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

SC 3/2026
[2026] NZSC Trans 13

ETHAN WEBSTER

Appellant

v

THE KING

Respondent

Hearing: 16 July 2026

Court: Winkelmann CJ
Ellen France J
Williams J
Kós J
Cooke J

Counsel: M J Dyhrberg KC, H G de Groot and T J Conder for
the Appellant
A J Ewing and E P C Duckett for the Respondent

CRIMINAL APPEAL

MS DYHRBERG KC:

May it please the Court. Ms Dyhrberg appearing this morning together with Mr de Groot and Mr Conder.

WINKELMANN CJ:

5 Tēnā koutou.

MS DYHRBERG KC:

Thank you. Just very, very briefly by way of just introduction. Sorry, my apologies.

MS EWING:

10 E ngā Kaiwhakawā, tēnā koutou. Kō Ms Ewing ahau. Kei kōnei māua ko Ms Duckett, mō te Karauna. Ms Ewing and Ms Duckett for the Crown. We have Jacob Ramsay's family in court today. His wife, his mother, his father-in-law, his aunt, and his close friend, they're sitting just behind me.

WINKELMANN CJ:

15 Thank you. Ms Dyhrberg.

MS DYHRBERG KC:

Thank you. Yes, thank you, your Honours. Just briefly, the appeal concerns the safety of Mr Webster's conviction for murder following his guilty plea and at the outset, the appellant does not suggest that there is a realistic path in this
20 particular case for acquittal on homicide, that the realistic issue, given the position as it is today, was and always murder or manslaughter.

The appeal is therefore concerned, in our respectful submission, with whether Mr Webster's guilty plea to murder can safely be treated as an informed and
25 reliable waiver of his right to trial.

The later foetal alcohol spectrum disorder and neurocognitive impairment matters in three related ways. First, it bears on Mr Webster's ability to participate in the proceedings at all. Secondly, it bears on whether his plea to

murder was informed and reliable, and thirdly, it bears on whether there was a real defence to murder that could properly have been put to a jury.

Now, the issues may overlap, but we will address the appeal in three parts.

- 5 Mr de Groot will address fitness and communication assistance. Mr Conder will address the approach to guilty plea appeals, and then I will address what the defence to murder would actually have looked like before a jury.

WINKELMANN CJ:

- 10 Okay, so sorry, can you just go through whose addressing what, I'm sorry, I didn't follow that.

MS DYHRBERG KC:

- 15 Mr de Groot and he's going to address fitness and communication assistance, and Mr Conder will address the approach to guilty plea appeals, and then I will address the – what the defence to murder would actually have looked like, you know, before a jury.

WINKELMANN CJ:

Thank you, Ms Dyhrberg.

MS DYHRBERG KC:

Yes, thank you, your Honours and Mr –

- 20 **KÓS J:**

Which category in section 232(4) do you seek to come within, subsection (a) or (b)?

MS DYHRBERG KC:

I think subsection (b), subsection (b) your Honour.

- 25 **KÓS J:**

Right.

MS DYHRBERG KC:

Thank you.

MR de GROOT:

Mōrena, your Honours. As Ms Dyhrberg just said, I will be addressing the
5 fitness issues and that basically breaks down into three parts. The first is that
I will be addressing the approach to an appeal of this nature, that is, where a
guilty plea is entered in the presence of an unidentified fitness impairment. The
second issue I will address is communications assistance. That obviously
connects to the fitness issues, but I will be talking about it as a source of
10 miscarriage in its own right and finally, I will address the individual appeal.

Just to give your Honours an indication, I don't intend to dwell too much on the
evidence or take your Honours through the evidence and I only intend to speak
briefly about the individual appeal. We rec –

15 **WILLIAMS J:**

The evidence of?

MR de GROOT:

Well, for example, the evidence that's –

WILLIAMS J:

20 The expert evidence or the –

MR de GROOT:

That's come post-conviction, yes, the expert evidence.

WILLIAMS J:

Right, yes, thank you.

25 1010

WINKELMANN CJ:

Because the Crown takes you on quite a bit on that, doesn't it? It did in the Court of Appeal and it does here.

MR de GROOT:

5 It does in part. But we recognise, your Honours, that whatever the test is, whether Mr Webster was fit to plead or fit to stand trial is an intensely evaluative exercise which requires quiet consideration of all of the evidence, not simply the highlight reel that counsel might be able to provide. And the Court's assessment of these issues is also likely to turn on the findings on the legal
10 issues. It may be that if the Court affirms that the test on an appeal of this nature is fitness to stand trial then we may not have a dispute, because I am not sure whether the Crown will contend that Mr Webster was in fact fit to stand trial, but I am sure my friend –

WINKELMANN CJ:

15 Without communication assistance?

MR de GROOT:

Yes. I'm sure my friend will tell me if I'm wrong about that in time, but it may be that the real contention is about the legal test to be applied.

20 All right, so I just want to briefly frame what I say with the following. At the core of all of these issues is defendant autonomy, and in the vacuum of information that prevailed at the time of the plea we suggest that Ethan had no autonomy. He just didn't know where he was on the landscape of the trial. He didn't know he was impaired. He didn't know he needed help. He didn't know what help
25 might be available to him, and neither defendant nor his counsel could conceptualise a trial in which he could participate and present a defence, and it was these circumstances which drove counsel to a single conclusion as to the plea.

WINKELMANN CJ:

30 Couldn't conceptualise the trial?

MR de GROOT:

Couldn't conceptualise –

WINKELMANN CJ:

The. The trial in which he could do that, because –

5 **MR de GROOT:**

That's right, the inability to conceptualise a trial in which he could actually participate, inform the plea advice, and Ethan was so reliant on that advice that he would've gone along with whatever counsel suggested. So we say that in these circumstances there is no interpretation of the events where Ethan has
 10 made an autonomous decision that he just regrets. He was given advice that was careful and it was proper and his counsel was doing everything right, but the advice was incomplete, and the result is that we have a trial process which isn't based on rational choices or rational compromises, but it's conducted on the basis of forced choice, and in effect the impairment has made the decision
 15 for everyone.

So I'll first address the test on –

WILLIAMS J:

So does that argument mean that if as a matter of fact it could be found that he
 20 did appreciate the significance of the plea and simply wished to accept responsibility, the fact that he could never have properly engaged in the trial would still vitiate that plea?

MR de GROOT:

That is going to be the argument, yes.

25 **WILLIAMS J:**

Why do you need to go that far?

MR de GROOT:

Pardon, Sir?

WILLIAMS J:

Why do you need to go that far?

MR de GROOT:

Well because that was the trial that he needed to be able to participate in for
 5 the decision on plea to admit of two realistic options, and what I'm about to suggest is that in the circumstances as they presented, where he could never have been taken to trial and it actually would have been irresponsible for counsel to take him to a trial, there were not two realistic options. There was only the one, which was the guilty plea.

10 **WINKELMANN CJ:**

You're saying never could be taken to trial. Never could be taken to trial without communication assistance?

MR de GROOT:

Certainly, certainly.

15 **WINKELMANN CJ:**

So we're not dealing with a situation in which he could never be fit to stand trial?

MR de GROOT:

No, I don't think that's the case. And certainly today I think the evidence would be that with communications assistance he could safely be taken to a trial today.
 20 I'm not suggesting that wouldn't still pose difficulties, and it appears from the evidence that there's still a degree of education that is required and would be required were the Court to order a retrial, but it has to be imagined that it would be possible.

WILLIAMS J:

25 Just explore that a little. So if he simply wished on careful assessment without understanding how a trial would work and so on that he wished to accept responsibility, doesn't that proposition cut across the very autonomy that you're saying ought to be protected?

1015

MR de GROOT:

This is a very interesting question and it's –

WILLIAMS J:

5 I'm sure you've a very interesting answer.

MR de GROOT:

Well, it's a vexed question and it's vexed Law Commissions around the world, which is something I'm going to address –

WINKELMANN CJ:

10 But really it's not something you need to get into here because there's no suggestion of that factual narrative, is there?

WILLIAMS J:

I thought it was.

MR de GROOT:

15 I will come to this in time, but there has been consideration, for example, by the Law Commission in the United Kingdom, whether an off-ramp needs to be created for this exact type of person because their law, like our law, doesn't recognise a divided test of fitness where fitness to plead can be partitioned off as its own animal that only recognises a standard of fitness to stand trial and
20 the problem that's been recognised in the UK is that there's no pathway for those people who were fit to plead but not fit to stand trial to in effect exit the process on the basis of a rational choice. We're just saying that's a legislative problem.

WINKELMANN CJ:

25 But it also would require that you could be fit to plead with communication with supports.

MR de GROOT:

Yes.

WINKELMANN CJ:

And the suggestion is not that people who are not fit to plead be allowed to
5 plead. The suggestion is that although they may not be fit to stand a full trial, if
they're fit to plead with systems they can plead.

WILLIAMS J:

I thought your case was that he wasn't fit to plead either and that he needed
supports for that.

10 **MR de GROOT:**

That is –

WILLIAMS J:

That's why I asked you whether you needed to go as far as you're going.

MR de GROOT:

15 No, but we just recognised that the Court may find against us on the evidence.

WILLIAMS J:

I see, okay.

MR de GROOT:

I don't say that that should be the conclusion. I say that the question on fitness
20 to plead, actually, with respect to the Court of Appeal, admits of an obvious
conclusion because the evidence is so clear that he was not fit to plead in the
absence of assistance. It was a contingent finding which assumed assistance,
so –

WINKELMANN CJ:

25 Well, the issues are complex enough. It could be quite good if we focused on
the case in front of us, I think.

MR de GROOT:

Your Honours, we have just talked briefly about what the approach should be to an appeal of this nature and fundamentally what the question is on an appeal of this nature. There is no dispute. I think that what the Court of Appeal did

5 was to focus narrowly on competency to enter the plea and we say that fitness to stand trial ought to have been at the core of the inquiry.

WINKELMANN CJ:

But does that really make a difference for you because don't you say he wasn't fit to enter a plea without communication assistance?

