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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 49/2019
[2019] NZSC Trans 31

**PETER HUGH McGREGOR ELLIS**

Appellant

v

**THE QUEEN**

Respondent

| | |
|---|---|
| Hearing: | 14 November 2019 |
| Coram: | Winkelmann CJ<br>Glazebrook J<br>O'Regan J<br>Williams J<br>Arnold J |
| Appearances: | R A Harrison, S J Gray and B Irvine for the Appellant<br>U R Jagose QC, S-G, K S Grau and A D H Colley for the Respondent |

**CRIMINAL APPEAL**

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**MR HARRISON:**

E Te Kōti, ko Harrison ahau. Kei kōnei mātou ko Sue Gray. Kaitakata *[sic]* Bridget Irvine, mō te kai whakapīra *[sic]*. May it please the Court. Counsel's name is Harrison. Appearing with me today is Ms Gray and Dr Bridget Irvine and we appear on behalf of the appellant.

**WINKELMANN CJ:**

Tēnā koutou.

**SOLICITOR-GENERAL:**

E nga Kaiwhakawā, tēnā koutou. Kei kōnei mātou ko Ms Grau, ko Ms Colley, mō te Karauna. Your Honours, we appear for the Crown.

**WINKELMANN CJ:**

Tēnā koutou Ms Jagose. Mr Harrison? Before we commence I just remind counsel that we're not going to refer to the names of any of the complainants and there's an agreed system of referring to them, and should someone slip up, that name is not to be reported because the names are suppressed.

**MR HARRISON:**

As Your Honour pleases. Your Honour, it seems clear from the Crown's submissions that the issue of jurisdiction has been conceded to the extent that they agree that pursuant to a rule 5(2) of the Supreme Court Rules 2004 the Court does have jurisdiction to proceed where there has been the death of an appellant. My submission is the issue then is one of law in what circumstances and what test should we be using to ascertain whether or not a matter should proceed after the death of an appellant.

Can I refer Your Honours to the case of *Smith v R* 2004 SCC 14, [2004] 1 SCR 385, which is the Canadian Supreme Court decision which has a test.

Now I refer to paragraph 50 and perhaps if I read that to you. "In summary, when an appellate court is considering whether to proceed with an appeal rendered moot by the death of the appellant (or, in a Crown appeal, the respondent), the general test is whether there exists special circumstances that make it 'in the interests of justice' to proceed. That question may be approached by reference to the following factors, which are intended to be helpful rather than exhaustive. Not all factors will necessarily be present in a particular case, and their strength will vary according to the circumstances."

Your Honours, they then, the Court then sets out a test which we would suggest would be helpful to the Court in considering how we proceed in such a circumstance. The first point that I would raise, and the reason why I read out paragraph 50, is it's not exhaustive and I think it would be very difficult to make such a test exhaustive in all circumstances. However, the Court in *Smith* set out the grounds that they suggested should be considered. The first is whether the appeal will proceed in a proper adversarial context. In respect of that, Your Honours, I wonder if you would mind if I park that to one side at the moment and perhaps come back and address it after I've looked at the other grounds of appeal, because I think that comes to the issue of if this was to proceed, on what basis would it proceed. Whether or not we need to have a substituted appellant or whether it can proceed in its own right. They seem to make it a precursor but I suggest that perhaps it's something that follows on from the more significant factors.

The second one was the strength of the grounds of the appeal. In this particular case the Court has considered those matters when considering leave to appeal. That, I think, in this particular case is not so significant as point 3, which is whether there are special circumstances that transcend the death of the individual appellant/respondent including a legal issue of general public importance, particularly if it is otherwise evasive of appellate review, or a systemic issue relating to the administration of justice, or collateral consequences to the family of the deceased.

In this particular case we submit that the Ellis case satisfies, or raises a legal issue of general public importance and secondly, that it also raises an issue of a systemic issue related to administration of justice. Those factors that we say raise this beyond just the mere facts specific to the Ellis case, are the issue of memory and the use of memory experts in court.

The Court would have seen our submissions in response to the Crown submissions and what seems clear from the affidavit in response from Professor Hayne in particular is that there seems to be a conflict, if you like, between who is an expert and also in respect of memory evidence, and more significantly when should an expert be used in a court in respect of memory. In particular Professor Hayne raises a number of issues and if I refer Your Honours to Professor Hayne's affidavit, and in particular starting at paragraph 6.3 she notes that –

**O'REGAN J:**
Is this is the original one or the reply?

**MR HARRISON:**
Sorry Your Honour. This is the affidavit in response. It was filed in response to the affidavit of Dr Blackwell and Professor Seymour. At paragraph 6.3 Professor Hayne indicates that, "Dr Blackwell and Seymour suggest that the only way to really assess the effect of suggestive interview questions on the Ellis children's reports would be to code how the children responded to each suggestion – both at the time it was given and subsequently. Specifically, they suggest a 'qualitative clause by clause analysis' of the children's reports."

Professor Hayne goes on later to indicate at 6.5 and 6.6 that this is, in essence, a misunderstanding of how memory works and that such a suggested analysis may be appealing to a lay person but it is impossible to measure the impact of any given suggestion by examining children's responses. Attempting to do so is likely to vastly underestimate the impact of suggestion.

So what Professor Hayne is suggesting or is stating in that respect is suggestibility is not a simple someone asked a child or put a proposition to a child and then you can track that through. Suggestibility is far more complex than that. It's the way in which the memory is originally encoded, what happens during its storage and what happens in its retrieval, and those are significant factors which transcend the issue of just the *Ellis* case.

**ARNOLD J:**

I suppose one question that arises is as the evidence indicates, the affidavits indicate, understanding has changed over time and that will be reflected in the way Courts currently go about dealing with these issues. So the question is is it really going to help to look at what happened at a trial 26 years ago when we're, in terms of getting some understanding of how these issues should be dealt with, wouldn't we be better looking at what currently happens and using that as the basis for this sort of decision-making you're talking about?

**MR HARRISON:**

In respect of this particular argument my point would be, Your Honour, this case is an appropriate vehicle for that to be done and that is an appropriate use of the Court's resources to have a look at that particular aspect. There's the decision, of course, of *M (CA68/2015) v R* [2017] NZCA 333 which was very much on this point and they held off perhaps considering who would be an appropriate expert and hearing evidence. As this case was originally set to proceed there was four days or four experts to be cross-examined and issues that are of significance for the Courts generally arising out of that. On that basis I say that raises a significant issue that should be – the resources of the Court should be used because it's help for all Courts going forward.

**WINKELMANN CJ:**

So your answer is that the law is not settled as to who's an appropriate expert in this area?

**MR HARRISON:**

That's correct, Your Honour, and perhaps more significantly when should a memory expert be used and what are the exact issues that are significant that would justify that? There are the other decisions I have seen in the Crown's submissions where appeals have been made in respect of the use of memory experts but they've been put aside largely because of the proviso in respect of those cases. There was compelling evidence quite apart from the memory expert evidence that was suggested to overturn those decisions.

But it's the understanding also of how memory works is a significant factor of itself and I think that's reflected in some of the comments made by Dr Blackwell and Professor Seymour that have been commented on by Professor Hayne, and I think that's an issue of itself that needs to be addressed.

So it's those factors, in my submission, that would justify the Court continuing on to hear this particular case, and the factors that they raise are pertinent to that original appeal and the points of contamination of the chain of custody of children's evidence.

**WINKELMANN CJ:**

So what do you say to Justice Arnold's point that things were done differently then so how useful is it to look at practice of 26 years ago?

**MR HARRISON:**

Because I don't think children change that much, Your Honour, that the issues that children raise in terms of taking evidence from them are the same then as they are now, that we still need to be able to understand that process and the risks of that process of obtaining evidence from children, and it's not contaminated in the way in which it's brought out, and if it is, those factors are well understood by the fact finder when they come to consider the weight they give to that particular evidence.

**WILLIAMS J:**

What about the point though that we are, we would be addressing a standard that no longer applies? We would be addressing practice that is now obsolete.

**MR HARRISON:**

That's in terms of the interviewing of the children, is that the point that you're raising there?

**WILLIAMS J:**

Well just generally in the approach to dealing with child complainants and their evidence.

**MR HARRISON:**

I would say –

**WILLIAMS J:**

Or do you think that practice, insofar as memory is concerned…

**MR HARRISON:**

Is enduring.

**WILLIAMS J:**

Is the same now as it was in 1993 and whatever the later –

**MR HARRISON:**

I think the same problems are present today as they were then in terms of firstly us understanding that.

**WILLIAMS J:**

Sure. But my question is more about how the criminal justice system, the Courts, the prosecutors, police and so on, respond to those challenges now. Are they any different today than they were at the time of this case?

**MR HARRISON:**

As to that, Your Honour, I believe that we're still, the Crown are presenting evidence to this Court that misunderstands how memory works. So there are still fundamental issues that are not understood.

**WILLIAMS J:**

Certainly, you might be right in this particular case, but your argument is this is a systemic issue.

**MR HARRISON:**

Yes and so in every case where we have children giving evidence these issues arise and are we addressing them appropriately.

**WINKELMANN CJ:**

So your point is that we're still asking children questions. It's the fundamentally same mechanical exercise. There might be some difference around the edges but there's still these traps.

**MR HARRISON:**

Yes.

**WINKELMANN CJ:**

For people who are acting.

**MR HARRISON:**

Which were not fully understanding and appreciating and presenting to the fact-finder the risks inherent in the matter.

**WILLIAMS J:**

So that's really the question I think that Justice Arnold put. How do we know that it's still the same, because we have no party capable of attesting to what the current practice on memory and the interviewing of children is.

**MR HARRISON:**

Well we have the, in terms of the interviewing of children there is a consensus I think now on what's appropriate, and that is still evolving, but there's a general consensus on it, best practice.

**WINKELMANN CJ:**

An emerging consensus.

**MR HARRISON:**

Yes, but in terms of the risks of what happens by the time the child gets to that interview process, that is where the misunderstanding arises and the misinformation arises, and that's where the education from a case such as this would come. So that doesn't change. We still have cases coming before the Court where children have been appropriately questioned, for a whole variety of reasons. We're aware of some of that questioning but we're not fully aware of the risks inherent in that, and that's where evidence in terms of what memory experts can tell us is significant, and that's why I say it could still be seen as systemic, because we're not fully understanding what memory experts can tell us, and what those risks are.

**O'REGAN J:**

But we do know that the current practice is to get a formal interview as quickly as possible before tainting can occur, don't we, and so if we already know that we know that what happened here wasn't best practice.

**MR HARRISON:**

But then you have the issue of not every child is going to be interviewed immediately, and quite often that doesn't occur. It may occur once the issue has been raised, but that maybe years later, and when you're dealing with a very young child, years later is extremely significant. How significant is important. Th length of delay is important in terms –

**O'REGAN J:**

But don't you just have to address that in the cases as they come? I mean we can't make a general rule because there is no generality, is there?

**MR HARRISON:**

No, but I think in terms of understanding the process and who is the appropriate expert to be giving that evidence is significant. What we have from Dr Blackwell is a suggestion that in the *M v R* case, for example, that children remember core details extremely well, that certain traumatic events are remembered better than others, and what we were seeing in *M v R* is that was not accurate in terms of what the science tells us. Those are the factors that are significant in terms of this particular case. The experts that are able to give evidence to this Court can outline the procedure by which memory is encoded, by which it is stored and by which it is recovered. That seems the issues in terms of suggestibility and contamination –

**O'REGAN J:**

But the Court is not going to make a decision on what is the best science, is it? The Court is going to determine whether a miscarriage occurred in this case.

