge should approach the imposition of a minimum period under ss 103 and 104 of the Sentencing Act in the following way. First, the judge should compare the offender's culpability with cases of murder that attract the statutory minimum of 10 years, which serves as a datum point or benchmark. Second, the judge should decide whether an additional minimum period is needed to satisfy the sentencing purposes of accountability, denunciation, deterrence and community protection. When following these processes the judge must apply the legislative policy that, in general, the presence of one or more s 104 factors justifies a minimum period of not less than 17 years; and further, that there may be cases in which the sentencing purposes in s 103(2) require that the sentence be served without parole. Third, the judge should compare sentencing decisions in other cases for reasonable consistency of outcome. As this Court explained in *R v Howse* and repeated in *R v Bell,* the primary comparison is between the individual case and the 10-year datum point. Comparison with other cases is a secondary requirement, albeit necessary and important as a check.
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> [81] When comparing cases it is also necessary to bear in mind that the legislation has changed over the years. In some cases s 104 did not apply because the offending predated the Sentencing Act. In others the offence was committed before s 103 was amended in 2004 to specify that the purposes of

[103] *Robertson v R*, above n 100 (footnotes omitted).

> denunciation, deterrence, accountability and community protection may justify a minimum period longer than 10 years. (Before amendment s 103 simply directed judges to consider the circumstances of the offence.) Since 2010 the legislation has contemplated that the same purposes may require that the sentence be served without parole. In addition to these statutory changes, sentencing levels evolve with collective experience.

[189] The court begins by comparing the instant case with cases that attract the statutory minimum period of 10 years. This case features a number of serious aggravating factors: Mr Tully murdered two victims and attempted to murder a third; Mr Tully set out to kill all three victims (and possibly another) and planned his escape to allow him to avoid detection; the victims were public servants acting in the course of their duty and attacked for that reason; the murders were cold-blooded execution-style killings; and there was an element of victim vulnerability. The first three of these factors qualify Mr Tully for a minimum period of not less than 17 years under s 104 of the Sentencing Act.[104]

[190] It is correct that this case lacks a number of the aggravating features that have led courts to impose long minimum periods in other cases. The murders were not committed in the course of another crime, nor were the victims killed to avoid detection.[105] The murders were callous but they were not marked by the exceptional cruelty seen in some cases.[106] They did not involve entry to a private home.[107]

[191] However, as this Court observed in *Howse*:[108]

> … The primary focus of the sentencing Court should be to compare the culpability of the case in hand with the culpability inherent in cases which are within the range of offending which attracts the statutory norm of ten years. The primary question is how much more than the statutory norm the instant offending requires in order to achieve the necessary additional punishment, denunciation and deterrence.

[192] The aggravating factors of Mr Tully's offending clearly do engage, to a very high degree, all of the section 103 purposes of accountability, denunciation and deterrence. In the view of the majority the organised and calculated manner of the

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104 The third factor qualifies under s 104(1)(i), having regard to subs (1)(f).
105 See *R v Bell*; *R v Burton*; *R v Reid*; and *R v Samoa*, above n 100.
106 See *R v Bell* HC Auckland T.020505, 13 February 2003 at [25]; and *R v Ogle* at [63]; and *Robertson v R* at [82], above n 100.
107 See *R v Dixon* at [27(b)]; *R v Konia* at [7]; *R v Reihana* at [25]; and *R v Ying*, above n 100.
108 *R v Howse*, above n 100, at [61].

killings and the attempted murder of the third victim confirm Mr Tully's culpability and more than offsets the fact that they were not committed in the course of another crime. Again, as this Court observed in *Howse*, it is entirely reasonable to regard the number of victims as relevant to overall culpability as the greater the number of victims the more people will usually be traumatised and affected by the offending.[109] Further, Mr Tully's planning extended to avoiding detection. For these reasons the majority agree that Mander J's starting point of 27 years was correct.