10 **MR de GROOT:**

We do say that but we also have a finding from the Court of Appeal that went against us on that actual point and we say that that should be the conclusion, he was not fit to plead in the absence of assistance, but the real question ought to have been whether his counsel could have taken him to a trial. It's not

15 inconceivable that you could have a case where the test matters and depending on the way the Court evaluated the evidence it may matter in this case. We say it shouldn't, but it may.

ELLEN FRANCE J:

So I'm unclear why are you saying that is the real question?

20 **MR de GROOT:**

Because that is the statutory question. That's the primary contention that when the Court is confronted with a conviction appeal where the pleading is I was not fit when the plea was entered because nobody knew about my impairment, the question that the Court should be asking is is this person fit to stand trial,

25 encompassing the fitness to plead.

WINKELMANN CJ:

So you're making a very hard road for yourself because for us to find that they not only have to be fit to plead but fit to stand trial means that people who would be able to plead with communication assistance or other supports would

nevertheless be precluded from doing so and given the regime under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 that's an unattractive proposition.

MR de GROOT:

- 5 In some ways it isn't an attractive proposition but to affirm it as an appeal standard or to try and affirm that pathway through an appeal standard leads to an even more unattractive proposition which is that a person who could never have gone to trial but may be fit to stand plea should effectively have their guilty plea ratified even though they were presented with a false choice.

10 **KÓS J:**

It seems to me you're making this more hard than it is.

MR de GROOT:

That's possible.

1020

15 **KÓS J:**

- Let me suggest an alternative. If this is about autonomy, then the question is how well informed the defendant is when he or she makes their plea. If they are informed, they are aware of their impairment, they are informed that either that they are unfit to stand trial or they could be fit to stand trial with particular
20 assistance, they must be able to take those matters into account and then making a choice about whether they go to trial or, instead, face the potentially interminable disposition process in the third stage of the Criminal Procedure (Mentally Impaired Persons) Act 2003. Now, that's going back to the Chief Justice's point, surely autonomy should allow them to make that choice
25 and say actually, I'd just rather plead guilty and get it over with, over. I'm fully informed, I'm making my decision and they're assisted in doing so. What more is there to tell them?

MR de GROOT:

What more is there to tell?

KÓS J:

To tell them. I mean, they're fully informed at that point and they're fully assisted in making a decision. Why can't they then make their decision?

MR de GROOT:

- 5 Again, this is the question that has vexed Law Commissions, should there be a statutory pathway for that person to get off the train? Maybe there should be.

WINKELMANN CJ:

But it doesn't even arise on this case because there is no suggestion that he wouldn't be fit to stand trial with assistance.

- 10 **MR de GROOT:**

No.

WINKELMANN CJ:

- So, can't we just focus on the issue about his state when he was pleading because that really is the gravamen of the appeal and I think the Court would
15 be most assisted with that.

MR de GROOT:

Yes, your Honour. I think I need to possibly make clear that we are not resiling from the proposition. The question the Court should be asking on an appeal of this nature is about fitness to stand trial proper.

- 20 **WINKELMANN CJ:**

Yes.

MR de GROOT:

Not just fitness to plead. But I appreciate what your Honour is saying, that that may over-complicate the issues in this individual case.

COOKE J:

Well, but actually isn't the question whether there has been a miscarriage of justice because the plea was entered by someone who wasn't fully informed, isn't that the statutory test?

5 **MR de GROOT:**

Yes, that's part of the statutory test and of course Mr Conder will – to a certain extent, these issues all bleed into one another because the other side of this coin is that there was an uninformed plea because nobody knew what kind of defendant they were dealing with, but that goes to a defence rather than fitness.

10 **WINKELMANN CJ:**

So why – what is the justice underlying your submission that we have to proceed on the basis of this very big idea of fitness to stand trial and not allow people to plead guilty who can be supported to be fully competent to enter a plea?

15 **MR de GROOT:**

The underlying justice consideration is whether the person who is fit to plead with assistance but not fit to stand trial is presented with a forced choice.

WINKELMANN CJ:

So that is just – that doesn't arise in these facts.

20 **MR de GROOT:**

What is suggested is if a defendant and their counsel can't conceptualise a trial –

WINKELMANN CJ:

25 So what you're saying is if the fact that they can't participate fully in a trial bears upon their decision they think oh well, I can't ever have a fair trial so therefore I will plead guilty, is that your point?

MR de GROOT:

Yes. That's the only thing for it, is to plead guilty, and that is a forced choice.

WILLIAMS J:

Only if that's what's going on in their mind. But if what's going on in their mind
5 is that I have no interest in a trial, I don't care.

MR de GROOT:

Yes, yes.

WILLIAMS J:

I accept responsibility and want to face the consequences whatever they may
10 be. That's an autonomous choice.

MR de GROOT:

Yes.

WILLIAMS J:

Why should a Court prevent an individual from accepting such consequences?

15 **MR de GROOT:**

Well, the first point is that's a very different category of case. What we have
here is a defendant who says I didn't, yes –

WILLIAMS J:

I'm not suggesting that's what we have here. You put the counterfactual. I'm
20 putting a different counterfactual to suggest there's a problem with what you're
putting to me, or us.

MR de GROOT:

Yes, well what we suggest is that the statute doesn't allow for people to –

WILLIAMS J:

25 So basically, your argument is a statutory interpretation argument?

MR de GROOT:

We're just saying section 4 should apply.

WILLIAMS J:

There's no choice, it's got to be the whole trial.

5 **MR de GROOT:**

Section 4 should apply.

WILLIAMS J:

Yes.

MR de GROOT:

10 And the alternative is a forced choice and if there is to be a pathway for those
people who, unlike Mr Webster, say I wish to plead guilty, I have no interest in
the trial, then, just like in the UK, that is a law reform project. There needs –
I'm not disputing that it would be a good idea to have a pathway for those
people. But what seems to be a very strange proposition is that that pathway
15 would be created by fixing the appellate standard in a case where a person
says I didn't get a fair go, I wasn't fit to stand trial and that forced my hand when
I was called upon to enter the plea.

WINKELMANN CJ:

Okay, well, that's not the case that we have before us though.

20 1025

WILLIAMS J:

One – can I just, one more question before you actually make your submissions.
It's this. In *Tihema v R* [2024] NZSC 112 we said fitness is not a static thing, it
can come and go during the course of a trial. Why can it not come and go
25 during the course of the entire process?

WINKELMANN CJ:

It can, is the answer.

MR de GROOT:

It can. It could –

WINKELMANN CJ:

5 You're postulating a situation where it isn't there and can't be assisted to be there.

MR de GROOT:

That's right.

WILLIAMS J:

10 But you see, the whole proposition is if you are fit enough to plead but would not be fit enough to stand trial you're fit, you're relevantly and materially fit at the correct time.

MR de GROOT:

15 Well no, the correct time is the time that you're entering a plea, and if your counsel can't imagine that you are in fact fit to go to a trial then that has the consequence that we've described.

WINKELMANN CJ:

20 I think we have your argument. I mean it does face problems in relation to the rights of the disabled because that would be denying autonomy to those who are wishing to plead and are fit to do so, but nevertheless it's not really at issue in this appeal, and this appeal does raise some pretty serious issues. So on that first ground, approach an appeal where guilty plea is entered in face of unidentified impairment, Ms Dyhrberg said the whole issue was whether the guilty plea was entered on an informed basis?

MR de GROOT:

25 Yes, yes.

WINKELMANN CJ:

And are you addressing that issue or is she addressing that issue? And –

MR de GROOT:

Mr Conder will address the fundamental – the underlying uninformed issue.

WINKELMANN CJ:

Okay.

5 **MR de GROOT:**

If I could just point your Honours to something, I don't intend to take the Court here by ClickShare or anything like that, but one of the documents in your bundle is the 2016 report from the UK Law Commission, and at pages – the reference is pages 91 to 97 and it deals with the precise issue that your Honours
10 have just been putting to me, whether there should be a way off the train. On the surface the Commission recognised that this may enhance defendant autonomy, but because of the forced choice component that appearance of autonomy may actually be superficial. It has unintended consequences. But whatever this is, and it's very interesting, it is a legislative problem and a
15 pathway can't be created by fixing the appellate standard in a completely separate category of case where it doesn't arise.

WINKELMANN CJ:

Yes.

WILLIAMS J:

20 Is the statutory definition the same in the UK?

MR de GROOT:

I think it's very similar.

WINKELMANN CJ:

We're not going to make that finding, Mr de Groot, in this case because it
25 doesn't arise and we'd be binding parties in a very serious way who – in circumstances where it might arise, and it certainly doesn't arise with this appellant because he can become competent on the face of the evidence to give his guilty plea and to stand trial with communication assistance.

MR de GROOT:

He could become but he wasn't at the time I think is our fundamental point, and the fact that he wasn't at the time is – when counsel was confronted with a client who when he seeks an answer to the Crown case is just met by silence and the
5 plea decision has to in the circumstances effectively be taken by counsel where the defendant simply affirms it, that is not a real choice in any meaningful sense. That is a forced choice, yes.

WINKELMANN CJ:

Yes, and that is at issue here.

10 **MR de GROOT:**

Yes, yes, exactly.

WINKELMANN CJ:

Whether or not he made an informed choice.

MR de GROOT:

15 And we suggest he didn't, because without information about him you never could have told him what the trial would look like. And if we put ourselves in –

WINKELMANN CJ:

So that's what you mean when you say they couldn't conceptualise it?

MR de GROOT:

20 Yes, yes. And if we put ourself in Mr Bourke's position, he was doing his best and he did all the right things, but I think we have to think it would have been irresponsible for him just to box on and say, well, I'm going to take this trial into my own hands and I'm going to run a defence which is not based on information supplied to me by my client when he's not going to be able to give me any
25 assistance when we go to this trial, and when he's called upon to make the election decision he's not going to be able to make, he's not going to be able to get in the witness box and give evidence if he needs to.

WINKELMANN CJ:

So you're saying his incapacity was actually bearing upon the decision?