**MR HARRISON:**

Yes, but in terms of –

**O'REGAN J:**

I mean it's not as if we will then say from now on in every case this is what will have to happen because it will all depend on the facts.

**MR HARRISON:**

It always will depend on the facts, Your Honour is correct, but the other side to that is what is the type of evidence that can be put forward when it is appropriate? Those are general factors that the Court can assist in and who is an appropriate expert. It could well be that from a decision in this case we could well have a situation where section 9 agreed facts are placed before a

fact-finder as the Court considered in the counterintuitive matters in I think in *DH v R* [2015] NZSC 35.

**O'REGAN J:**

But normally when this Court is going to make a ruling on something definitive like that, it has the benefit of the views of a trial Court and the Court of Appeal. In this case we're effectively receiving it as a first and last Court, aren't we? It's not the ideal way for an issue of law to be resolved in an Appellate Court.

**MR HARRISON:**

Well, I would say, Your Honour, that it is an ideal way because those issues are still present now. They're not fact-dependent on the *Ellis* case but those overriding issues of who is an expert and what is the nature of memory, that is where I think the Court can give guidance to the Courts lower down. And that I think itself is important because I also note in the appeal cases that in one particular case, I think in 2019, they suggest that Dr Blackwell would be brought in to give evidence if this matter had been brought – if the evidence had've been allowed into the case, and when you have an expert purporting to be an expert in memory and there are issues in terms of the general appropriateness of some of the statements she made in terms of memory, then I think that is a significant factor and that is one that the Court needs to consider.

**GLAZEBROOK J:**

Is the submission that we have quite extensive evidence in this case that actually brings these issues particularly to the fore and that's one of the reasons that you say that this is a suitable vehicle? Is that what I'm understanding you to say?

**MR HARRISON:**

Your Honour, yes.

**GLAZEBROOK J:**

And that that mightn't happen in quite this way in other cases for all sorts of reasons to do with resources and whether counsel actually understand these issues sufficiently in order to bring them up? Is that the basis of the submission? Have I understood that?

**MR HARRISON:**

Your Honour, yes.

**GLAZEBROOK J:**

Thank you.

**MR HARRISON:**

So, Your Honours, I have not addressed particularly section 23G but again I would say that that raises an issue of importance in terms of how far experts may go in terms of presenting their evidence to the Court. It's an unusual situation in that you have legislation that was purportedly science-based which was subsequently shown to be less than best practice, if I can put it that way, and that also may well raise an issue with the Court of where we have that situation, I accept it would be a rare situation that that would arise, does that justify the Court considering a miscarriage of justice where that has been done? So that is another factor that the Court may want to consider.

**GLAZEBROOK J:**

We have considered that evidence, however, of conduct and certainly things have definitely moved on in terms of what's actually allowable and presentable in court. Now do you have a comment on that?

**MR HARRISON:**

I would agree that we've moved a long way forward from where that particular case, or where it was back in the early 1990s and I think *R v Aymes* [2004] 21 CRNZ 523 in the Court of Appeal is a fairly good indication of where the Court's thinking is.

**WINKELMANN CJ:**

Can you speak up a little bit Mr Harrison, you're drifting away from the microphone and I'm finding it hard to hear.

**MR HARRISON:**

Sorry Your Honour.

**WINKELMANN CJ:**

So Justice Glazebrook's point is that the Court has looked at the issue about the significance of behaviour, consistent or inconsistent, with sexual offending against a child, and your response is, yes, the Court has moved on, but why are you saying it's still relevant to look at that?

**MR HARRISON:**

Well I just think in terms of a general point I couldn't see it occurring on many occasions, but where we have legislation that is purportedly science based, which is actually poor science, which I think which is what 23G was, does that justify subsequently once the evidence, or once the legislation has been subsumed by other legislation such as 23G has now by section 25, does that of itself justify an argument for a miscarriage of justice where that has been used in a conviction.

**WINKELMANN CJ:**

So you don't make a broader argument that the evidence that you wish to call would be helpful on this issue as to, in relation to consistent/inconsistent behaviour, because there's quite a separate issue in terms of, from the constructed/reconstructed nature of memory.

**MR HARRISON:**

Yes.

**WINKELMANN CJ:**

There's also this other area that you've got expert evidence on in terms of the consistent/inconsistent behaviours.

**MR HARRISON:**

Yes, I think those, both approaches can be taken, I'm just saying that that also is a unique point that the Court might like to consider in terms of 23G, and I appreciate that the Court has ruled in respect of the use of that evidence in the past, but I still think that's a relevant point to consider.

**GLAZEBROOK J:**

In terms of at least setting out the current state of the science, is that the submission, because many, I'm not sure that we had this level of expert evidence in some of those earlier cases that would have enabled us to set out the agreed nature of the science, assuming – well, that's assuming we could do that, but that, what you're saying is that's one of the issues that could be helpful, at least in a more general sense in respect of this appeal.

**MR HARRISON:**

Yes. Your Honours, I come now to the adversarial context in respect of this matter. If the Court finds that it is appropriate that this matter proceed, on what basis should it proceed. We have filed an affidavit from a family member indicating that they are prepared to step in and assist. The Crown have indicated that if the Court is to proceed that it should proceed in the appellant's name. That would be our preferred course of action. The issue is, if that was the process that we proceeded on, would it continue in an adversarial context, and in my submission it would. We do have substantive submissions filed. We have leave submissions filed. We have instructions from our client before he died. It is difficult to see where an adversarial context could not continue on that basis. We're quite clear in what the arguments are, where we need to go and I don't see input from Mr Ellis would be helpful in that regard. That is…

**GLAZEBROOK J:**

And the instructions, as I understand it, are to deal with the two issues that are before the Court and were before the Court at the time of his death in terms of the leave submissions. Is that a correct understanding as well?

**MR HARRISON:**

Yes. Well, there was a great deal of discussion about what grounds to bring. He was guided by us in terms of that and raised other issues that perhaps he thought should be before the Court as well. But in terms of the time that we had available at that time we narrowed it down to these particular points, and if there were other matters to be argued they would not require perhaps an input from Mr Ellis of himself because we – well, it would be very much on legal points, so what he was most emphatic about was that we continue in the best way that we thought appropriate.

Unless there are other matters that the Court would like me to address, that's really the nub of the submissions. Your Honours have seen our submissions in response. I think those submissions raise the concerns we have in terms of the significance of this matter. Unless there are other matters that the Court would like to address me on.

**O'REGAN J:**

In the *Smith* paragraph 3, the third paragraph (c) was collateral consequences to the family or other interested persons, is there anything in that regard that arises there?

**MR HARRISON:**

Well, if I can just get to paragraph 3, what I can say, Your Honour, is that in this particular case there is a wide group of people who have been affected by this decision, not least of which are Mr Ellis' mother who is still alive and his extended family. But for Mrs Ellis, she was alleged in some of the statements to have been involved in hanging children in cages and been involved when some of these factors occurred. She was never charged but that stigma, if you like, remains with her. That is, I think, goes a wee bit beyond what they considering in *Smith* where it was just the general distress of having someone convicted. So it goes beyond that. There are also I think the women who were acquitted beforehand in terms of a number of reasons that Justice Williamson thought it was appropriate for the case not to proceed against them, one of which being the prejudice of being in Court with Mr Ellis

in terms of their chances of a fair trial. So those women also sit in the general public. So of a wider public importance I think this is a very significant case.

**GLAZEBROOK J:**

Seeing we're talking about other people affected, the Crown indicates that this isn't a case that one should be looking at the position of the complainants and the inability even on an appeal to come to a definitive conclusion now in respect of these matters. Do you have a comment on that? I'm probably summarising the Crown's submissions in truncated fashion but…

**MR HARRISON:**

I would say, Your Honour, that whatever happens in respect of this case that there would never be a final closure in that regard, that there will always be people who will raise concern about the way in which the case was conducted and whether or not there is guilt or innocence and that is unfortunate in that there is no eventual closure to date for the families, but the nature of this particular case and the way in which it was brought about is always going to have that odour to it, if you like, if I can put it that way.

**O'REGAN J:**

What do you say to the Crown's submission that at least on some of the grounds of appeal a success would only mean a retrial, would only have meant a retrial being ordered?

**MR HARRISON:**

Well, in terms of an ordering of a retrial, I don't think a retrial could be ordered now. One of the things about memory is if it's distorted, and if it's imbedded, it can never be changed. So for where you have a young child –

**WILLIAMS J:**

Well it can be changed, it just can't be unchanged.

**MR HARRISON:**

Yes.

**WILLIAMS J:**
Isn't that the point of what the –

**WINKELMANN CJ:**
Corrected.

**MR HARRISON:**
Yes.

**GLAZEBROOK J:**
I think Justice O'Regan's point would be that if it was only on the grounds of, for instance, the inadmissible evidence, assuming it is inadmissible in respect of consistency, and the issues in respect of the interviews were rejected, then in normal circumstances you would have a trial because you'd just be able to exclude the inadmissible evidence and start again. So I think it was assuming that the memory issues were rejected, there'd be a retrial, and I certainly take your point that there would be issues with a retrial if there was a finding in favour at the appeal stage on those memory issues.

**MR HARRISON:**
Yes, and more significantly a number of people have died since that process, I think would be an extremely unlikely that if Mr Ellis was with us that we would end up in a position, if we were successful on these points, that we would be looking at a retrial. If we were to look at a retrial then I think that that would be unfortunate, but it should not be a situation where only where you can factually prove someone's innocence beyond all reasonable doubt that you should hear a moot appeal where someone has died. I don't think that that would be appropriate and that would not promote the ends of justice to do so. There has to be a wider distinction, and that's only one of the factors, I think, that they considered in the *Smith* case which was absent a lot of these other factors that we're talking –

**O'REGAN J:**

I don't think the Crown was suggesting it was a complete, you know, a killer point, they were just arguing that that was a reason among a number of others, that the Court might hesitate about continuing in the circumstances where obviously a retrial couldn't occur. Of course in this case, given the state of Mr Ellis' health when the leave was given, it was probably never – there was probably never going to be a retrial.

**MR HARRISON:**

Your Honour, yes. I just think in a general point we refer to it in our submissions, yes at paragraph 29, I think Your Honour, we note that. Are there any other matters that the Court has questions for us concerning this?

**WINKELMANN CJ:**

No thank you Mr Harrison. Ms Jagose?

**SOLICITOR-GENERAL:**

Your Honours. The summary of the Crown's case is that for reasons of policy and principle, which I'd like to elaborate on today, it should only be in rare or exceptional cases that an appeal proceeds once the appellant's personal interest in the appeal is no more. That really is the issue before Your Honours today and that given that this matter has not been determined in this Court before, in fact in New Zealand there's only a small smattering of cases that have considered the impact of the death of an appellant in a criminal appeal. It is worth, in my submission, the Crown coming back to basics and principle and policy to address this question, because it's well accepted across cognate jurisdictions that the position of the appeal and the appellant both change profoundly on the death of the appellant. In the bundle, which I don't need to take you to for now, *R v Kearley (No 2)* [1994] 2 AC 414 (HL), in the United Kingdom. *Smith*, as Your Honours have been taken to already, in Canada. Obviously death puts an accused person, or an appellant, beyond any relief that is within the power of the appellate court to grant.