[193] Miller J concurs in the reasoning of the majority but would adopt a 25-year starting point by reference to other cases. In *Bell*, for example, the murders were committed in the course of a crime and to avoid detection, and the killings were especially brutal.[110] A 30-year minimum period was imposed on appeal, (although it is accepted that the case predated the 2004 amendments to the Sentencing Act, which might have resulted in a higher minimum period). In *Howse*, which also predated the amendments, the murders were highly callous and they were evidently committed because the victims had complained of sexual offending by the defendant.[111] The minimum period was reduced to 25 years on appeal. There are a number of single-victim cases in which long minimum periods were imposed,[112] but in those cases the offender's history of the circumstances of the offending pointed to a very high risk of reoffending.

[194] We agree with the Judge that there is an imperative need for community protection.[113] It is a function of personal circumstances in Mr Tully's case, so we treat it as a personal aggravating factor. His sense of entitlement is likely to bring him into conflict with others and he is capable of being very dangerous. Because these characteristics are primarily the product of a personality disorder, there is no reason for optimism about rehabilitation. Mr Tully's intractable sense of grievance, which is evident in his every dealing with the Court, may well preclude treatment.

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109 *R v Howse,* above n 100, at [62].
110 *R v Bell*, above n 100.
111 *R v Howse*, above n 100.
112 *R v Reid; R v McLaughlin*; *R v McKenzie*; *R v Burton*; *Robertson v R*; and *R v Dixon*, above n 100.
113 Sentencing Act, s 103(2)(d).

[195] The life sentence means that Mr Tully may be detained for life, and he will not be released unless and until the Parole Board considers that his reoffending risk has been reduced to an acceptable level. Nonetheless, s 103 recognises that community protection may justify a longer minimum period, and a court must be prepared to make its own assessment when the circumstances require it and the evidence and sentencing materials permit.[114] There are a number of cases in which the need for community protection has contributed to a very long minimum period.[115]

[196] In none of those cases would the offender be at such an advanced age at the end of the minimum period as Mr Tully will be. Nevertheless, the majority consider that Mr Tully's risk is likely to endure, having regard to his mental condition and narcissistic personality, so that while they would not increase the starting point for such risk in the circumstances, the possibility that it may abate with age does not warrant a reduction. Miller J considers it a reasonable possibility that advanced age may sufficiently mitigate the risk that Mr Tully presently presents, and for that reason would not uplift a starting point of 25 years for reasons of community protection.

[197] We agree with the Judge that Mr Tully does not experience remorse. The only possible mitigating factor is his mental health. It is a factor that may mitigate culpability or make a prison sentence harder to endure. As noted, Mander J made no allowance for Mr Tully's mental health. The Judge described the delusional skin disorder as a "preoccupation".[116] With the benefit of Dr Dean's evidence, we think that it is properly characterised as a mental illness.

[198] We also accept that but for that illness Mr Tully might not have approached WINZ or become as insistent as he did on receiving what he thought were his entitlements. Nonetheless, it was his narcissistic sense of entitlement rather than his delusional skin disorder that explained his animus toward WINZ. His planned, organised and purposeful behaviour, which extended to disguising himself and making his escape, strongly indicates that he well understood what he was doing. We agree with the findings of fact made by Mander J and quoted at [176] above. We add that in

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114 *Robertson v R*, above n 100, at [84].
115 See *R v Bell*; *Robertson v R*; *R v McLaughlin*; *R v Burton*; *R v Reid*; and *R v Dixon*, above n 100.
116 Sentencing notes, above n 1, at [20] and [33].

our opinion Mr Tully is an intelligent man who behaved strategically throughout his trial, and this appeal, exploiting his health complaints to escape accountability for his actions.

[199] As noted above at [75], Mr Tully underwent genetic testing for 47,XYY Syndrome. The results showed "no evidence of numerical or structural chromosome abnormalities" and "no evidence of an additional Y chromosome". There is therefore no basis for a diagnosis of the Syndrome. We declined Mr Tully's requests for further testing for other conditions he believes he may have.

[200] In these circumstances, we are not prepared to accept that Mr Tully's mental conditions mitigate his culpability. On the contrary, they contribute to the long-term nature of the risk that he presents to others. And while we recognise that his delusional skin disorder causes him distress, we do not accept that imprisonment will make it significantly harder to bear.

Sentence appeal result

[201] The sentence appeal is dismissed.

Solicitors:
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