MR de GROOT:

Absolutely. That's –

5 **WINKELMANN CJ:**

Because when counsel was – counsel was thinking this man is very uncommunicative, doesn't seem to give convincing and kind of independent evidence so I can't put him in the witness box, that's your point?

MR de GROOT:

10 That's the exact – that's the short way of making the point. It's a constrained decision.

1030

WINKELMANN CJ:

And so were you going to take us to communication assistance next?

15 **MR de GROOT:**

I can move to communication assistance.

There is no issue in this case that if counsel had known more he would have sought assistance and I don't think there can be any dispute that it would've
 20 been provided for. Section 80 of the Evidence Act 2006 is framed in very strong terms, creates an entitlement to communications assistance. This wasn't, of course, the whole picture and the absence of full information about the defendant still made it impossible for counsel to fully inform the plea and to discharge his duties to protect his client from conviction as far as possible, but
 25 communications assistance was still a necessary part of the equation to ensure the foundational requirements of fitness and the prospect of full participation in the trial, and the strange reality in this case is that seeking the communications assistance would almost certainly have brought to light the condition which

would have been the centrepiece of any defence, but that is simply a coincidence.

The assistance –

5 **WINKELMANN CJ:**

Counsel was rather let down though, weren't they, on that front?

MR de GROOT:

I agree.

WINKELMANN CJ:

10 By the advice they received?

MR de GROOT:

I agree, your Honour.

But the assistance alone would have moved Mr Webster further along the path
 15 to be able to discharge the section 4 capacities. It would have ensured that
 counsel was able to communicate the elements of the charge to the client,
 educating him about what the Crown needs to prove and actually seeking a
 response from his client on the elements. It would have ensured that counsel
 was able to communicate the substantial effect of the evidence and avoided a
 20 situation where a deeply impaired defendant was reduced to reliance on their
 memory alone when they couldn't read and were unable to take evidence home
 with them and review it, and it would have ensured that the client was able to
 communicate back what his response was to the charge, having been educated
 in seeking clarification as he required it. But instead we have the situation that
 25 prevailed which was that Mr Bourke was met by silence when he attempted to
 discuss the critical issue for the preparation of the defence.

It really added to all of these issues, in our submission, that Mr Bourke was
 seeking instructions on a complex case. Recklessness is one of the most
 30 difficult intent pathways to explain to the client. In a lot of ways this would have

been a very different equation if the argument was just you've pointed a weapon, pointed a firearm at someone and pulled the trigger and shot them because you wanted to do that. It's much easier to bring home the direct intent pathway than it is to bring home the recklessness pathway and, of course,

5 counsel needed instructions on recklessness that weren't located in the time in which he was seeking them but he needed his client to locate those instructions at the time the events actually occurred.

These issues are only compounded if the Crown's new solution of party liability

10 in respect of some phases of these events becomes the basis of the Crown case at a retrial. Then Mr Webster would need to be educated about what party liability means and that's difficult for all of us.

WINKELMANN CJ:

Is Ms Dyhrberg going to deal with the issue of the admissibility of the interview?

15 **MR de GROOT:**

Yes.

As I've said, what we have is silence and the most telling clue that we never had a meaningful dialogue established on the intent issues is that Mr Bourke

20 never asked Mr Webster to give him formal instructions about the elements of recklessness. Instead he asked the one question that the client could handle which was do you want to accept my advice to plead guilty to a murder. None of this is a criticism. As this Court pointed out in *Tihema*, counsel are not experts in the management of clients with complex needs and complex

25 communication needs.

1035

Could he have been scaffolded at the time he entered the plea? It's ultimately an unknown. The answer may at that time may have been, no, even with

30 assistance, and it may be only that the passage of time and the education that he has received through the interviewing process has brought him to a place

where he can understand the charge that he faced and the instructions that he needed to give, but with –

KÓS J:

How are we supposed to deal with these questions of uncertainty about his fitness? I mean, you're not saying for certain that you can point, you know, you can't point to definite evidence that he would, he could've been scaffolded or not scaffolded.

MR de GROOT:

The one area of this case, where the evidence is the strongest, because obviously the witnesses are being very careful in the way that they frame their conclusions because they're conducting retrospective assessments, but the one area where this is expressed as a probability is in Dr McFadden's evidence when she says: "His fitness is uncertain at the time, but it seems relatively clear on the balance of probabilities, that he could not have discharged the required capacities without assistance." So that, in my submission, is a solid basis to find that that was actually the case that existed at the time of plea, and through the lens of section 232, that would, in our submission, inevitably lead to a section 232(4)(b) problem, it would be an unfair trial. But, even if the Court found that the evidence did not have that effect and what we have is simply a real doubt, then it would remain the case that an error has still occurred in the trial. The error is that a person has been pled out without any understanding of his true position, and the Act is then openminded about whether that actually affected the outcome. It can become a section 232(4)(a) problem where the Court would merely need to find that there's a real risk that the absence of that assistance affected the outcome of the trial and –

KÓS J:

Well that then directly brings into play the strength or otherwise of the defence that you might have.

MR de GROOT:

It may.

KÓS J:

Which is a defence only to murder, you're saying today?

MR de GROOT:

It's a defence only to murder, I mean, at the risk of being incautious and it would
 5 obviously need instructions from him, but it seems very likely that if a retrial
 were ordered, one of the first steps would be to ask the Crown to approach the
 Solicitor-General about whether a plea could be accepted to manslaughter.
 That would be the outcome that would be being sought at trial.

KÓS J:

10 Well, given your indication to the Court, I can't see how you could do otherwise?

MR de GROOT:

No. No, but I'd be reluctant –

WINKELMANN CJ:

But that was proper for you, Mr de Groot as the junior counsel to say that, yes.
 15 Right.

MR de GROOT:

Reluctant to offer that up as something that will happen, because he would
 need to be worked through that with assistance in that phase, but it seems the
 overwhelming likelihood.

20 **KÓS J:**

But that's why the question whether it's subsection (a) or (b) becomes very
 important, because we don't necessarily get into that question, I mean, that's
 something we'd have to explore with whoever is dealing with it. I'm finding this
 division of responsibility difficult, I have to say. Whoever is going to deal with
 25 this issue as to whether subsection (a) or (b) applies, because it's possible that
 if it's subsection (b), unfair trial, then we don't get into the question of whether
 the outcome could reasonably have been affected.

MR de GROOT:

No, that would be right, and we say first, this is an unfair trial problem, and the Court should conclude that he was unfit.

KÓS J:

- 5 But that's because of disability as opposed to error or lack of appreciation on the part of counsel as to a potential defence. Lack of appreciation by counsel as to a potential defence is normally dealt with under subsection (a).

MR de GROOT:

It may well be.

10 **KÓS J:**

Well, it is.

MR de GROOT:

Yes, yes.

KÓS J:

- 15 It's – there's not an unfair trial just because counsel fails to appreciate a potential defence.

MR de GROOT:

- I will accept that if the Court finds that too much uncertainty abounds to find that we can say with certainty what the position is at the time of the plea, then there is still an error and it's a section 232(4)(a) problem and that engages consideration of the defence, I accept that.
- 20

WINKELMANN CJ:

- How you first articulated it was that there's strong evidence, at least on the balance of probabilities basis, to say that he was under a disability which was not adequately addressed at the time he entered the plea, but then you say that's an unfair trial. But then you say, if it's not, if we're not satisfied the evidence establishes that, but if we think it just raises a possibility, is that where
- 25

you say we go to miscarriage of justice simpliciter and have to consider whether it affected the course of trial?

1040

MR de GROOT:

- 5 Yes, yes and that would engage considerations of the factors that my friends will deal with next, the availability of a defence, and we say there was certainly a defence available here just as trial counsel believed there was a defence available here with the benefit of complete information.

WINKELMANN CJ:

- 10 So, is your next heading the expert evidence, or, no, the evidence? I'm not sure what the evidence is.

MR de GROOT:

I've been redirected I see to the evidence instead of the law.

WINKELMANN CJ:

- 15 Well, is there any more you wanted to say on communication assistance because I thought we had exhausted that?

MR de GROOT:

- I think probably that has been exhausted, but I just make the reference to – I don't need to bring it up – this is paragraph 150 on page 78 of Dr McFadden's
20 report when she's talking about the situation at the time and saying it is unlikely that he would've been able to do what he needed to do without assistance at that time.

- And of course, the only other point that can be made about communications
25 assistance is it seems uncontroversial to say that if there were a retrial tomorrow, he would be given the benefit of assistance. He would require that assistance to fully participate in the proceedings and the question is if he needs that to effectively participate today, how is it thinkable that he could have managed in the absence of that assistance in late 2022.

WINKELMANN CJ:

What paragraph of her evidence, sorry?

MR de GROOT:

Paragraph 150. It's on page 78.

5 **WINKELMANN CJ:**

Right.

MR de GROOT:

There's one other point that is worth mentioning about the assistance. How an absence of assistance interacts with the question of a miscarriage of justice is possibly quite an undeveloped area of law in this country. There's quite limited cases but – and we've been talking about the way that communication assistance interacts with fitness. But there has been at least one case, a decision of Justice Toogood in the High Court where it was the absence of assistance alone that was the source of the miscarriage.

15 **KÓS J:**

That was *Hemi v R* [2017] NZHC 714.

MR de GROOT:

Hemi, that's right, yes, and the way that the Court dealt with the issue in that case which I submit is a very sensible and likely correct way is to ask whether the absence of assistance interacted with the fundamental trial decisions, so the plea decision and the election to give evidence decision. In that case, it happened to be the election to give evidence. But where the absence of assistance interacts with one of those two decisions, that can be the source of a miscarriage.

25 **WILLIAMS J:**

Or in *Tihema* where the assistance had become neutralised.

MR de GROOT:

Yes.

WILLIAMS J:

These are pretty easy in principle propositions, aren't they?

5 1045

MR de GROOT:

Yes, yes.

WILLIAMS J:

I don't think the law needs developing. It's pretty clear, if it has gone to that, if

10 the lack of assistance had gone to that, the trial would be problematic.