So with your leave, Your Honours, I'd like first to address the jurisdictional issues that arise and then the substantive policy and principle positions before finally coming to, in light of all those submissions, what does the Crown say this Court should do in Mr Ellis' case.

So the first is the jurisdictional matter. May I clarify what Your Honours referred to last week in the judgment as a concession. In the very broadest sense that is so and that the Crown says the Court has a way through to exercise a discretion to consider a posthumous criminal appeal. To be clear it's not conceded that the circumstances exist here that this is such an appeal. We submit this is not one of those rare and exceptional cases that should be continued after the death of the appellant. But the first jurisdictional point is obvious. There is no appellant before the Court. There's no one subject to the Court's jurisdiction.

**GLAZEBROOK J:**
I'm sorry, I didn't quite catch the first part of that. The first issue is – perhaps if you could just slow down slightly.

**SOLICITOR-GENERAL:**
Sorry Your Honour, yes I will.

**GLAZEBROOK J:**
It just makes it easier to take down the submissions, thank you.

**WINKELMANN CJ:**
I don't think we were saying in that judgment that we assumed the Crown was conceding jurisdiction in this case, but your point is that the Court may find their way through to consider an appeal post-death, but your submission is that this is not such a case.

**SOLICITOR-GENERAL:**
That is right. I think I was just starting to say, on the jurisdictional point it is obvious that there is no appellant before the Court. There is no one on the

appellant's side that is subject to the Court's jurisdiction or control. Also there is nothing in the rules or in the law the continues such an appeal after death, and as the written submissions set out the Court does have the power in the Supreme Court Rules, rule 5, that could be used to regularise this position. So that's the jurisdictional matter which I will come to in a bit more detail in a moment. But secondly, the change in substance, substantively the change on the death of the appellant is profound also because when the appellant dies his interests die too, and I accept and acknowledge the interests of those who mourn the dead appellant, or support him, and they have interests that deserve recognition, but those interests are of much less substance in the balance, in my submission, that Your Honours must now undertake than the appellant's interests were when he was alive.

**GLAZEBROOK J:**

Accepting that point, perhaps at some stage, just if you could address the tikanga aspects of this, because as we know from some of the Crown settlements, those sort of issues in respect of miscarriages of justice and obviously collective, but as well as individual cases, have a profound effect right through the generations, and right through even in terms of the socioeconomic issues. So perhaps at some point if you could address that.

**SOLICITOR-GENERAL:**

Yes.

**GLAZEBROOK J:**

Not necessarily now, because the point you're making is a more individual one at this stage.

**SOLICITOR-GENERAL:**

Thank you, I will come to that. So I was just at the point, and it was a summary point, to say that in the Crown submission the interest of Mr Ellis' supporters and his family don't overwhelm the interests of victims, now the people most directly affected by the offending and the conviction, and they

don't overweigh, in my submission, principles of certainty and finality that are clearly at play here.

So can I turn to jurisdiction. So the Crown's position is set out in paragraph 3 of our written submission, which is that the appeal has abated on Mr Ellis' death. The appeal is quintessentially personal to the convicted person. *Kearley* tell us that in the House of Lords, but also the statute tells us that. Section 383 of the Crimes Act 1961, which is the provision under which this appeal was brought, a convicted person may appeal, and that remains the case even though the Court of Appeal decision that is now being appealed against, the 1999 decision, was a section 406 reference back from the executive. It's still considered to be a conviction appeal personal to the appellant, and so they've said there's no one before the Court. When this Court gave leave that wasn't the case, of course, and what has happened is that the matter has become irregular in the broad sense before the Court now that Mr Ellis has died.

In the United Kingdom that's always been the position until an Act of Parliament changed that position. In Australia that still seems to be the position, that the appellant's death abates the appeal. In Canada that was the common law position until the cases that Your Honours have in the casebook through the development of common law where the Court rules allowed the Courts to find in rare and exceptional cases that some appeals could be continued, and in New Zealand that was also the position until relatively recently.

I refer Your Honours to the case *R v Saxton* [2009] NZCA 61, [2009] 3 NZLR 29 which is in the bundle, which I don't need to take you to unless you'd like me to, but it was the first time the Court really grappled in more than a, I don't mean this disrespectfully, but in more than a cursory or sort of practical way of how to deal with the dead appellant. In *Saxton* the Court used the Court of Appeal (Criminal) Rules 2001 to allow the Court's jurisdiction to be exercised to hear that, and those facts were, of course, quite different in that the dead Mr Saxton and his continuing living father, Mr Saxton, were both appealing

their convictions for almost identical crimes. There was an issue of a pecuniary interest on the estate that remained, and the Court of Appeal there thought it was something that could be dealt with even though the Court of Appeal acknowledged that this was a rare an exceptional case where the jurisdiction could be used.

So that is why the Crown says, in a slightly long-winded way, but I think it's important to understand why this is so irregular and the Court will need to do something first as *Smith* says to regularise it before it can go on.

Of course, unlike the law of format, there is no provision to continue criminal matters after death. There is no form of procedure to assist this Court in how it should deal with the matter. So rule 5(2) Your Honours will be familiar with. You may dispose of the case as nearly as practicable in accordance with the provisions of rules affecting any similar case, or, if there are no such rules, as the case here, in the manner that the Court thinks best calculated to promote the ends of justice. So that broad ends of justice promotion concept gives Your Honours the power.

In my submission the first step will be to consider whether and how to substitute an appellant or to appoint a representative of the appellant, Mr Ellis. That's the first step, and then to consider in your discretion whether or not to hear the appeal, or, in the Crown's submission, to revoke the leave that was given. In my submission that's the proper – substantively the Crown says that's the proper end but also just at this point that's the, in my submission, the proper way to resolve it if the matter is not to be continued. This Court has before indicated that what will happen after leave has been granted but if something happens that changes the circumstances on which leave was given, the proper course is to revoke the leave.

**GLAZEBROOK J:**

Would we need to revoke leave on your argument which is abatement but only in exceptional circumstances continue because if the normal case is abatement then effectively that is the end of the matter –

**SOLICITOR-GENERAL:**

It probably comes to the same end.

**GLAZEBROOK J:**

– and it's only if the Court decides in its discretion to continue that that would continue?

**WINKELMANN CJ:**

Although it's currently something, isn't it, because we're here? Or is that just we're here on the application?

**SOLICITOR-GENERAL:**

Well, the Crown's submission is that it is nothing. It has abated.

**WINKELMANN CJ:**

Does the Court normally take formal steps to strike out an appeal or a proceeding on the death of a party? I think it does.

**SOLICITOR-GENERAL:**

In the New Zealand the Court's practice has been to simply view the matter as abated, note the file and leave it. Nothing formal appears to happen. No party needs to take a step. That's the case if I think back to the UK cases in the casebook prior to the statutory change. They simply declare, I suppose, the matter at an end.

**GLAZEBROOK J:**

That was my understanding.

**SOLICITOR-GENERAL:**

And so to Your Honour Justice Glazebrook's question, are we being tidy in a housekeeping way to say that this Court should then revoke its leave, or does it just get left. I think that outcome is probably the same in either way.

**GLAZEBROOK J:**

Yes, the outcome is the same. I was just asking procedurally whether it was necessary to revoke leave on the Crown's argument. Because the Crown's argument is abates, except in exceptional circumstances on application, it can be continued and at the moment that's what we're considering. An application for it to continue.

**SOLICITOR-GENERAL:**

Yes, I accept that Your Honour, and the cases that the Crown has put on this point are, of course, different in fact in that the appellant doesn't die, but some other significant change occurs that the Court says, we're no longer going to consider it. Yes I actually, now standing in front of Your Honour with those questions, I don't think that revocation of leave is actually required. It's a tidying, housekeeping question really. Not substantive.

**WINKELMANN CJ:**

Well something has to happen to it, so the question is whether there has to be an action of the Court or whether it's simply an administrative action.

**SOLICITOR-GENERAL:**

Or a declaration that the matter is abated would also have the same effect.

**O'REGAN J:**

That would suggest that if we accept the arguments made on behalf of Mr Ellis' estate, we would have to recreate the appeal. If it's abated we would have effectively reinstate it.

**WINKELMANN CJ:**

That's why I don't think it's an automatic thing.

**SOLICITOR-GENERAL:**

Mmm.

**O'REGAN J:**

We've been talking about continuing the appeal, which means that there's something to continue. If it's abated we would have to actually resurrect it.

**SOLICITOR-GENERAL:**

Resurrect it, yes.

**WINKELMANN CJ:**

Or this may be a philosophical question that we're not, it's beyond our capacity to resolve.

**WILLIAMS J:**

Well the answer must be if the estate wishes to proceed with an appeal then it must be a judicial declaration to abate it. It can't, it requires a Judge's decision to indicate whether it has abated or whether it still lives sufficient for the discretion to be exercised. No registrar could do that.

**SOLICITOR-GENERAL:**

No.

**WINKELMANN CJ:**

I mean I have my recollection from being a High Court Judge is that we did take judicial action to bring proceedings such, in that circumstance to and if there was a judicial act, so it wasn't an automatic act, but I don't know that it's critical so perhaps we could move –

**SOLICITOR-GENERAL:**

And was the act recognising what had happened or was the act, yes, mmm.

**WINKELMANN CJ:**

And I don't know that it's going, it's not going to be dispositive of the issues we have today.

**GLAZEBROOK J:**
And it may be that the judicial act is merely to say the appeal abates rather than revoking leave in the circumstance, because –

**SOLICITOR-GENERAL:**
Yes, and a declaration that it has or is abated.

Can I just make a submission, which is still about, which still comes from my submission about revocation but it just a point about moot appeals generally which, of course, this Court and all Courts take the view that moot appeals should continue only where there is a sufficient public interest in resolving a question of law for which context is unimportant and that departures from that position should be undertaken with caution. I think we're seeing the same thing being reflected here in this Crown submission about the rare and exceptional case and, of course, as I'll come to, this appeal doesn't, isn't able to be resolved in a way in which context is unimportant. The Crown says there is no transcending legal issue that this Court needs to determine.

So if the Court is going to deal with the matter then the first step is to substitute or appoint a representative and that person can then be properly before the Court. There's not really very much in that now, in my submission. The substituted person can't stand in the shoes of the appellant, of course. Couldn't be retried, of course, if that even was the issue, which it isn't here. In *Saxton* the Court substituted the dead appellant's mother as the appellant so that they had a representative of the appellant before them but then actually continued the case in the appellant's name. She didn't become a party. I think she's best described as a representative of the appellant.

The only time where that will become an issue is if further evidence is to be filed and Your Honours have noted in last week's judgment that the Crown might bring a fresh application, bring an application again to adduce further evidence. That will become a problem for a substituted appellant. I might not take that point any further, Your Honours, given the nature of the judgment, the nature of the evidence that Your Honours have seen already in the

application from the Crown that was declined. That might become an issue, and I'll come to that again in the adversarial contest part of the test. So the first step –

**GLAZEBROOK J:**
Is the submission because of the lack of ability to take instructions from the deceased appellant? Is that…

**SOLICITOR-GENERAL:**
Yes. I mean accepting, and as Mr Harrison put it, that there is a lot already before the Court for which active instructions aren't required, I'm indicating that there might come a time when that no longer is the position.

So that's the first step. The Court needs to substitute or find a representative and to that end because of the problem I'm just adverting to, the Court really takes no issue whether it's Mr Ellis' brother who has indicated he can be a person so nominated, but the Court does need a live person subject to its control here.