MR de GROOT:

Yes. Just to make the point that, yes, it's obviously inseparable from fitness on one view of things, but it could be a source of miscarriage in its own right.

WILLIAMS J:

15 Yes.

WINKELMANN CJ:

Well, and it's actually that they're not participating, so it's not fit to stand trial at that point, isn't it? So it's not really on its own right, it's just evidence of, and is Mr Conder going to take us to the cases about, so like cases *Merrilees v R* [2009] NZCA 59, *R v Le Page* [2005] 2 NZLR 845 (CA), and *Nonu v R* [2017] NZCA 170.

20

MR de GROOT:

Yes, yes, absolutely.

WINKELMANN CJ:

25 Right.

MR de GROOT:

So, really, I only had brief comments prepared about the individual case in terms of his fitness to plead and stand trial.

WINKELMANN CJ:

5 Is Ms Dyhrberg dealing with that in more detail or not?

MR de GROOT:

I think Mr Conder will be, I'm sorry, Ms Dyhrberg will be dealing with the expert evidence as it relates to the potential trial issues, yes.

WINKELMANN CJ:

10 Right, okay and with the other evidence we have, because we have the transcript of his interview?

MR de GROOT:

Yes, yes. So the first contention in the individual case is that he was not fit to plead, especially without assistance. Although it is a conclusion of the expert
15 evidence that he was aware that he was being called on to enter a plea to a charge of murder, and that would have certain consequences, what is much less clear is that he actually had any understanding of what he was being asked to plead to and the way that the witnesses have expressed this is to say that it's not clear that he understood the intent element that was most relevant to his
20 case. Perhaps the best indication of the lack of understanding of these issues is the level of understanding that is evident in more recent times. Mr Webster has obviously been through a process of interview with experts and these issues have been explored with him in some depth, and even the more contemporaneous attempts to describe what recklessness is do not describe it
25 with any accuracy, and –

WINKELMANN CJ:

Is this picked up in the reports?

MR de GROOT:

Yes. So one expression of this is on page 72 at paragraph 101.

WINKELMANN CJ:

Of what?

5 **MR de GROOT:**

That's Court of Appeal additional materials –

WINKELMANN CJ:

McFadden – is that Mc – doc – Ms McFadden again?

MR de GROOT:

10 McFadden, yes.

WINKELMANN CJ:

Page 72, paragraph 111.

MR de GROOT:

Paragraph 101. Apologies, I think I've gotten that wrong.

15 **WILLIAMS J:**

Page 71.

COOKE J:

Did you really mean that, or did you mean paragraph 110 on page 72?

MR de GROOT:

20 Well, I, yes, yes, you're right, your Honour.

WINKELMANN CJ:

Yes, you don't need paragraph 101.

MR de GROOT:

Paragraph 110. So this is after Mr Webster has been spoken to by Dr Panckhurst and he's discussing these issues with Dr McFadden and the expression is: "When I asked him to think about it, he tentatively stated", this is
 5 of recklessness, "You don't know what is happening, or you don't care about what happens? Or maybe you knew death was going to happen, but you wouldn't care?" And then the next sentence is consistent with the pattern that he was in with counsel which is fundamentally an expression of uncertainty of how a person could be guilty of murder if they don't: "Intend for someone to
 10 die."
 1050

KÓS J:

I mean, it's very difficult to form any clear views about this in the absence of cross-examination of the experts.

15 **MR de GROOT:**

Yes.

KÓS J:

And I'm not certain that's required for your purposes and whether the question is simply whether there is a reasonable possibility alone that there is this
 20 unfitness informing plea, thereby creating an unfair trial.

MR de GROOT:

Yes.

KÓS J:

I'm not sure we have to be definitive about this as long as an evidential basis is
 25 laid for the argument and I don't think there can be much doubt an evidential basis is laid for it. I just don't know what the outcome would be if we cross-examined these people.

WINKELMANN CJ:

Well, they weren't cross-examined.

MR de GROOT:

That may be fair, but taking what we have, it's what we have, the best indication
 5 of the likelihood that he understood at the time is possibly in the more
 contemporaneous attempts for him to explain and he's given multiple goes and
 he's obviously not clear and he still doesn't know exactly what that is. So –

KÓS J:

Sure, but he doesn't have to be a law student. This is not a crimes' exam.

10 **MR de GROOT:**

No, but he was charged with reckless murder and that had particular
 requirements and he had to accept those requirements in order to accept that
 he was guilty. Importantly, he had to accept that he had foresight of a likelihood,
 real and appreciable possibility of death, in a way that was coincident with a
 15 guilty act.

WINKELMANN CJ:

Right, so, but Ms Dyhrberg is going to take us through these reports in detail,
 is that the point?

MR de GROOT:

20 Yes, yes.

WINKELMANN CJ:

Okay. I mean in *Nonu*, the Court didn't describe a standard of proof it was
 moving to. It just said on the basis of the reports it was satisfied that. It's not
 talking about any particular standard of proof and would you say that's the
 25 appropriate approach?

MR de GROOT:

It probably is the most appropriate approach because we have inherent difficulties in trying to reconstruct what went on in the past. In our submission, it is clear that he was not fit to plead in the absence of assistance at the time
 5 and that would lead to an unfair trial. But if the Court was to approach it in a different way and said that too much uncertainty abounds, then you get into this much wider consideration of well, there's a real risk that something went wrong so now we have to consider the whole package of the trial.

COOKE J:

10 What we can be satisfied of is that the entry of the plea wasn't fully informed.

MR de GROOT:

Yes, yes and that's the point Mr Conder is –

COOKE J:

Yes. So, a different question about whether he was fit to plead or not.

15 **MR de GROOT:**

Totally, they are totally separable questions. There are many pathways that the Court could go down in order to allow the appeal in this case and –

WINKELMANN CJ:

But all those fit to – I mean they all are not different pathways in some ways
 20 because fitness to plead really bears upon his rights under section 24, doesn't it, which is right to be effectively represented and to offer a defence and to have adequate resources to support the offering of a defence.

MR de GROOT:

Yes, yes, that's right. But, maybe to put it one other way, the Court could, the
 25 Court could, if you like, reach no conclusion on the fitness issues and simply say that the plea, even if we assumed a totally competent person, was not informed because it could not have been informed just by the absence of information, so –

WINKELMANN CJ:

Well, that doesn't sound right.

MR de GROOT:

They – well, I submit that it is right, your Honour.

5 **WINKELMANN CJ:**

How can it be right?

MR de GROOT:

Well, this is the exact issue that Mr Conder will deal with, but the fundamental point is that counsel would have given him different advice with the benefit of
10 this information.

WINKELMANN CJ:

Oh, so he has FASD, but he is still fit to plead?

MR de GROOT:

Yes. I'm – maybe. Look, I'm probably confusing things but I'm just trying to –

15 **WINKELMANN CJ:**

You're certainly confusing me.

1055

MR de GROOT:

I'm just trying to suggest that there are different pathways here. There are the
20 fitness issues and then there are the informed plea issues. They bleed into one another and they rely on the same evidence, but in one sense they are at the end of the day separable, because you could just, if you like, assume the competence of the defendant to enter the plea, I'm not saying you should do that but you could assume that, and still say because we didn't have this
25 information the counsel wasn't able to advise about the defence.

WINKELMANN CJ:

And the information you didn't have if he was fit to plead was that he had foetal alcohol syndrome?

MR de GROOT:

- 5 Yes, and that could be supplied as a source of doubt that he had the necessary intent to be guilty of murder.

WINKELMANN CJ:

Right.

WILLIAMS J:

- 10 Although an alternative way of looking at it, setting aside the question of fitness, is he wasn't aware of the impairment, fitness or otherwise, and that the impairment was the reason he misconstrued the indications given either verbally or by action of this individual as to whether he was agreeing with him or disagreeing with him, and had he known that those indicators indicated some
15 other thing he might've given different advice.

MR de GROOT:

Yes, that's another way of looking at it.

WINKELMANN CJ:

Well that's another pathway.

- 20 **MR de GROOT:**

I'll gratefully accept that as another pathway for looking at it.

WINKELMANN CJ:

Because actually, that point about –

WILLIAMS J:

- 25 That avoids dealing with fitness.

MR de GROOT:

Yes, yes.

WINKELMANN CJ:

And so does the foetal alcohol syndrome, because irrespective of fitness your
5 argument is I think that foetal alcohol syndrome was relevant to intent because
it has bearings upon people's higher functionings?

MR de GROOT:

Yes, well that goes to the plea. That goes to whether the plea was informed.

WINKELMANN CJ:

10 Because counsel didn't know about it.

MR de GROOT:

Because counsel didn't know about it.

WINKELMANN CJ:

So he couldn't take into account in assessing the prospects of recklessness.

15 **MR de GROOT:**

The prospects, yes, and it would have been the first thing that counsel said to
the jury in opening and in closing. It would've been the centrepiece of any
defence.

KÓS J:

20 But they are different pathways, and to perhaps suggest an obsession on my
part with taxonomy, some of these take you into section 232(4)(a) and only
unfitness I think takes you into section 232(4)(b), and that may have a different
consequence in terms of whether the defence is sustainable.

MR de GROOT:

25 Mr Conder is going to suggest that it's a section 232(4)(b) problem in terms of
informing the plea, and I don't want to trespass into his territory.

KÓS J:

No. Well perhaps we better hear from him.

WINKELMANN CJ:

Well you've probably finished then, haven't you, Mr de Groot? Unless there's
5 anything else you want to say. I'm just thinking of the time.

MR de GROOT:

No. Unless the Court had any other questions for me, I think I can leave the Court in peace.

WINKELMANN CJ:

10 Thank you very much for your submissions.

MR de GROOT:

Thank you.

MR CONDER:

Thank you, your Honours. I'll just take a little moment to get myself situated.
15 What I propose to do, departing a little bit from what I had planned, is to begin by giving just a very brief précis of probably the two ways in which we say that the guilty plea might've been defective, and then to turn and examine quite closely this question about whether it's section 232(4)(a) or (4)(b) and the extent to which that actually makes a difference in this context, and then respond
20 briefly to the way that the Court of Appeal approached it and the way that the Crown is approaching it and how that fits into the overall scheme here.