**GLAZEBROOK J:**
So is the submission still that it – just so basically – submission still that it continues in the name of Mr Peter Ellis but his brother is appointed just as his representative should the appeal continue for the purposes of the appeal, is that…

**SOLICITOR-GENERAL:**
That is one way that it could be done, yes. So that was my submission about the jurisdictional point and I come to the substantive point, and I've already mentioned, of course, the rare and exceptional threshold for the exercise of this discretion or, as another Court has put it, to be sparingly exercised. That was *Saxton* in the Court of Appeal.

I agree with my friend, Mr Harrison, that the *Smith* tests are not set in stone and they're not, well, they're multifactorial and flexible. This interests of

justice, as Your Honours are well aware, is an overriding principle that is a flexible consideration, and in my submission it is intensely fact-specific. Mr Harrison's submissions were at a level of abstraction about what the issues were here for the Court to deal with but in my submission this question, should we continue to hear Mr Ellis' appeal, is an intensely fact-specific question for Your Honours in exercising that rare and exceptional discretion.

In the written submissions from the Crown at paragraph 4 we've set out three categories and I just want to address two things about that. First of all, to correct, in paragraph 4, it says, "The Crown submits there are three categories where the Courts should exercise their jurisdiction." That should be "could" exercise their jurisdiction.

**WINKELMANN CJ:**
Or "may".

**SOLICITOR-GENERAL:**
"May," yes, indeed. But the other point to make about that is that I don't want it to be taken the Crown is saying there are only these three situations because this is a heavily laden question with what is just, what are the issues here, it's multifactorial as *Smith* tells us, it's broad, it's flexible, in order to do what is needed in the interests of justice or to advance the ends of justice.

In my submission Mr Ellis' death does not simply render the matter moot such that the many cases that we're all well familiar with about how to deal with moot matters are applicable because the balance of interests has significantly changed. The appellant in death's interests are no longer before the Court and as I have already submitted that this is an intensely personal appeal against a conviction and that difference is more than a simple moot matter where the Court could continue or might continue without rebalancing those interests, and I'm aware of this Court's caution as I took it from the judgment last week not to re-run the leave question before Your Honours.

**WINKELMANN CJ:**

So your point is it's not right to say it's moot because there are interests that continue to be very much engaged?

**SOLICITOR-GENERAL:**

Well, I say it's not simply moot such that Your Honours might say, well, without the personal, without the parties, there is still something here. In my submission it is super-moot in that the interests that once existed are no longer here. It was different from a case, for example, if a party considers they don't want to continue or the individual matter is resolved between the parties but there's still a bigger issue of law.

**WINKELMANN CJ:**

What I was saying to you is it's not super-moot in this sense that although Mr Ellis' right to be vindicated no longer, I mean interest in being vindicated no longer continues because he has died, the interests of the complainants remain very much engaged.

**SOLICITOR-GENERAL:**

Well, yes, thank you, Your Honour, although, yes, that is also the Crown's submission that when this Court, having given leave, it's a matter of significant and public importance and, as Your Honours said in the leave judgment, and interests specific to Mr Ellis, those balancings have to occur again and I'm not saying to re-run the leave question but they have to balance again because the interests, his are gone and as Your Honour, the Chief Justice, is pointing out, the Crown's submission, the interests of the victims remain heavily to be weighed in that balancing.

**GLAZEBROOK J:**

The submission is in terms of the public interest factors, these have changed significantly because there's no personal vindication because of the fact of Mr Ellis' death?

**SOLICITOR-GENERAL:**

Yes.

**GLAZEBROOK J:**

That's the submission. It's a different balancing exercise and I certainly wouldn't say that it was re-running the arguments and that was not what was meant by that comment.

**SOLICITOR-GENERAL:**

No, thank you, Your Honour, yes. And the Crown does acknowledge, of course, Mr Ellis' family and supporters and they do have an interest here. But they're not the same and they do weigh differently and I'd like to spend some time on how the Court, the Supreme Court in Canada has dealt with that question.

**GLAZEBROOK J:**

And are you going to deal with Mr Ellis' mother and the point specifically made about extra interests of the other crèche workers and Mr Ellis' mother that was made by Mr Harrison?

**SOLICITOR-GENERAL:**

I can. I will. I hadn't anticipated dealing with them separately but in light of his comments I can deal with that.

**GLAZEBROOK J:**

Yes, that's what I was just asking for a response in terms of those comments if there was one. Aside from the interest, is it the same as Mr Ellis' interest which, of course, is accepted?

**SOLICITOR-GENERAL:**

So can I ask Your Honours to turn up *Smith* in the Supreme Court in Canada which is at tab 30. So at page 403 – these pages confusingly have two sets of numbers but I'm referring to the one at the top on the right-hand side of the page.

**WINKELMANN CJ:**

Is there a para because I'm going from Mr Harrison's copy.

**O'REGAN J:**

It has paragraphs in the margin.

**WINKELMANN CJ:**

Okay, I'll go to the Crown one.

**SOLICITOR-GENERAL:**

Page 403 and paragraph 40(2). Well, actually, I'll start at 40(1). So as page 403 begins at paragraph 40(1) the Court is referring to the earlier case of *R v Jetté* [1999] 182 DLR (4th) 454 (QCCA) where the appeal was heard after Mr Jetté's death and the Supreme Court looks at the three reasons that the Quebec Court of Appeal gave. There were serious grounds of appeal. The verdict carried significant consequences for the parties seeking to continue the proceedings, and that was the family of Mr Jetté in the interests of justice, and the criticism that the Court makes of that, it says in some ways it's too broad and in some ways it's too narrow, the idea that, at point 2 on that page, the verdict carrying significant consequences for the party. In most cases this would be self-fulfilling because if there were, because if survivors of the appellant didn't feel strongly about the matter, they were unlikely to insist on the matter going ahead or resisting any motion for it to be quashed. But then they say, and this is the point I want to make to Your Honours, that the second factor is a useful reminder to differentiate between the benefits of the appeal to the original appellant that can no longer be comforted and the collateral consequences or potential benefits if any to those who survive him, and to the public.

They go on to say, it's a worrying way to put it, as the Court of Appeal did in *Jetté*, significant consequences to the parties seeking to continue it because it's both too narrow and too broad. Too narrow because the interests of the, the general interests of the public might be stronger than what motivates the survivors, but too broad as well because, as the Court goes on over the page

at paragraph 45, “Any criminal conviction carries significant consequences in the subjective eyes of the executor or the personal representative of the member of the family.” They go on to say, “Most serious crimes carry a stigma and if that was sufficient the combination of the appeal of a dead appellant would become the rule rather than the exception in criminal matters. So to come to Your Honour Justice Glazebrook’s question about the Crown submission in relation to a particular point put in relation to Mr Ellis’ mother, I would say the same point arises here. Of course she has an interest, and of course she feels the stigma, but that isn't sufficient, in my submission, to reach the rare circumstances in which this discretion should be exercised, because then we would never, it wouldn’t be rare. It wouldn’t be distinguishing enough.

**GLAZEBROOK J:**

My understanding was that Mr Harrison was saying that she had a special interest and had given that at least some of the allegations were that she was actually herself involved in the offending and so that has a personal stigma for her that is over and above my son was accused of a serious crime.

**SOLICITOR-GENERAL:**

As I understand it those were matters that were ventilated in public, not in the court, not through the process. She wasn’t charged so that was, that comment that is made through publicity or through media or other comments, in my submission that can't be relevant here because again it would lead to any criticism of a person’s perhaps involvement or blame for what happened for a family member being convicted and has then died, again we would be in the position of this no longer being a rare and exceptional situation.

**GLAZEBROOK J:**

It’s probably relatively exceptional that you have that comment without someone being charged. I know it does occur but it’s possibly slightly more exceptional than the run of the mill. You certainly get criticism of they should have controlled their son more but not that they were personally involved in

the offending. Not to say that that takes away from your point you're making, it's just that it probably isn't a floodgates was the only point I was making.

**SOLICITOR-GENERAL:**

No, I accept that. It probably isn't a floodgates. But again this must be about, that might, as I've said already, this is an intensely fact-specific question, how the interests of justice should fall, and I can see that it might be a situation if what the Court had in front of us was it was conclusive evidence that determined guilt or innocence of the person who has died.

**WINKELMANN CJ:**

Do you know the detail of that which Mr Harrison refers to, because he didn't give us any detail?

**SOLICITOR-GENERAL:**

I don't have any – it was in Mr Ellis' affidavit that he swore just before he died, but I don't know anything more. Such a factor might be relevant if, say, as in *Jetté*, the Court was faced with evidence that conclusively scotched the Crown's case, and Mr Jetté had died, and it was in the interests of justice to deal with that matter by quashing the conviction. If in those facts there was a family member who had been implicated but not charged, that might be a weighty factor.

**WINKELMANN CJ:**

Anyway, your point is that it may weigh but it can't weigh much?

**SOLICITOR-GENERAL:**

Certainly that, thank you, Your Honour, yes, it –

**WINKELMANN CJ:**

On the facts of this case?

**SOLICITOR-GENERAL:**

Yes. I turned over the page on *Smith* to 404 to point out two other points. At the bottom of paragraph 47, sorry at the bottom of page 404 which is paragraph 47, the Court there considers that in *Jetté* the interests of the family and the fact that they were very motivated to continue the appeal were actually useful to consider in the "is there an adversarial contest" here. That's where the *Smith* Supreme Court would have put that question. Their determination to establish his factual innocence is supplying the adversarial context.

And so the other point from *Smith* that I want to bring up is at the bottom now on page 405, paragraph 49, which is a long paragraph sort of summarising the point. "The existence of collateral consequences for the administration of justice, quite apart from the interest of the particular convicted individual or his family, is an important consideration." Now that was raised in *Jetté*, the police brutality and the police officer who perjured himself in the trial. So they are significant consequences for the administration of justice quite apart from the interest of the particular individual. They go onto another case, "In *Morin*," but at the bottom of that paragraph, a moot appeal may also raise questions about systemic failures in the justice system which transcend the interests of the immediate parties, and may justify the continuation of the appeal provided the appropriate adversarial context exists. And I am going to next come to that point, what of other circumstances that transcend the death of the appellant.

**WINKELMANN CJ:**

Can I just take you to this? There's a sentence earlier in that paragraph 49, "In *Morin v National SHU Review Committee*," where the Court says, "For example, a legal point arose which recurs with some frequency but, due to the nature of the proceedings in which it generally rises, is ordinarily evasive of appellate review," and I think that's the point that Justice Glazebrook took Mr Harrison to earlier. This is an appeal which is quite uniquely set up to have a look at this issue of memory and the impact of that evidence, where it should be admitted and who should be regarded as an

expert, and we have an exercise which I think is quite unprecedented which has been undertaken on behalf of Mr Ellis by expert evidence, including a very extensive engagement with international experts. It's unlikely that the Court's going to have a case set up in this way for it to look at this really very important issue again. So I just wanted to ask you if you could comment on that because that seemed like a good point.

**SOLICITOR-GENERAL:**

Yes, thank you, Your Honour. That question as to whether something will come before this Court in a way or whether this issue is going to evade appellate consideration, which is the point being raised there, in my submission this isn't such a case. For one thing, as Your Honours have already discussed with my friend, Mr Harrison, the law has changed significantly. Practice has changed. I don't think Mr Harrison referred Your Honours to the fact that section 23G has been repealed.

**GLAZEBROOK J:**

He did say that.

**SOLICITOR-GENERAL:**

So there is a very significantly different factual and practice matters that in fact are coming up through the Courts. There are a number of cases that are certainly getting first instance appellate consideration on memory, whether juries are assisted by memory experts or whether in fact that young children's evidence could be subject to contamination or could be susceptible to suggestibility. Contemporary matters, either awaiting judgment in the Court of Appeal or awaiting hearing in the Court of Appeal. One such case that has been heard by the Court of Appeal is *Bradley* where some of these very issues are being dealt with on contemporary practice and contemporary law. So to Your Honour Chief Justice I say first of all these are not matters that are envading appellate scrutiny, because they plainly are. They might well come to this Court and when, or if, they do that will be on a basis that is about current law and practice.

**WILLIAMS J:**

I wonder how powerful that point is because all of the Crown's key arguments is, look, we've been here before. We've done this three times. Same arguments. Which means that actually there is a complete record of precisely the things, presumably, that *Bradley* will talk about, but more complete and more comprehensive, more holistic.

**SOLICITOR-GENERAL:**

Well I have to accept, of course, that there is a whole record, as Your Honour points out. But 25 year old practice, I'm about to come to the question is there an issue here that transcends the death of the appellant and I think we're right on it so I'll just keep going with that point. A practice that is 25 years old, that might be fully before you, but to what end. Are Your Honours able to, will Your Honours be able to grapple with what my friend invites you to comment on who should be an expert and –

**WILLIAMS J:**

When they should be engaged.

**SOLICITOR-GENERAL:**

When they should be engaged and when juries are assisted by memory evidence with what I would suggest would be quite a vacuum for Your Honours for modern relevance. Yes you'd have the complete record but it is a historic record.

**WILLIAMS J:**

Well my point is really that we have a complete record in which memory was in play. Memory and the reliability of it was being attacked roundly, both in several levels of legal submission, and in the evidence itself, in a process which involved the interview at some level or another of 118 potential complainants. It'd be hard to replicate that in terms of a case which so completely sets up the systemic issues. It is itself a systemic case, you might say.

**SOLICITOR-GENERAL:**

Well I wouldn't accept that, Your Honour, that it's systemic. I accept, as I've said, that you have the whole matter before you and combed over many times as Your Honour has said. The issues are there, memory, but the intensely fact-specific questions that Mr Ellis' case has to face in order to persuade Your Honours that there was a miscarriage, will go to whether any of those convictions are unsafe because of the risk of contamination or the suggestibility of the children. And it is part of his case that the jury was not helped by the experts. It actually hasn't been part of the case to date that the experts were not expert, or they shouldn't have been called. That is what contemporary courts are saying. The appellate courts are saying, do juries really need all this memory evidence. Actually juries are capable of understanding the basics, that memories can be, they can fail, they can be manipulated in the way that the matter is brought, the way that evidence is brought to the Court, and that can never be undone. Those are matters of common sense. The appellate courts are saying to us, so Mr Ellis' case doesn't actually raise those questions of who is an expert, and when should they be used. His challenge is to the specific memories and evidence of the victims, and the next part is part of the Crown's criticism of his case, is that it doesn't follow on then to say how has that affected the evidence that the jury heard, the cross-examination of the children, the examination, cross-examination of the experts, and hasn't dealt with the fact that there were mixed verdicts in respect of the same process and the same evidence.

**WINKELMANN CJ:**

Well, can I just ask you? I think, well, two points. Firstly, doesn't the appeal itself raise the issue about who's an expert on memory because in fact the contest between experts raises that because the appellant's experts say that the respondent's experts aren't proper experts on memory so the appeal itself raises that issue?

**SOLICITOR-GENERAL:**

I suppose it does. At that point it raises that issue. Mr Ellis doesn't raise that issue. He doesn't say the – at the trial –

**WINKELMANN CJ:**

No, I take that point, but the second issue I wanted to raise with you which is one I mentioned to Mr Harrison, you say all this time has passed but essentially what is occurring is fundamentally the same thing. Children are being, engaging with their families and a complaint is arising, they are being taken to the police and they are being asked questions. So although time has changed and some of the finer points of what occurs through the formal interview process may have changed and refined, it's still fundamentally the same process that's going on. Children are being asked to record. So human memory in operation and that is the thing that we are being asked to look at on this appeal.

**SOLICITOR-GENERAL:**

In my submission that is such a sort of an abstraction of the questions that are being brought on this appeal that the Court only has – if that's what the Court would attend to on the appeal, it would also need a lot – I was going to say it would need a lot more evidence about current practice because, yes, you're right, Your Honour, that in a very broad sense children are asked questions and that is recorded and then it might be put to the jury, but in such a different factual and legal setting now that in my submission if that is the issue that captures the Court's interest in continuing this appeal, it is at too high a level of abstraction for today's practice.

**WINKELMANN CJ:**

Yes. That's not what I'm saying to you. I'm saying that this is fundamentally a human process and the fundamentally human process has not changed in 26 years. These children are engaging with their parents in relation to the issue. The whole – according to the expert evidence, the suggestibility has occurred in that context initially. Their memory has already been affected before they are being interviewed. So it's the process of memory and how it operates is at the heart of the appeal. Contamination, reconstruction.

**SOLICITOR-GENERAL:**

I would say two things in response to that. On one level that is the same no matter. This is not relevant then that as children no – in any challenge or contest, particularly in criminal sex cases, no complainant, as they are then, is likely to arrive immediately at the Court without having spoken to anyone. So it has to be relevant what the processes are that are gone through. But then my second point to that is, with respect to Your Honour, it sounds much more like a Commission of Inquiry's job to look at the overarching approach to how we –

**WINKELMANN CJ:**

I'm not suggesting that. I'm trying to get to the heart of what Mr Harrison says is the broad issue and you're saying things have changed so much that it's not helpful to look at it and I'm saying to you, well, has it really changed that much? It's still the human process. It's still the operation of human memory. I'm not suggesting that you'd undertake an entire Commission of Inquiry into it, although that might be interesting.

**SOLICITOR-GENERAL:**

Well, as the Australians have done exactly that.

**WINKELMANN CJ:**

Yes.

**SOLICITOR-GENERAL:**

But in any event I know that Mr Harrison submits that's what his case is but Mr Harrison's case has to be that any of the convictions that Mr Ellis has challenged are unsafe. With respect to him, he cannot bring a case now that is about, broadly speaking, how should we question, record and hear the evidence in criminal cases. That is akin to an inquiry. His case must be about pointing out that any one of those convictions is unsafe.

**WINKELMANN CJ:**

And that is his case. He's simply saying that because of the range of circumstances, because of how many interviews there were, et cetera, it's a good review of the issues, and that's what I'm saying too. And your point is that time's gone past and so therefore it really isn't a particularly helpful review.

**WILLIAMS J:**

Also I think it runs into the point made at paragraph 49 of *Smith* that you underlined, which is some things are so systemic they transcend personal interest. Your argument is the more systemic it is, the less useful it is as the basis for an appeal. Now I wonder whether that can really be supported.

**SOLICITOR-GENERAL:**

No, sorry Your Honour, that isn't my case, that the more systemic it is the less likely it is, but rather if this Court wants to consider the systemic question about how children are interviewed and brought before a Court in order for a jury to determine a matter that's before them, my submission is that this is so old that it is not useful to ventilate that systemic question, because of the change of practice and of law.

**WILLIAMS J:**

So at the heart of this aspect of the appeal is the experts and the processes undertaken, the expert's evidence and the processes undertaken at the time were inconsistent with the science of and reliability of memory, encoding, amendment and so forth. And I think the appellants are saying that if we have the science right in 2019 then the legal principles about standards that should apply must be legal principles based on that science because it was better, or more correct, than the science they'd obtained in 1993. If that's the case does it really matter what the practice is in the Courts today or even in 1993. It's really a contest over the science and the law that must follow from the science if it's accepted.

**SOLICITOR-GENERAL:**

I think I want to say three things in response to that Your Honour. The first proposition that I understood Your Honour to put to me was, was the evidence of Professor Hayne, and it is contested as to whether even if the day –

**WILLIAMS J:**

Sure.

**SOLICITOR-GENERAL:**

So there's a contest, or at least a conflict there.

**WILLIAMS J:**

Yes.

**SOLICITOR-GENERAL:**

I think there is a strong question to be asked and answered about are we talking about a science here or are we actually talking about analysis and revision in the abstraction of matters that get put to juries all the time to determine –

**GLAZEBROOK J:**

Sorry, perhaps if you just explain that point to me just a bit – that second point, I'm not sure I've got it.

**SOLICITOR-GENERAL:**

It's not just a matter of science.

**GLAZEBROOK J:**

Whether it is a matter of science, and what do you say – or, so you said it was a question of whether it was a matter of science.

**SOLICITOR-GENERAL:**

To which I would submit that this isn't a science. This isn't a matter that we can go back to 1993 and say he wasn't here or we now know proof of some particular factor in the case.

**WINKELMANN CJ:**

So what are you saying is not science?

**SOLICITOR-GENERAL:**

Well His Honour is putting to me if we know that there are these matters of science in 1993, this is what I understand His Honour to be putting to me, matters of science in 1993 that we now know something different about it, can we not go back and as a matter of law determine that question.

**WILLIAMS J:**

I think –

**WINKELMANN CJ:**

But can I just ask you to answer what are you saying is not a science? Are you saying that memory, what we know and don't know about memory is not a science, is that what you're saying or…

**SOLICITOR-GENERAL:**

Well it isn't a science of a type that is capable of certainty. There will be experts who disagree probably forever about the nature of memory. It isn't the same science as occurred say in a case where DNA evidence is available.

**WINKELMANN CJ:**

It is a science, it's just a different kind of science.

**SOLICITOR-GENERAL:**

I can accept it is a science. It isn't a scientific fact that we can go back to 1993 and determine. We would still have a contest of opinion.

**GLAZEBROOK J:**

Well in climate change, for instance, there were still people who disagreed but nobody would suggest that climate change is not a science, would they? The fact people disagree doesn't make it not a science, it just means that people disagree on what the –

**SOLICITOR-GENERAL:**

Perhaps my submission should better be, that we can't go back to 1993 and say determinatively this is how it should have gone.

**GLAZEBROOK J:**

Right, yes, I understand that.

**WILLIAMS J:**

Well, that's –

**GLAZEBROOK J:**

I mean we may or may not be able to but we don't know until we look at it I guess.

**WILLIAMS J:**

My question was really, if the appeal is based on our science is better now, and you'll disagree with that of course, in fact you argue there's no need for science, people understand this stuff, and the appellant's experts say, no, that's completely wrong, they don't. That's for argument in due course if we get that far. My point is, on the basis of what is a complete, extraordinarily complete record, and arguments around whatever the best science is, if we're able to come to a view about what the best science is, then the law to ensure that it adheres to, as it has fidelity to that best science, ought to follow from that whatever the practice is at any time on that timeline. In other words it's an issue the law, principles of law that apply to reliability of this evidence, must depend on quality science, to some extent, and therefore in practice in 2004, or even 2019, while interesting, is not going to be relevant to that question. Or at least not relevant enough for it to be a slam-dunk on your side of the argument.

**SOLICITOR-GENERAL:**

Mmm.

**WINKELMANN CJ:**

You might want to think about that over the morning tea break.

**WILLIAMS J:**

Speaking of dunks.