Beginning then with what I would call the two possible errors, the things that might've given rise to an unfair trial or to a miscarriage of justice, the first is the
25 discussion that my friend ended on, which is a fundamental lack of information on the part of the defendant and his lawyer as to his ability to form the necessary intent.

1100

And looking at the cross-examination of Mr Bourke in the Court of Appeal, he gives a fairly frank description of the assessment that he made when he was deciding whether or not there was an arguable defence here. If you go through his affidavits, he says, look, I identified the issue of recklessness, I considered the objective evidence and formed the view that it seemed to be reasonably overwhelming. I then put it to Mr Webster whether there was any possible explanation to this, and he wasn't able to produce one. And so Mr Bourke acknowledges in his evidence that when he was making that decision, he says, you know, I was trial counsel, the issue was simply, well, he's young. Is that going to be sufficient to mitigate everything that the Crown will be able to say about intent? So he's left at that point where he's advising on plea making that assessment based on the assumption that the only thing he has to undermine the otherwise seemingly obvious inference of intention, is that this is a young defendant. He acknowledges that now that he has this additional information about foetal alcohol syndrome, about the impacts that that has on this defendant, that he would be making a fundamentally different assessment there. There is suddenly a body of evidence that can respond to what is the otherwise obvious inference. The absence of that information, we say, is the critical error on this limb. It is the one that says that it was impossible for Mr Bourke or Mr Webster to conceive of the defence that was able to be run here because they did not know the single piece of information that could be used to respond to the otherwise obvious inference.

The other error here is a little different and this relates more to fitness but it's a similar argument to what my friend has been setting out, and that is that having no knowledge about his own impairment and his lawyer having no knowledge about the depths of his impairment, he was in a position of a forced choice. He was unable to conceive of the trial and therefore, instead of making a free and fully informed decision to plead guilty, he makes the only decision he feels he can make, to plead guilty, and it's based on a fact that he's led to believe that he can't participate in a trial, that's just the circumstances. He thinks, I can't do this, and he is led to believe that he doesn't have a defence because there's no evidence on which it can be.

WINKELMANN CJ:

Is there evidence that he said he felt he couldn't do this and therefore, he should plead guilty? Because it seems to me to be setting out quite a kind of an intricate factual narrative where the simple factual narrative is that he didn't
 5 make an informed consent.

MR CONDER:

Yes, I accept that. I think in the expert reports, there is some discussion about his comments where he talks about it being overwhelming. He doesn't particularise it in any great detail, but it is our submission, and this is what we
 10 were talking about being unable to conceive of a fair trial, he's never presented with the ability to really see an alternative pathway.

This takes us to section 232 and the emphasis that I would make at the outset here is that the language of section 232(4)(a) is not to talk about whether there
 15 is a real risk of a different verdict, but it is to talk about whether there is a real risk of a different outcome at trial. In my submission, that language permits of more than one possible interpretation. As we've said in our written submissions, there is a meaningful distinction between a guilty verdict following a trial where a defendant has had the opportunity to exercise all of the rights
 20 that are guaranteed under section 25 of the New Zealand Bill of Rights Act 1990, and one where he has entered unknowingly a guilty plea that he didn't have to enter and so we submit in these cases there may not be a great distance between the subsection (4)(a) and the (4)(b) standard. In particular, what we have suggested in our written submissions is that it is not necessary for the
 25 defendant to establish all the way to a verdict that the outcome would be different, other than it is necessary for the defendant to identify that there was some practical error and that means in this case, the advice needed to be deficient. There had to be something that should've been advised and wasn't, which implies a certain degree of mistake about the possible verdicts, and then
 30 that needs to have been something that influenced, not the verdict, but something that influenced the decision to plead guilty. So we're in that *Merrilees* category where it is a question of, was there an arguable defence that wasn't advised to the defendant.

WINKELMANN CJ:

So the question under that limb on your – under subsection (a) you say is not whether, you know, he had a defence should it have gone to trial, but whether the outcome at the plea stage, is there is a narrative that it would've been
5 different?

MR CONDER:

Yes, your honour. That he –

WINKELMANN CJ:

Was affected?

10 **MR CONDER:**

One can envision different ways that this might arise. A defendant who is told that he simply will not have the opportunity to give evidence, who wants to have the opportunity to say his piece, even though his lawyer has advised him that he will be convicted no matter what he has to say, if he is deprived of the
15 opportunity to or he's told at trial, you won't have an opportunity to speak for yourself, and therefore he says, well, I may as well plead guilty, that is an error that goes to whether or not he would've made the decision to enter a plea. It doesn't go to whether or not he would've been ultimately acquitted of the charge. But, in my submission, it does relate to there being a different outcome.
20 1105

Similarly, in my submission, there would be no argument, although this may fall more under section 232(4)(b), if the lawyer goes and enters a guilty plea despite the fact that the defendant has not instructed that, it's never an answer to that
25 situation to say oh, well, he didn't have an arguable defence.

WINKELMANN CJ:

So, on your analysis then, the only counterfactual with which the Court is concerned under section 232(4)(a) in this kind of case is the plea outcome, not an eventual outcome following a trial, a hypothetical trial that is allowed to
30 proceed?

MR CONDER:

Yes. Yes, that's the approach that we're taking and, in our submission, the Court of Appeal, when it described the test largely said the same thing. The final sentence of paragraph 76 of the Court of Appeal decision: "We agree but
 5 note that, because a guilty plea was entered, the question is whether the failure created the real risk the decision to enter the guilty plea was affected." And, in my submission, that is the correct reading of section 232(4)(a) together with section 232(5), that the outcome of the trial is the guilty plea.

WINKELMANN CJ:

10 What paragraph is that?

MR CONDER:

That's at the very end of paragraph 76 of the Court of Appeal judgment. I will go on to say later that when the Court of Appeal was applying that test, they misapplied it. But I agree in principle that what they're saying there is a correct
 15 statement of how section 232(4)(a) works.

In our written submissions, the other thing I say about this is I say that the fact of a guilty plea is a waiver of all those rights the defendant otherwise receives and if that waiver is not free and fully informed, then the result of that necessarily
 20 is an unfair trial because all of those rights have been taken away from the defendant and this is why I say that regardless of whether it's looked through section 232(4)(a) or section 232(4)(b), it leads to effectively the same conclusion because the result for the defendant is the same, he loses the fair trial that he was otherwise entitled to.

25

And I would point at this stage, that when one goes to the decisions in this area, the language about exceptional circumstances always begins with a presumption that the plea that has been entered is free and fully informed. In *Le Page*, the language of the Court of Appeal there is that it is when the
 30 appellant fully appreciated the merits of his position and made an informed decision to plead guilty that the conviction cannot be impugned. That goes to the question of whether it has been a valid waiver by him of those rights and

the fact that it's only exceptional circumstances at that point doesn't affect it, in my submission, if those assumptions don't hold.

The same is true in the language that's used in *Merrilees*: "If a plea of guilty is made freely, after careful and proper advice from experienced counsel, where an offender knows what he or she is doing and of the likely consequences, and of the legal significance of the facts alleged by the Crown, later retraction will only be permitted in very rare circumstances."

Again, it's presumed through all of this that the defendant has made an autonomous decision to waive those rights and in the absence of that, it's my submission that even the fact that the plea would have been different. Whether the ultimate verdict would have been changed or otherwise is a sufficient ground for a miscarriage of justice.

COOKE J:

Do the authorities concentrate on whether it's in section 232(4)(a) or section 232(4)(b), or is it –

MR CONDER:

No, they don't, your Honour. They're actually, in my view, I'm going to make a broad submission here that says when you read through them together, there's very little concern about whether we're under section 232(4)(a) or section 232(4)(b). Obviously, some of these earlier cases predate the current language, but ultimately, what ends up happening is the cases get categorised under one of these four categories typically. Even under *Le Page* or *Merrilees*, if you establish the category, it's accepted that the plea can be vitiated and the section 232 test is not particularly directly examined.

One of the things that we have referred to in our written submissions in a little bit of detail is that when Courts do start talking about the possibility of a different verdict, or how strong the defence has to be in order to justify the plea being reopened, the language is very variable and in my submission, that is an indication that this is an area that has not been theorised in detail, if you like.

We haven't gotten to the bottom of that particular rabbit hole as to what we're doing because we haven't been looking at the statutory language of section 232. We've been looking at it through the lens of *Le Page* and *Merrilees*.

5 **COOKE J:**

Well, I mean they're really treated as a category all on their own these cases when there has been a guilty plea.

MR CONDER:

They do, your Honour, and this is why we don't go back to section 232
10 particularly much and we don't talk about section 232(4)(a) or section 232(4)(b) because it's just accepted that we've got these four categorisations and while they're not closed, the reality is that 90% of cases fall within one of the four.

COOKE J:

Yes.

15 **MR CONDER:**

And that's the way we tend to approach it...

1110

There's also a little bit of difficulty here in that although I'm saying that the
20 strength of the defence case is not directly relevant to whether there would be a different verdict, it is still necessary for an appellant who is relying on that fourth category, as we are, to say that there is an arguable defence. So there is a little conceit, I suppose, in what I'm saying that on the one hand we do have to establish an error and that means we have to establish something arguable,
25 but then I'm saying it only needs to be something that should have been advised on and may have affected the plea. We don't then need to go to the first step of saying in addition to being an error is it also likely to succeed?

COOKE J:

Well, I wonder if it's just we treat this category as one that stands on its own and that the strength of a possible defence is always going to be a material consideration in allowing an appeal when there has been a guilty plea.

5 **MR CONDER:**

I accept that it must be, your Honour, in the sense that there needs to be enough evidence to suggest that an error has been made and that it could have been material to the plea. The way the Court of Appeal framed dismissing the appeal on this ground was to say that while the Court acknowledged that there had
10 been an error in the advice, nevertheless it was satisfied that it couldn't possibly have made a difference on the plea because notwithstanding Mr Bourke's evidence it was the view of the Court of Appeal that no one would ever recommend taking this to trial.