**GLAZEBROOK J:**

That's probably the argument, that if you find in 2025 that in fact say I mean let's take it out of this area, because climate change science has moved on, that in fact something should have been done differently, as a matter of law should that be a basis for allowing the appeal, rather than saying that that wasn't the practice at the time, and there are a number of arguments in respect of that I think.

**WINKELMANN CJ:**

Right. We'll take the morning adjournment. You've now had many ideas thrown at you, you can think how you respond after the adjournment.

**COURT ADJOURNS: 11.32 AM**

**COURT RESUMES: 11.47 AM**

**WINKELMANN CJ:**

Ms Jagose.

**SOLICITOR-GENERAL:**

Thank you, Your Honour. So we were just at the point where Justice Williams was putting to me this as I understand it. You've got the full record in front of you to show in order that this Court could determine what is the best science in relation to how children's memories should be treated and then the Court could then say what is the law that should follow that best science. That is what I think is being put to me. Is this the transcending issue? And I'm afraid, Your Honours, that I'm going to make the submissions that I think I've probably already made.

This is an appeal against conviction and this is an appeal against the 1999 Court of Appeal's determination of the issues. That question about what is the science and what might the law be is, with respect, at such a level of abstraction that it is more akin to an inquiry, not to the appellate function of the Court, in particular the apex Court, unlike *R v Poulin* 2019 SCC 47, 11 October 2019, for example, which we haven't gone to and we probably don't need to, which was in the casebook, in the Supreme Court in Canada, the question there about the proper interpretation of the charter was going to be a matter of law that determined the question for all Courts on sentencing and, with respect, I cannot understand how this Court could come to something so concise and capable of appellate guidance with matters that are, as I've already submitted, when you get back to the evidence, old practice with laws that have changed.

One of the issues that my friend hasn't addressed is that one of the changes to the law in the Evidence Regulations 2007 is that the Court may give directions to juries when hearing evidence from children under six, and that includes some of the contested criticisms here. Those regulations aren't in front of Your Honours. In fact, they aren't even in front of me. But they make it clear that young children, children under six, may well be required to be questioned differently, to be encouraged to speak before they are able to make allegations or give their evidence properly. That change is a significant one in light of – I might just bring those regulations up, if I may. So I think that's a significant change to the law that is at loggerheads with Mr Harrison's submission that one of the things that has gone wrong was the way in which the children were asked open questions such that they might be – such that their evidence might have been unreliable. Might I bring that up? Are you assisted by that or –

**GLAZEBROOK J:**

While you do that I think that as I understood Justice Williams he was saying that no matter what the law might allow or not allow that if in fact the science shows that these were inappropriate questions or there was an inappropriate

interview, the Court would intervene in any event in terms of miscarriage of justice. There practice and even the legislation might well be irrelevant to that question because the issue is going to be just the issue as to how that should happen in terms of the science, and I might be misunderstanding.

**WILLIAMS J:**
No, that's it.

**GLAZEBROOK J:**
No. So that was the question. Now, of course, you might say that the law in practice can't be irrelevant and I think that's where your submissions are going in terms of these regulations. Have I understood your submission in response?

**SOLICITOR-GENERAL:**
Thank you, that is the submission. That is one of the submissions.

**WINKELMANN CJ:**
So what are the regulations?

**O'REGAN J:**
The Evidence Regulations 2007. I think it's regulation 49 is the one you're looking at.

**SOLICITOR-GENERAL:**
Thank you, it is 49. I'm no longer connect to the network, sorry, Your Honours. I don't have it. Thank you, it is 49. Have Your Honours got that? I'll just address the points.

**GLAZEBROOK J:**
Sorry, I actually…

**ARNOLD J:**
So just describe it to us. I haven't…

**SOLICITOR-GENERAL:**

So in criminal –

**GLAZEBROOK J:**

Yes, it's not as easy to get things up on here as it should be I'd say.

**SOLICITOR-GENERAL:**

Yes, I appreciate that. "If, in a criminal proceeding tried with a jury in which a witness is a child under the age of six, if the Judge is of the opinion that the jury may be assisted by a direction about the evidence of very young children and how the jury should assess that evidence, the Judge may give the jury a direction to the following effect." There are five possible directions. "Even young children can accurately remember and report things that have happened to them in the past, but because of developmental differences, they may not report their memories in the same manner or to the same extent as an adult would. This doesn't mean that a chid witness is any more or less reliable than an adult. One difference is that very young children typically say very little without some help to focus on the events in question. Another difference is that, depending on how they are questioned, very young children can be more open to suggestion than other children or adults."

The final one, "The reliability of the evidence of very young children depends on the way they are questioned, and it is important, when deciding how much weight to give to their evidence, to distinguish between open questions aimed at obtaining answers from children in their own words from leading questions that may put words into their mouths." So if that is the state of the law today, which, of course, is a matter that the Court may give direction to a jury to assist them understanding evidence of very young children, with respect to Your Honour I struggle with what this Court might say which is applying what the law should be following the best science given the, it's my same submission I'm afraid, the distance of time and the change of law and practice.

**GLAZEBROOK J:**

And did you say that was consistent or inconsistent with what the experts were saying now? I thought you said it was inconsistent. Some of it's consistent and some of it's inconsistent, is that right?

**SOLICITOR-GENERAL:**

Well, some of the criticisms – precisely. Some of the criticisms that come are from, will you recall, Professor Hayne's diagrams or charts perhaps – I'm sorry, I don't mean to disrespect her by calling them those. I think she called them charts, identifying how many leading questions were given. Well, that is unhelpful, in my submission, given that we now know that it is accepted that sometimes very young children will say very little without some help to focus on the question.

**WINKELMANN CJ:**

But that's a different thing to a leading question. That regulation 49 contemplates that the child may need some assistance of focusing on the particular issue but not being led with an answer and the point that Professor Hayne is making is about questioning which actually suggested bad things had happened, et cetera, so…

**SOLICITOR-GENERAL:**

Her counting of questions, she doesn't actually follow through with that. So what are the questions she's referring to? Why are they to be criticised for, in the words of those regulations, putting words in the children's mouths as opposed to helping them focus on the events in question?

**WINKELMANN CJ:**

So her evidence is very consistent with those regulations because she's saying you shouldn't put words in the mouths of children.

**SOLICITOR-GENERAL:**
Well, I would say they are also inconsistent with these regulations because she doesn't seem to accept that without some help to focus on the events in question the young children wouldn't have said very much.

**WINKELMANN CJ:**
I suppose –

**GLAZEBROOK J:**
Actually, I thought – well, I don't think it's worth getting into the minutiae of the evidence but I didn't actually read her as saying that. It's just – but anyway it's not worth the candle.

**SOLICITOR-GENERAL:**
So the point of my submission which I'm sure is clear is that in light of the law and in light of the changes in practice what this Court can do with a record that is of a very old series of events is not the role of the Appellate Court, is more akin to a broad inquiry, and actually you're starting to really stray away from the particular issue here which is these 13 convictions in relation to six children should one or any of them be set aside, and I won't go back into my submissions about the very specific and personal interest that Mr Ellis has in respect of that part of the case but I do say, with respect, these matters should not be pulled apart because then the Court will be, will not be within its own appellate function.

I haven't yet come to another point to that submission about finality and certainty, and just before the break Your Honour, Justice Glazebrook, put the question in a climate change context of 25 years on we find a change of science. You know, do we go back? There is a point at which we have to accept full finality and certainty, which in my submission has to be considered as part of the interests of justice, is important and here we have six victims with the certainty and finality of convictions that have not been upset despite two appeals and a Ministerial inquiry. That should play very heavily into the

question and in my submission outweigh what I understand to be a very abstracted from contemporary practice exposition of how the law might be.

I would, if Your Honours wish to hear from me, come to the point at the end of these submissions if Your Honours do decide to exercise your discretion to hear the appeal, what might you need, what else might you need and what else might the Crown wish to put before you. We can get to that.

**WILLIAMS J:**
Well, the underlying question, as you submit rightly, with respect, is, the underlying question is the ends of justice and finality and certainty. The question of whether something ought to be final and certain is a question that's essential to answering the underlying one, what are the ends of justice, and doesn't that really come down to how strong is this appeal?

**SOLICITOR-GENERAL:**
Well, no, in my submission it comes down to not only how strong is this appeal but also is there something that transcends the death of the appellant because I was at pains to spend some time on the point at the beginning of my submissions about the changed interests here absolutely require a different weighting and, in my submission, a different outcome. The strength of the appeal is less important in that weighing as compared to is there a transcending issue here. Finality and certainty. What is it that is so rare and exceptional that this conviction needs to be reviewed, and I have to say for the third time, by an Appellate Court? Those are the driving questions rather than the strength of the appeal alone.

**WINKELMANN CJ:**
So I was going to ask you if we can just look at that a little more closely. These are serious convictions so if we were to form a view that these grounds of appeal look strong – I'm not saying we have. I'm just saying this is a hypothetical consideration. Were we to form the view that the grounds of appeal look strong in respect of very serious convictions, is there an enduring interest which is beyond that of the appellant in a sense which is that the, the

integrity of our system of justice? So could the Court form the view that very serious convictions have been entered and that there are strong grounds to believe that they are unsafe in some respect but then decide not to proceed to hear the appeal? And I suppose the question is what does that do to the confidence in our system of justice and the fabric of it?

**SOLICITOR-GENERAL:**
So there is a question about the confidence in the system of justice and I think that might well also be factored in to what are the ends of interest here. And, Your Honour, the Chief Justice, has started that by saying these are serious convictions and, of course, I accept that. They are serious convictions when looked at from either angle but I repeat the submission that the interests of the convicted person have gone. They cannot be weighed in the balance now and there might be cases, although I say this is not one, where there are systemic issues that would so affect how people viewed or the confidence with which society would view the administration of justice that it would warrant a posthumous appeal.

But in *Smith*, even on pretty strong grounds of appeal where Mr Smith's inculpatory statement made without his relevant charter warnings and where his – whether – where one of the compelling pieces of evidence was from what is called a jailhouse informant without the jury being warned about the risks of that, so some pretty systemic issues, the Court still said taking out Mr Smith's interest there isn't enough here to be one of those rare circumstances in which we will consider an appeal that has abated.

So I accept Your Honour's proposition that there might be situations in which the Court says that the public interest in being confident in the justice system is the transcending issue, I say this isn't that case because at best what we have here is a contest about whether differently put, better put material before a jury might have come to a differently outcome. Now we don't – there is nothing conclusive or even close to conclusive about that.

*Jetté* went a different way, of course, with the Court saying yes, there really is an issue here about the police –

**WILLIAMS J:**
Perjury.

**SOLICITOR-GENERAL:**
– physical assault, sorry, perjury, yes, and the physical assault on Mr Jetté in order to get his statement. The only thing on which he was convicted was his own confession. When the Court found out that was obtained by violence from the police and a police witness statement that was a lie, that threshold, they said, was met.

**WILLIAMS J:**
Can I test you on the Mr Smith's interest is gone, which of course is the Canadian position, UK position, and I think probably the historic New Zealand position, but it's quite a western idea that on demise you have nothing to protect. If we're serious about tikanga in the law, as Justice Glazebrook mentioned, should New Zealand divert from that very Anglo approach?

**SOLICITOR-GENERAL:**
To that, Your Honour, I would say this, that accepting that that is a very Anglo approach and we have it not just in this context but also defamation, privacy interests, when you're dead these things are, you know, our law is redolent with them which is not to say they're right but that –

**WILLIAMS J:**
They are there.

**SOLICITOR-GENERAL:**
Well, they are law, which is not to say they should never change. It might be that when a Court is faced with a question in which the factual circumstance is one where there is evidence to say this is the enduring impact for survivors that that calculation might be weighed differently. I think what's –

**WILLIAMS J:**

But that's the survivors. What about the deceased?

**SOLICITOR-GENERAL:**

Well, that – yes, although that can only be –

**WILLIAMS J:**

You see in a tikanga context the death – and, of course, Mr Ellis is not Māori but that's not really my point.

**SOLICITOR-GENERAL:**

No.

**WILLIAMS J:**

In a tikanga context the death not only is not irrelevant, excuse the double negative, but an ancestor has even more reputation to protect, is more tapu, has more mana. So the Māori perspective on this I would have thought would be the opposite of the Anglo perspective, and so if an apex Court were a Māori Court, say, you'd be very unlikely to get that principle that on death there's nothing to protect for the deceased. Do you think we should divert from that Anglo principle just as a matter of general approach?

**SOLICITOR-GENERAL:**

I would say that the Court has to, must be open to that as a principle, properly advised and/or with the right evidence in front of it.

**WILLIAMS J:**

Sure.

**SOLICITOR-GENERAL:**

But who – but, with respect, in the face of the person who has died, it will be survivors who bring that perspective to Court, not –

**WILLIAMS J:**

Yes, but they'll – but as here they say we – the deceased's reputation is very important to us, something that doesn't resonate in the common law but very much does resonate in tikanga. Well, in the English common law. Obviously, we've got to the point where the common law has got a Māori flavour in it in Aotearoa.

**SOLICITOR-GENERAL:**

And I'd be slow to accept as a general proposition that this Court should recognise that without thinking again about what is the – so the conviction that here we're talking about, I mean that in any case that Your Honour is referring to we'll be talking about, that is also very personal to the person. I'm slow to accept that this must be a development that we should take here because we just don't have the material in front of the Court to –

**WINKELMANN CJ:**

What material do we have? Not a trick question.

**SOLICITOR-GENERAL:**

No. We have the evidence from Mr Ellis saying he wants his appeal to be heard and we have the evidence from Mr Mark Ellis saying that Mr Peter Ellis wanted the appeal to be heard, that he would stand in his shoes.

**GLAZEBROOK J:**

Isn't it a matter of law though, isn't the question being asked, given that we are in Aotearoa, given that we have the Treaty, given that we have statements, at least both extrajudicially and otherwise, that tikanga should be part of the common law generally, and in fact it should always have been part of the common law historically, then as a matter of law should we be taking the approach in this context and not when required by legislation, such as in defamation issues, that death takes away that personal interest of the person? That's the question that's being asked and it's nothing to do with evidence. I suppose we could get evidence of tikanga but I wouldn't – I would've thought that that was, if you look at *Takamore* and various cases of that nature, I

wouldn't have thought it was controversial to say that tikanga does not take the same approach. I would have thought judicial notice of that was probably able to be taken.

**WILLIAMS J:**

Well, can I just add one line to that, and that is, and it's writ most large in the Mokomoko Pardon and the Rua Kēnana Pardon in which these very points are made clear in the statutes –

**GLAZEBROOK J:**

Yes. Well, that's why I mentioned the individual cases when I asked the question first.

**WILLIAMS J:**

Yes, that's what you mentioned.

**WINKELMANN CJ:**

This is a – we're looking at it. We don't have tests yet. We can devise our own test and there is nothing to say that we have to take the view that the interest of the appellant dies with his – passes or ends with his death, but there are –

**SOLICITOR-GENERAL:**

No, I agree with that. This is for this Court to determine.

**ARNOLD J:**

I guess one thing we do need to understand if we do that is what are the implications of it in other contexts, and for myself I have not the faintest idea what the answer to that is and it is a matter on which I at least would want to hear argument because one may think, well, it makes sense here but what about over there or over there or…

**WILLIAMS J:**

And the converse is that when the rule was imposed no one thought about the implications of that either. These are judicially imposed, intuitive rules.

**WINKELMANN CJ:**

But another way of saying this is that you might need to take some time to have – we might need to give you an opportunity to file submissions on it because it's a tricky question we've asked you to address.

**ARNOLD J:**

Just if I – I don't want to have an argument across the bench but this is not an intuitive rule. It is based on personal jurisdiction and certainly in Australia it's based on the notion that as a statutory court an appellate court has specific powers. Now we've moved beyond that for what I think are perfectly sensible reasons but you do have to go back to the fundamentals and the fundamental principle as you articulate it is the criminal jurisdiction is a personal one and that has consequences.

**SOLICITOR-GENERAL:**

I would appreciate an opportunity to think about that point, which it's quite clear I haven't thought through.

**WINKELMANN CJ:**

And you had no notice of it.

**SOLICITOR-GENERAL:**

Well, I might have been able to think of it for myself but I didn't.

**GLAZEBROOK J:**

And we were asking, certainly for myself I was asking these questions without a fixed view on what it should be, but to get the submissions from both sides in respect of that particular point. So I would certainly appreciate having submissions in that wider sense and by no means indicating that I've got a fixed view on it.

**SOLICITOR-GENERAL:**

No, I would appreciate that opportunity because I can't answer that question now. Well, I don't want to. There's too much in it about –

**GLAZEBROOK J:**

Yes.

**WILLIAMS J:**

Very wise.

**ARNOLD J:**

One thing it would also be interesting to know is what impact it would have in terms of appeals. I have no idea how many appeals are not proceeded with because the appellant dies somewhere in the process and it would be useful to have some, if there are any, some statistics or understanding of what we're talking about.

**GLAZEBROOK J:**

And we're only talking really I think clearly here about the continuation of appeals rather than the bringing of appeals. But, of course –

**SOLICITOR-GENERAL:**

Well, are we, Your Honour? I mean the question itself might be –

**GLAZEBROOK J:**

No, no, no, in this particular case –

**SOLICITOR-GENERAL:**

In this case, yes.

**GLAZEBROOK J:**

– I was just indicating that it might be that there's a wider question that can be dealt with in the submissions, if there is a more floodgates argument in terms of…

**SOLICITOR-GENERAL:**

I accept that this case is –

**GLAZEBROOK J:**

Recognising of course that one of the other issues always in these matters is whether the other procedure is more appropriate in terms of – although presumably not after death. In terms of pardons, et cetera. Sorry, I was…

**SOLICITOR-GENERAL:**

The other procedure being a 406 reference?

**GLAZEBROOK J:**

Yes, whichever, whatever it is at the moment or if we do go down and have a criminal cases review.

**SOLICITOR-GENERAL:**

Thank you. Well, I imagine also that both parties will make submissions.

**WINKELMANN CJ:**

Yes.

**SOLICITOR-GENERAL:**

And could we suggest to the registry a timetable that we can agree?

**WINKELMANN CJ:**

Well, no, we can set that at the end of the hearing but you might like to just have in the back of your mind about how long you think you'd take on it.

**SOLICITOR-GENERAL:**

I'm just trying to see where I am at. I think I've –

**WINKELMANN CJ:**

So I'd asked you about the impact on the public confidence in the justice system if something we'd said appears to be strong grounds for an appeal is allowed to go unaddressed and you had immediately gone into the interest of

the fact that the appellant's interest ceases with death and that's how we ended up in a world of…

**SOLICITOR-GENERAL:**

Right, yes, and I think I was saying in that context that there might well be such cases but in my submission they would be at a high level of certainty or conclusivity about the issue. In this context it would be is there something that it is likely that the Court can conclusively determine guilt or innocence and of course we say this isn't that case.

**WILLIAMS J:**

Guilt or innocence, or guilt or not guilt?

**SOLICITOR-GENERAL:**

Guilt or not guilt. A fair point, thank you, Sir, yes. Although it might also actually confirm innocence.

**WILLIAMS J:**

Might do.

**SOLICITOR-GENERAL:**

For example, DNA evidence says it wasn't you.

**WILLIAMS J:**

Yes. Or it was.

**SOLICITOR-GENERAL:**

Or it was, indeed. Yes, it can go both ways. But that comes to my point about finality and certainty and I've already mentioned, of course, the victims' interests. They have finality. They have convictions. In my submission the best that Mr Ellis can do in this appeal will leave them in a limbo that I think needs to be weighed in to what the interests of justice are when they have gone through this process some 26 years ago with convictions that have

stood considerable scrutiny. I think finality and certainty is critical here to recognise their interests.

I said earlier in my, when I began, I would end by addressing all of these principles in the instant matter but as we have gone I think that I've addressed all of that.

Unless the Court has got any questions on those submissions, I would next, if it's useful, address what the Court might need if it is to hear this appeal or rather what – it struck me this week that we might have been in a substantive appeal set down for four days this week but for Mr Ellis' death.

**O'REGAN J:**
Can I just, before you do that, ask you, is there a clear distinction in the authorities between first appeals and subsequent appeals? I mean *Smith* was a first appeal, wasn't it?

**SOLICITOR-GENERAL:**
The cases that we have seen are primarily first appeals.

**O'REGAN J:**
Was *Jetté* a first appeal as well?

**SOLICITOR-GENERAL:**
Yes. So was *Poulin*, yes. In fact, one of the things about finality and certainty, I was looking to see whether the Courts made that distinction. The only places where sometimes that comment is made is in the UK and references back from the Criminal Cases Review Commission. The Courts there do mention is this a useful use of our resources and time given the length of time that has passed? I would, in my own submission, sorry, in the Crown's submission, the fact that this would be our third appeal and a fourth substantive look at the question also weighs very heavily.

**O'REGAN J:**
The authorities are – I mean the fact that they happen to be first appeals doesn't really tell us anything about what would have happened if they weren't. So we haven't got something which says –

**SOLICITOR-GENERAL:**
No, that's right.

**O'REGAN J:**
"This is a second appeal so no. We might have allowed it if it was a first appeal. We're not going to allow it for a second."

**SOLICITOR-GENERAL:**
We haven't got such a case. We haven't found one, yes.

**WINKELMANN CJ:**
What do you say is the significance of the fact that it's a fresh evidence appeal because of course in a sense that's like a first appeal, isn't it, because you look at it on a new basis.

**SOLICITOR-GENERAL:**
Well the Crown's written submissions addresses the Crown's position to that which is to say that while this is new in that it is – while it is new in that it is freshly finished, it isn't fresh evidence because the same challenges are made, the same criticisms are made, albeit with more years of research and study and commentary, but to the same point that the risk of contamination and the suggestibility of the children adversely impacted their reliability. Those are the same points being made, albeit in 1993 they were using 1993 expert evidence and in 2019, some 25 years of study and commentary have gone, so that is what we say to that point Your Honour.

Your Honour Justice O'Regan's question has prompted me to look at the case at 34. So tab 34 is a case *United States v Moehlenkamp* 557 F 2d 126 (7th Cir 1977), a circuit court which sets out at paragraph 3 how the

Supreme Court deals with matters, because in the United States it tends to be the practice that criminal convictions, the appeal abates on death of the appellant, but so does the conviction. There at paragraph 3 the Court is saying, "The Supreme Court may dismiss the petition…" for certiorari, "… without prejudicing the rights of a deceased petitioner, for he has already had the benefit of the appellate review of his conviction…"

So it doesn't quite address Your Honour's point but it is where the Supreme Court is thinking or saying a second appeal is different. That is, I think, to address the policy position there that in a first instance appeal, and you die before it has been heard, your conviction is also quashed on the policy basis that certainty and confidence in the conviction has been questioned by the filing of the appeal and so the interests of justice make those courts set aside the whole conviction. So in that context the Supreme Court makes the distinction where this is a second appeal that those policy factors don't play quite so heavily, and the Court deals with that at paragraph 3 saying, it's about half way down, "In contrast, when an appeal has been taken from a criminal to the court of appeals and death has deprived the accused of his right to our decision, the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal…"

So the Supreme Court, the merits have been resolved once, the second appeal takes on a different flavour and they might dismiss the appeal without dismissing the conviction.