COOKE J:

15 All right.

MR CONDER:

And so the issue was still whether or not it would have been a successful defence but it was framed in the sense of any responsible lawyer would tell Mr Webster to plead guilty.

20 **WILLIAMS J:**

It's kind of a public law relevance test.

MR CONDER:

Yes, I think that's right, your Honour. That is probably the correct way to look at it.

25 **ELLEN FRANCE J:**

This Court in the Solicitor-General's reference says the overriding test is whether there will be a miscarriage in the particular case unless the guilty plea can be impugned and the conviction set aside. So that does, although that's

the Court suggesting the categories are illustrations of when the miscarriage may have occurred, it does throw you back to the definitions of miscarriage, doesn't it?

MR CONDER:

- 5 It does, your Honour, and I suppose that, at the end of the day, is what I am arguing for is I'm saying that *Le Page* and *Merrilees* give us some guidance as to how the miscarriage test should be applied but ultimately the Court should be looking back to the fundamental question which is has Mr Webster, without a free and fully informed choice, waived rights that he should have otherwise
10 been able to assert and has he gone down a different pathway than what he would have otherwise which is the different outcome.

WINKELMANN CJ:

So is that then your submission that the defence only comes into its bearing upon the plea and not this hypothetical counterfactual trial that runs?

- 15 **MR CONDER:**

Yes, that's correct, your Honour. I acknowledge that to establish an error we have to establish something of an arguable defence but we –

WINKELMANN CJ:

So does that also count when a person completely lacks competence to plead?

- 20 **MR CONDER:**

I would say in that circumstance the reasoning is much more direct. I would say no. I would say that if a person lacks the competency to plead or pleads guilty under a false assumption that they have no other choice, which is really the argument that we're trying to put, I suppose, in those circumstances under
25 either standard you've got an unfair trial because he loses all the fair trial rights that he would've –

WINKELMANN CJ:

But he doesn't – but he may not hypothetically be mentally competent to be having that conversation with himself about what a hypothetical trial will be like. I'm just troubled with the different gradations of people that this test you're

5 formulating might affect because it might be people who are marginal on competence to plead guilty, who can be competent with the systems or who are just not competent to go through the mental processes to plead guilty at the moment they do so, which, on your argument, is in fact the appellant.

MR CONDER:

10 Yes.

WINKELMANN CJ:

So if he's just not really an autonomous human being pleading guilty, should we hold him to that choice even though he hasn't made it, on the basis that, well, if we made him competent he would inevitably make that choice? If we

15 assist him to competence he would inevitably make that choice.

MR CONDER:

I suppose I'd say two things. I think the framing of that question invites its own answer. If he has made that choice without being a real participant in it, I don't think there is any sense in which it can be right to hold him to that choice.

20 1115

It then comes to the question of, as you've said, if that was always going to be his choice, should he be entitled to revisit it? I think that the Court should be very, very slow to conclude that a defendant who has advanced an appeal

25 saying I want to reopen my guilty plea would inevitably make the decision to plead guilty. It's ultimately a decision for the defendant, not for his lawyer or for an appellate court to decide whether or not it is a defence that he wants to run. And this is where I say if he would have made a different decision if he were presented with all of the facts at the outset, if he knew about the alternatives

30 that were available, he was aware that there was some evidence to support intent, he was aware that he would have the benefit of communications

assistance if he needed to give evidence, and if that would be enough for him to advance a defence or for him to choose to advance a defence I suppose is the language I would prefer, then in my submission the Court shouldn't say yes, but it's not a very good defence, or it's not a defence that we think is worth
 5 running. No other defendant –

KÓS J:

What you're really – just picking up Mr de Groot's point, you had a forestalled opportunity to go to the Crown and say actually, with this additional information, how about manslaughter? In other words, there is a potentially different
 10 outcome. There's at least a step before if the Crown doesn't accept that and if on further reflection you don't think that defence is valid, well then he might replead to murder, but you haven't had that opportunity because you didn't have the information to advance that alternative. That's the important point.

MR CONDER:

15 I can accept that, your Honour, but I would go one step further and I would say that if a defendant wants to advance a hopeless defence, every other defendant has that opportunity, and if he has not freely and willingly given away that right he shouldn't be deprived of it simply because now having wrongly entered a guilty plea without understanding it he's in a position where the onus is now on
 20 him to establish that he should get his section 25 rights. And –

WINKELMANN CJ:

So you're saying it's paternalistic for us to say, oh well, you would've pleaded guilty anyway because your defence was hopeless?

MR CONDER:

25 I think the Court should be very hesitant –

WINKELMANN CJ:

Or you should be held to that plea because your defence is hopeless?

MR CONDER:

Yes, that is what I say. I say that it's okay for the Court –

WILLIAMS J:

The danger is gaming.

5 **MR CONDER:**

I agree.

WILLIAMS J:

This buyer's remorse when you get a sentence you don't like.

MR CONDER:

10 Yes, I would agree with that, but then that leads us to another complicated area, your Honour, which is there are a number of cases where the defective advice that allows the reopening of a plea is nothing other than inaccurate advice or misunderstood advice on sentence.

15 And if I take at this point – in *Whichman v R* [2018] NZCA 519 there is a helpful summary of the decision of *T (CA662/2012) v R* [2013] NZCA 550. In that case what happened was that the appellant pleaded guilty on the understanding that the police would not oppose – that they would be neutral to a discharge without conviction. Ultimately the police entered an opposition. He was convicted
20 probably I think in the circumstances reasonably inevitably. The Court of Appeal in that case acknowledged that there didn't appear to be any defence to the charge, but nevertheless he wouldn't have pleaded guilty and gone down that route but for the advice that he'd received about discharge without conviction which proved wrongful. He was entitled –

25 **WILLIAMS J:**

You can see a causal problem there though, where not only – I don't know what the facts were in this case. Perhaps there wasn't an impairment issue. It's a big difference. If this was just the advice ended up not being taken up by the police and I pleaded on the basis of an expectation that I reasonably had that

was dashed, you can see the justice in revisiting that. But where it's an assessment of the status of an individual, a much less precise assessment, you've got to avoid the danger of the rights rhetoric generating bad outcomes.

MR CONDER:

5 I accept that, your Honour, but I think the answer is not to impose a separate standard, but it's to impose the standard that's set by section 232. What I mean by that is what does the defendant – or the appellant have to show? The appellant has to show that something has gone wrong, so the onus is on the appellant to establish some sort of error or irregularity. Here it's the lack of
10 information about impairment, it's the lack of assessment around fitness. He must then also establish either that he has suffered some real unfairness by that or that he would've gone down a different pathway, and that's where I say subsection (4)(a) is about plea. If he would have made a different plea if he were fully informed, whether that's the right decision or the wrong decision, it's
15 his decision.

WILLIAMS J:

I think the reluctance is that the assessment itself is such an imprecise assessment that there are dangers in being so binary and so black and white. I mean in the clear cases no one is going to argue with you, but these experts,
20 all of them say I can't really be sure, partly because of the circumstances, they're coming in two years after the event so one understands that, but they all say this area is extraordinarily difficult and there are potentially no right and wrong answers, just advice.

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25 **MR CONDER:**

Yes. I think we can think about a few different ways. Going back to the discussion that my friend had with you about what do we do about defendants who want to plead guilty anyway, because really, I think we're talking about the same category. They're people who make the reluctant choice, who later think
30 better of it, perhaps they get a bad sentencing outcome and then they want to come on appeal and say, well actually, I didn't fully understand what I was doing

and therefore, I should get another go. That's really where I think the floodgates risk, if you like, comes from.

5 I think partly we can head that off through responsible lawyering in a certain sense, which is a defendant who says, I'm aware that I've got some issues around fitness, my lawyer has said to me I can go down the fitness route if I want to, but I don't want to and I want to make this decision, who's had a discussion of that kind with his lawyer, is in a much stronger position to or is it, I suppose, a much weaker position to then turn around and say, actually, I
10 should have had the opportunity to plead not guilty. If he's presented not necessarily with the choice of plea or trial, but plea or CPMIP process, he nevertheless has faced a real choice. He's made his election and it's appropriate to hold him to that as a kind of free and fully informed choice.

WILLIAMS J:

15 The answer, I suppose, really is in the rigour of the process.

MR CONDER:

It is to a certain extent.

WILLIAMS J:

We're stuck with the law as it is, and the process has to be rigorous enough to
20 make as few mistakes as possible.

MR CONDER:

That's correct.

WINKELMANN CJ:

Mr Conder, can you just restate where you've got to on this point about the
25 relevance of the defence, because I think you've been travelling a little bit in your thinking and then speaking.

MR CONDER:

What I would say about that is that the strength of the defence is only relevant to the question of whether or not an error has occurred. If there is no defence, then there's no error to have failed to advise on it. But once the Court is satisfied
5 that there is something that should've formed part of the advice, there has been an error, in the advice –

WINKELMANN CJ:

This is assuming a competent client.

MR CONDER:

10 Yes, sorry, this is when we get to the defence issue. I'll come back and go through the assessment a second time with fitness.

WINKELMANN CJ:

Okay, all right, so this is the FASD issue, simpliciter.

MR CONDER:

15 If I call it the intent issue.

WINKELMANN CJ:

Intent issue.

MR CONDER:

It's the availability of the intent defence. We would say that you assess the
20 strength of that defence when assessing whether there has been an error, irregularity or occurrence in respect of the trial, but you don't need to assess it in determining whether or not a different outcome was available. If the defendant would have entered a different plea or there is a real risk that the defendant would have entered a different plea, had that error not occurred, then
25 in my submission, the Court doesn't also need to be satisfied that the defence could succeed and that's where I gave the example of other advice that might be given about how the trial could be run. Could this witness be cross-examined.

WINKELMANN CJ:

That's your *T* case? Was that your *T* case?

MR CONDER:

And also *T* where you've got the advice about sentencing processes that leads
 5 to that plea, but there is no arguable defence and in a similar category I would
 put the *Cooper v R* [2013] NZCA 551 case where that was to do with the
 lawfulness of the firearm and the Court of Appeal accepted that while it could
 well have been put forward what the basis for lawfulness was, it wasn't fatal to
 the appeal, that nothing had yet been put forward. I should also just pause at
 10 that point to say, that distinguishes this, in our submission, from the *Wheble v*
R [2024] NZCA 541 decision that was an insanity argument where obviously
 there is an onus under section 23 of the Crimes Act 1961, and so it was
 appropriate there that the test was somewhat different than it is in cases where
 it is a defence that is effectively one of the elements is not present.

15 **KÓS J:**

This distinction you're making seems to follow from paragraph 76 of the
 Court of Appeal decision in that last sentence that I think Mr de Groot said he
 agreed with.

MR CONDER:

20 Yes, your Honour, that's correct.

KÓS J:

That is to say, we've got the page up on the ClickShare, that's section 232(4)(a),
 real risk that the outcome of the trial is affected, and you are saying that for
 these purposes, trial is the guilt with a plea of guilty.

25 **MR CONDER:**

Correct. That is –

KÓS J:

I'm not sure for myself, that's what Parliament intended section 232(4)(a) to have in mind, whether it was simply just limited to the plea, but actually rather whether the outcome of the whole process would've been different.

5 **MR CONDER:**

This is where I –

KÓS J:

That is if a different plea was entered, there was a trial, whether that would've resulted in a conviction, just as it did obviously if an entry of a plea of guilty is
10 made.

MR CONDER:

This is where I say, and we've got a series of subparagraphs in our written submissions, but I say there is a meaningful difference between a guilty plea following a trial and a guilty – sorry, a guilty verdict following a trial and a guilty
15 plea, that those are and should be viewed as different outcomes. I also say that this is an area where the distance between subsection (a) and (b) becomes very narrow because what the defendant loses when he enters a guilty plea that's not fully informed or is influenced by error is he loses precisely those rights that are guaranteed to him under section 25. He loses the fair trial that
20 he would otherwise be entitled to.

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So in my submission, this is a situation where there may not be a difference between subsection (a) and (b). What there is is the different outcome, is the
25 lack of the fair trial to which he is otherwise entitled.

WINKELMANN CJ:

Because it's very hard for a court to responsibly or reliably assess the likely outcome when there hasn't been a trial with defence.

MR CONDER:

That's the third layer of our argument which is to say that the Court is in a very difficult position because it must rely on untested evidence, partial evidence, and so it is also, as it happens, in my submission, fundamentally unsafe other than in the most clear of cases for an appellate court to make that assessment, and there I have pointed to decisions like the *Re Erebus Royal Commission* (No.2); *Bradley v Attorney-General* [1981] 1 NZLR 618 (CA) decision where the Court says time and time again unless you actually have that trial it's not safe to conclude that there is no possible answer. You know, the annals of the law books are full of examples of seemingly open and shut cases that were not, and that is also a thread in our bow, if you like, that reaching the assessment that the verdict couldn't possibly have been different is something that the Court should be very, very hesitant to do when the evidence has never been subject to a trial.

COOKE J:

The language of subsection (4) actually literally does seem to proceed on the basis that there has been a trial. So I wonder if that's a reason for thinking of these guilty plea cases as being in a category of their own rather than trying to squeeze them into categories that have been devised to exist after a trial.

MR CONDER:

Yes, your Honour. I think there's two things I'd say about that. Obviously, subsection (5) says trial includes proceedings where the defendant has pleaded guilty, but it does become difficult to apply the test in the same way in those two very different environments.

I also think there is a tendency in a lot of the cases that are under subsection (4)(a) to almost bring in the old language of the proviso as the real test. There is a real continuity between what happened before 2013 and what happened after 2013 and I think that is indicative of the established practices under the proviso becoming the established practices under subsection (4)(a) and I'm not certain that that's necessarily right. I think in most cases they'll lead to the same outcome but there is room, particularly in cases involving guilty

pleas, I would say, for there to be a shift because the language is now, as I say, the outcome of the trial that is affected.

KÓS J:

But your argument effectively shifts it into subsection (b). You say that denial
5 of the trial, the fair trial that would have occurred, takes you into subsection (b) anyway.

MR CONDER:

I say that it's a distinction without difference when we're talking about guilty
10 pleas.

10

That's really the argument in terms of the intent defence in terms of how we say
section 232 fits together. The next thing I would propose to do is to go through
the same analysis but in terms of if there has been an undiagnosed fitness issue
and we haven't had the opportunity to examine fitness and there hasn't been
15 any opportunity in particular to examine the availability of communication
assistance, in my submission that probably more clearly sits under
subsection (4)(b) because the lack of assistance, the lack of identification of a
fitness issue, has that inherent flavour of unfairness but at the same time, even
looking at it under subsection (4)(a) we end up in a similar situation. If the
20 defendant would have chosen to go down a different pathway, if those issues
had been examined or resolved, or if the defendant, remembering that it is only
a real risk, may well have gone down a different pathway had those issues been
investigated and resolved, then in our submission that is a different outcome.
That is an outcome under subsection (a) that permits of a successful appeal.

25 **WINKELMANN CJ:**

And then after morning adjournment we'll go on to the approach where there's
lack of capacity or do you think we've already covered that?

MR CONDER:

I think lack of capacity would simply be unfairness. I think, again, you could run
30 the same argument and you could say that lack of capacity creates a situation

where if that had been examined properly we would have gone through a different process and that's a different outcome, but each step –

WINKELMANN CJ:

Simply an unfair trial?

5 **MR CONDER:**

– but each step we get closer and closer to something that is inevitably an unfair trial.

10 So after the break I'd proposed to simply deal with the way that the Court of Appeal dealt with this question and then deal with my friends' suggestion that there is in fact no error in the advice, but that's probably all that I would have to say on how section 232 should be applied.

WINKELMANN CJ:

Okay, thank you very much, Mr Conder. We'll take the morning adjournment.

15 **COURT ADJOURNS: 11.30 AM**

COURT RESUMES: 11.47 AM

WINKELMANN CJ:

Mr Conder.

MR CONDER:

20 Thank you, your Honour. So having set out what we say is the correct legal test, I'm going to focus now particularly on the intent defence component and go through what we say are the two important questions, whether there was in fact an error, and as I understand it, the Crown's main opposition to this aspect of the appeal is the Crown says there was not in fact an error, and then whether
25 or not that could have influenced the plea here and that, in my submission, is where the Court of Appeal reached its conclusion saying no, the plea here was always inevitable.

First, I begin by saying that the framing that the Crown has used to say that there is no error is to focus in on the language of there is a “real risk” of conviction. It’s true to say that part of the advice that was given at the time was that there was a real risk of conviction and it is still true today to say that no matter what happens at trial, there would be a real risk of a conviction. But, in my submission, that underestimates the advice that was in fact being given and therefore, it’s not fair to say that that is, that, you know, that overarching comment hasn’t changed and therefore, the advice wouldn’t have changed.

I think it’s useful at this stage to trace through the way that the advice took place and the way Mr Bourke described it, because it shows what I tried to emphasise at the outset of my portion of the submissions the extent to which the lack of a proper explanation really was a driver behind the ultimate advice to plead guilty.

So what you can see is, and this is just going through Mr Bourke’s first affidavit that he filed, at paragraph 21 he makes it clear that Mr Webster began by denying his intent to murder the victim. That’s the starting point that he took.

Mr Bourke responded to that by looking at the objective evidence that made that inference seemingly obvious. So, he talked through the various definitions with him and he goes through the evidence that he says he found particularly concerning, that is evidence that led him to conclude that there would be an almost irresistible inference around intent, and you can see that particularly at paragraphs 22 to 25 of that affidavit and then there is a similar concluding comment at –

WINKELMANN CJ:

Can we just ask, does he say his advice was that there would be an “almost irresistible”?

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MR CONDER:

He does not use those words, no. But where we come to is that he then, having formed the view that there is a strong inference, he concludes: "Mr Webster was never able to articulate answers that I thought mitigated the risk he faced."

- 5 What one can take from that statement is that he's formed a view that this is a strong Crown case and there needs to be something to answer it in order for there to be any kind of an arguable defence.

- 10 And turning back to the piece of cross-examination that I began with, it's to a very similar effect because he says that the question that he thought he was answering – this is page 4 of the notes of evidence at line 22 – he's acknowledging that murderous intent and specifically foresight are the key issues but he goes on to say: "... obviously where I was at when I was trial counsel was simply, well, he's young, is that going to be sufficient to mitigate everything that the Crown will be able to say about intent?" So when he is
15 working out how to advise Mr Webster he's thinking there's a strong Crown case and the only thing that I can say in response to it is, well, he's young. He doesn't have any answers from his client that he can put on the stand to explain why the seemingly obvious inference is incorrect. At this stage he doesn't have
20 any experts who can say this is a person with real impairments who wouldn't necessarily reach the same conclusions that ordinary men and women would, and so he's left going is youth alone enough to say that this otherwise obvious inference should be rejected?

- 25 And he effectively concludes, in my submission, and this is reading between the lines a little bit but it's the way that the advice turns out, the lack of an explanation, the lack of an alternative, he reaches the view that there is – he says in the first affidavit "considerable risk" of a conviction, and so he gives Mr Webster very clear advice that he should plead guilty. And he's also quite
30 clear, and this is at paragraph 33 of the first affidavit in particular, he's quite clear that Mr Webster was not sort of weighing up this advice and carefully making his own conclusion. Rather, it was clear that if he recommended a guilty plea Mr Webster was going to accept that advice. He was very dependent, "heavily reliant" are the words that Mr Bourke used, on the advice. So –

COOKE J:

When you say – when he uses the word “different pathway”, that’s where you say there is a real risk that there would be a different plea?