**WILLIAMS J:**
Is this just implicitly that on a second go finality has greater weight than access –

**SOLICITOR-GENERAL:**
In our context, or in the States as well?

**WILLIAMS J:**

Well in any context really. That the interest of finality and certainty just gets heavier when you've already had one appeal and you're trying to get through another hoop.

**SOLICITOR-GENERAL:**

Yes.

**WINKELMANN CJ:**

Or is that there is greater confidence in the conviction once it has already been looked at by an appellate court.

**SOLICITOR-GENERAL:**

Well I take those points to be the same. That the appeal's looked at it once and hasn't disturbed it. The same, I see those to be the same proposition, I think, that I'm taking from that reference to the Supreme Court on a second appeal. We can be confident in the conviction because we've already looked at it once. It needs, finality and certainty do weigh more heavily.

**O'REGAN J:**

But the Court in *Smith*, for example, didn't quality the factors that it said should be taken into account by reference to first appeals or second.

**SOLICITOR-GENERAL:**

No.

**O'REGAN J:**

So it was just a generic statement.

**WINKELMANN CJ:**

So moving on to your point, what might the Court need if it is to hear this appeal?

**SOLICITOR-GENERAL:**

Dr Blackwell and Professor Seymour have set out in their affidavit that they were pressed for time and they would like to do further analysis, so the Crown would want leave to bring that further evidence, what they say will be a clause-by-clause analysis of the evidential videos. The Crown would seek disclosure of Professor Hayne and Dr Patterson's materials so that our experts' source materials are the questions that they have counted up to say are leading, by way of example, what were they, so that our witnesses can see them in their proper context and comment on that. In some ways it depends on this Court's decision as to the scope of the substantive appeal. The Crown might well want to bring expert evidence from international or other experts about contemporary standards of interviewing.

The Court might want to consider an intervener or an amicus in light of the lack of the ability in the appellant as substituted to give instructions for the matter to be properly argued.

As already indicated and as addressed in Your Honours' judgment last week, the Crown would bring a further application to adduce further evidence and it seems very likely that there will be cross-examination of expert witnesses as well as any other witnesses should there be any other evidence.

That puts me in mind that the four days that we had thought we would need for this appeal will not be sufficient, and if the Court is attending to the matter in order to provide guidance in the law as to this wider system issue about who are experts, when can they give their evidence and how do, to use my friend, Mr Harrison's, words, how's the chain of custody of children's memories get protected, I would say the sort of time that is needed for this Court needs to recognise that it is unlike an appellate function that the Court is being asked to determine and it might well need considerable time. I know Your Honour, the Chief Justice, didn't agree with my submission that this is starting to sound like a Commission of Inquiry but as far as I've understood Your Honours, and I accept that I may be wrong, what I'm hearing is an

appeal is going to be very like an inquiry for which considerable evidence and questioning of the evidence will need to be brought.

**GLAZEBROOK J:**

If he hadn't died that would be the case as well. I can't see that – because if this evidence is needed for the appeal, it would have been needed for the appeal anyway. I know that there was an issue about trying to get the appeal on before Mr Ellis died and that that was one of the reasons that it was accepted that it would perhaps have a truncated timeframe and I know that the Crown and the Court did everything possible to ensure that, but if there hadn't been an issue of Mr Ellis dying then presumably all this evidence would have been there. So I'm – the only relevance to the fact this evidence might be there is that it might take longer and be more of a waste of the resources, isn't it, rather than it changes the character of the appeal? Because had there been no issue of Mr Ellis being ill then one assumes that this type of evidence would have been thought necessary anyway.

**SOLICITOR-GENERAL:**

Well, I accept that there was an element of practicality about the timing and –

**GLAZEBROOK J:**

And that was clearly –

**SOLICITOR-GENERAL:**

– and there's no criticism anywhere to that point, but if Mr Ellis was alive and pursuing his appeal it would be an appeal, an ordinary appellate process about his convictions. But now –

**GLAZEBROOK J:**

Which would have had to do with, given the evidence that's been brought up –

**SOLICITOR-GENERAL:**

Yes, relevant to his convictions.

**GLAZEBROOK J:**

– whether they were actually appropriate people to give that evidence, which would necessarily have included the sort of – and one would have expected that Dr Blackwell and Seymour would have wanted further time to do more research, had they not been working to a truncated timetable.

**SOLICITOR-GENERAL:**

Which they did say. But in his death, if this Court is to continue the appeal, in my submission, and with respect, what I'm hearing, which might not be where the Court ends up, it is sounding like the transcending question, not the conviction at all, the transcending question is, what should the law be in relation to experts in memory of children's evidence. It is a bigger question than –

**GLAZEBROOK J:**

Well my understanding is that Mr Harrison's point is that that is the transcending question that has always been part of the appeal, and would always be, have needed to be answered in order to assess the appeal. That's what I've understood. And that, well not co-incidentally, that's the wrong word, but in fact that gives the transcending interest, that not that it only arises now, it at all has arisen.

**SOLICITOR-GENERAL:**

I accept that that is Mr Harrison's point and the death of Mr Ellis, in my submission, changes that significantly.

**GLAZEBROOK J:**

I can understand the change of balance and also should the Court be undertaking this sort of exercise in this, in a case which the Crown says is moot.

**SOLICITOR-GENERAL:**

Yes. Thank you Your Honour. That is what we say. Unless Your Honours have any other questions, those are the Crown's submissions.

**WINKELMANN CJ:**

In terms of filing of submissions in relation to the tikanga point, what time do you think you require Ms Jagose?

**SOLICITOR-GENERAL:**

I know I should look at my colleagues before I answer that question. I'm thinking a couple of weeks. Is that too long for Your Honours?

**WINKELMANN CJ:**

No, that's fine.

**WILLIAMS J:**

I thought you were going to say 2025.

**SOLICITOR-GENERAL:**

The question is whether Mr Harrison should file his submissions on this question first and we reply.

**GLAZEBROOK J:**

I was going to ask you that.

**WINKELMANN CJ:**

Perhaps we'll have Mr Harrison. How long do you need to take to file submissions, because you haven't addressed it in your submissions.

**MR HARRISON:**

I have not addressed that issue Your Honour. I would imagine I would be wanting to speak to an appropriate qualified person to guide me in terms of those issues.

**WINKELMANN CJ:**

Three weeks?

**MR HARRISON:**

Three weeks.

**GLAZEBROOK J:**

And then two weeks after that. Where does that take us to in terms of…

**WINKELMANN CJ:**

Next year I think.

**GLAZEBROOK J:**

It probably does take us almost to next year.

**WINKELMANN CJ:**

Almost to next year.

**SOLICITOR-GENERAL:**

Goodness, yes, I think it probably does.

**WINKELMANN CJ:**

Well, we can work those dates out.

**O'REGAN J:**

We're not expecting you to file submissions on Christmas Day if that's what you're worried about.

**SOLICITOR-GENERAL:**

Thank you Sir. If that's all from Your Honours?

**WINKELMANN CJ:**

No, I think those are the questions, thank you Ms Jagose.

**SOLICITOR-GENERAL:**

Kia rite ki te pai o te Kōti.

**WINKELMANN CJ:**

Mr Harrison, do you have anything in reply?

**MR HARRISON:**

Just in terms of a housekeeping matter Your Honour. When I was referring to Mrs Ellis and whether or not she had been referred to in the evidence, at page 582 of the case on appeal, the child interview that was played in court, and the comment was that, referring to Mr Peter Ellis, "He was taking photos with his mother," and I think there were other references in other transcripts, but that's one that we've been able to find, and that was child 5.

The other factor that my learned friend raises is the regulations and rule 49 of the regulations. That is talking about where a Court may provide assistance to a jury, but on what basis should that warning be given, and this particular case is an exceptionally good case in respect of providing that assistance to the Court in terms of when it becomes relevant. Specifically for those pre-contamination issues that have been involved heavily in this case, and still occur today, so it's those pre-contamination issues where it would be of assistance for a jury to be properly informed.

**WINKELMANN CJ:**

What do you mean "pre-contamination"? Do you mean pre-interview?

**MR HARRISON:**

Sorry, pre-interview contamination issues. So that's prior – by the time the child comes to be interviewed by the police for a formal interview there may be several events occurring prior. For example, my understanding is that Oranga Tamariki does scoping interviews with young children before they actually come before the Court. Some of those scoping interviews are not recorded, some of them are. Some of them may have very leading questions –

**O'REGAN J:**

So are you saying we could provide some guidance about how to use the power in regulation 49?

**MR HARRISON:**

Yes.

**O'REGAN J:**

But isn't that very much a factual thing, depending on each case?

**MR HARRISON:**

Well, it is a factual thing, Your Honour, but in terms of where these issues are present it would be helpful. Where you have these pre-interview contamination issues, for example, which is a lot of what we have in the Ellis case.

I'll also note that it refers specifically to children under six but how does that impact where the evidence obtained from a child who is now seven, but they're alleging matters that happened when they're four or five, and they've been questioned a number of times leading up to finally getting before the Court, those sorts of issues, I think they're also important.

**O'REGAN J:**

I just don't see how the Evidence Regulations 2007 would have anything to do with an appeal in relation to interviews that took place in 1992 or 1993. I mean how could we say anything about that?

**MR HARRISON:**

Because what the regulations are saying is we're dealing with –

**O'REGAN J:**

Yes, but they don't apply in Mr Ellis' case.

**MR HARRISON:**

No but my understanding, Your Honour, and correct me if I'm wrong, merely asking to proceed in this case on the basis of the, as we were proceeding prior to him dying, we needed something more, one of those issues that transcends just the mere facts in his case. So what I'm suggesting to

the Court is that the facts in the Ellis case actually raise an issue of general importance, part of which would relate to when you would be using regulations such as regulation 49.

**O'REGAN J:**
I think the point that the Crown was making was the law has changed and therefore that's a reason to not proceed. I don't think Ms Jagose was suggesting that the Court needed to somehow address these regulations.

**MR HARRISON:**
No, but what I'm suggesting to the Court is that it may well be helpful to give some direction in respect of rule 49. When is it that it's appropriate? What has happened with the child that would mean that you would be saying that you need to be cautious about a child –

**O'REGAN J:**
But we don't just, I mean we deal with the cases before us, we don't just sort of make a, say, and why we're here we'll now make some observations about something that's completely irrelevant to the case.

**MR HARRISON:**
What I'm suggesting to Your Honour is that the issues that are raised by contamination of a child's evidence would be relevant to that particular regulation.

**WINKELMANN CJ:**
Right.

**MR HARRISON:**
Unless there are other matters Your Honour?

**WINKELMANN CJ:**

Thank you Mr Harrison. Thank you counsel for your submissions. We'll wait for receipt of the further written submissions and we will let you know our decision in due course.

**COURT ADJOURNS: 12.39 PM**