MR CONDER:

- 5 Yes, your Honour. What I’m saying here is that he’s looked at the options that are available for a defence and he says there’s just not enough here to really be able to put forward an intent defence, all I’ve got to go off is youth. But when he’s asked about it during cross-examination with the benefit of all the reports that have then been obtained, he says look, the advice would be different now.
- 10 He doesn’t say specifically what the advice would be and I pointed earlier in particular to the decision in *T v R* as an example where no defence was actually set out as the grounds for vitiating the plea, but in my submission it’s obvious. If you look at the reasoning that he’s followed in reaching the advice that he reached, it is to start with the fact that this is an objectively strong case, that
- 15 there needs to be some sort of explanation to get you around the inference that there is intent or that there is recklessness, rather, and that it’s not until there is some independent evidence that says this is a man who has real difficulty with that kind of mental calculus, this is a man who has real difficulty understanding what is obvious to all the rest of us, that it becomes something that is genuinely
- 20 a live issue.

COOKE J:

Right, so it’s a new line of inquiry that he would engage in with this further information. So how far do we need to – do we need to know where he would likely have ended up after engaging in that inquiry?

- 25 **MR CONDER:**

I would submit no, and I would turn again to the language of section 232 and say the question is, is there enough here for the Court to be satisfied there is a real risk of a different pathway, and I would submit yes, you’ve got a lawyer who says –

COOKE J:

Of a different plea, you would mean?

MR CONDER:

Of a different plea, that is what I mean by that. And I would say that yes, there
 5 is at this point. There is a real risk that with the benefit of all that information a
 different conclusion would be reached, and when I come to talk about the
 Court of Appeal's assessment I'll talk about that component a little bit more.
 Here I'm focused more on the fact that we say there was an error in the first
 place, that there was a defence or – error perhaps puts it the wrong way. An
 10 irregularity. There was a defence that should've been advised on and couldn't
 be.

WINKELMANN CJ:

So when we're talking about this argument, this is really directed simply to the
 fact that Mr Bourke didn't know about foetal alcohol syndrome, because you
 15 say that on the competence side if we're satisfied that the guilty plea wasn't fully
 informed we wouldn't really be interested in this question?

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MR CONDER:

Correct. We only get to this point once we've moved past the fitness component
 20 of the appeal. We are looking at an uninformed plea in terms of this category 4
 of *Merrilees*, an available defence that was never properly advised on. That's
 solely where we are.

The Crown's position, as I understand it on that, is that there is no error in the
 25 advice because the advice is still there's a real risk of conviction, why would
 you take a different view? And, in my submission, what is missing when you
 look at the way Mr Bourke examined the issue, he said the starting point is a
 strong inference, there needs to be some sort of explanation, and I simply can't
 find an adequate explanation. But now that we have the expert evidence
 30 around foetal alcohol and the impact that that has on his ability to reason, that
 that creates a foundation for a defence that otherwise seemed like it was closed.

COOKE J:

So you still look at the defence, but only to the point that fully informed, Mr Bourke would still have told him to plead guilty?

MR CONDER:

- 5 Yes. So, through the lens of those two questions, was there an error, or should there have been additional advice and we say yes, there should have been, there should've been advice about this foetal alcohol issue. No fault of Mr Bourke, but that's what should have happened and then we say and it has a real risk of changing the plea and that's where I say section 232(4)(a) and
10 section 232(4)(b) merge together. But this does fulfil the requirements of section 232(4)(a).

COOKE J:

You say section 232(4)(b) really is just a case where there was complete incapacity to –

- 15 **MR CONDER:**

- No. What I really say about that is that in these cases, section 232(4)(a) and section 232(4)(b) tend to merge together because what the defendant loses by choosing the other pathway is they lose their fair trial. That's not the only conclusion available here, but that's the way I'm framing it, is to say that by your
20 plea you are waiving the fair trial you would otherwise receive and if that decision has been influenced by an error, then what you have had is an unfair trial. You've never had the opportunity to assert your section 25 rights. If you waived them knowingly, you understood that that's what you were waiving and that you had another option open to you, then you would be in probably strictly
25 section 232(4)(a) territory. But here, where the waiver of your fair trial rights is impacted by the error, we say that section 232(4)(a) and section 232(4)(b) simply merge together.

WINKELMANN CJ:

You say it's a risk. Not satisfied that it affected the error, but a risk. Wouldn't you think it would be – are you proceeding from the statutory language in that sense?

5 **MR CONDER:**

Yes, I am. I am taking the generosity of section 232 that all I need to establish here is a real risk. Ms Dyhrberg is going to go through the defence in somewhat more detail and will speak to its strength, which is our position. But I am saying for the purposes of the section, all that needs to be established is that there is
 10 a genuine error and that Mr Webster may well have made a different choice. If those two things are established, then that is as far as we need to go.

The Crown suggests that what's now being sought by the appellant is an opportunity to investigate a defence rather than a defence that already exists.
 15 We expressly do not concede that. It is our position that there is a real and arguable defence here and that that is clear on the evidence that's already before the Court. But we also say for much the same reason that I've just gone through, that it would be permissible if this were only a very nascent defence and that's where I point at *T* and I've pointed also to *Cooper* as examples of
 20 cases where the defence is not fully investigated at the time of the appeal and the Court, if it is satisfied that there is a real risk of a different pathway, nevertheless concludes that the grounds of appeal have been made out. So it is important to understand that the onus on the appellant is only to establish that and not to establish fully the strength of the defence. If there's something
 25 that's been missed, if it really could've made a difference, the answer, in our submission, is that the appeal must succeed.

COOKE J:

What do you say to the proposition that it would be necessary to show that the plea would have been different had defence counsel say had I known this
 30 information, I would have advised him to plead not guilty?

MR CONDER:

I think that that is going beyond the statutory language. That the statutory language is there is a real risk of a different outcome and in my submission, it is difficult in these circumstances to be certain what would've happened in the
 5 past. But if there is a real prospect of a different pathway, in my submission, that's adequate because at that point the defendant is the person who should get to make that choice and that is really the essential point here. It comes back to that loadstar of defendant autonomy.

COOKE J:

10 Right and still, if an appeal was allowed, still gets to make that choice?
 1200

MR CONDER:

Yes. I mean this is the example that Justice Kós gave earlier that it could well be the case that there is an investigation, there is a discussion about the
 15 possibility of accepting a plea to manslaughter and then a decision taken not to proceed the full distance to trial. But that would be open to the appellant. He's not necessarily fully committed to take it to the full end of the pathway and I think our position would be we expect he probably would if that wasn't offered, but anything could happen in a new trial process and it's certainly not necessary
 20 for an appellant in this process to nail his colours irrevocably to the mast. He's entitled to make that decision with the benefit of a process that doesn't contain the error that affected his plea the first time around.

We also say that there is, as I say, a real defence here which Ms Dyhrberg will
 25 speak to, but there is a real error here. That's the important component.

The existing evidence provides a foundation for a defence based around a lack of recklessness. The advice previously was effectively that this was a closed door, that although he said he lacked intent, that the evidence was
 30 overwhelming. Here, on the current evidence, it's a much more open door. There's something that's plainly arguable.

In my submission, it's not necessary that it goes from being absolutely no defence to a strong defence. There will be cases, in my submission, where something that may have been acknowledged but as only marginal, when it becomes clear that it is, in fact, much stronger, is a situation where the defendant's reluctant plea, the defendant's calculus of his compromise, is undermined by the fact that that advice was given in wrong terms. You can see that in all of the cases that revolve around errors about sentencing. There the defendant is allowed to revisit because the compromise that he or she believed that they were making has changed fundamentally.

10

This is different from what some of the case law talks about. In *Le Page* in particular, when talking about category 2, which is what *Le Page* was, a wrong legal ruling, the Court of Appeal there was sceptical about the extent to which evidential rulings could be a ground for challenging a guilty plea. The language that the Court of Appeal ultimately concluded was, there needs to: "... be no legal avenue left to an accused, not just that his chances at trial have suffered a body blow." I would be inviting the Court not to take that position here and that the statutory language of a real risk of a different outcome actually points in the opposite direction, that if there is a real prospect that the equation for the defendant who has made a compromised plea would be different, that the Court should be more open-minded than saying that it's necessary for him to show he had no other option than a guilty plea before this will be entertained.

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Fundamentally, the Crown response to suggest that there is no error is to point to the evidence that the Crown says shows that intent is an irresistible inference. In my submission, the problem with the approach taken there is that this is necessarily looking at objective evidence to draw an inference about a subjective state of mind. As the Court has already acknowledged, difficult to do that without the benefit of a trial record and possibly unsafe to do that without the benefit of a trial record, but my comment on that would simply be that the Court should be very hesitant to reach the conclusion that the facts here only permit one outcome. Without testing the evidence at trial, without the opportunity to develop these points further, in my submission, it would be unsafe to conclude that this is not something that should've been advised on

and therefore, we say there is a genuine error here that meets that first part of the test. Something has gone wrong with the advice and that raises the question of could it really have impacted the plea.

- 5 The fundamental thing that we rely on there is Mr Bourke's evidence where he says quite directly, that yes, in fact, the advice would have been different if this had been known at the time. In our submission, it necessarily would have been different when you look at the way the advice was constructed, the fact that it was effectively excluding the possibility of an intent-based defence on the basis
- 10 of the objective evidence and the lack of a proper answer. Now that there is a proper answer to that evidence, necessarily the advice must change and again, in the language of section 232(4)(a), there is a real risk that a different pathway is selected.

WINKELMANN CJ:

- 15 Does Mr Bourke address what impact the Carlyon advice had on him?

MR CONDER:

He effectively says that he looked at the Carlyon advice and that that was enough for him to conclude that he could proceed on the basis of what he had, I think, is a fair summary.

- 20 **KÓS J:**

It was paragraph 37 of the first bit: "... suitable comfort there were no impediments to Mr Webster entering a plea."

MR CONDER:

- Yes, I think it's implicit, particularly with that quote at paragraph 36, that it goes
- 25 beyond "no impediments to Mr Webster entering a plea" but also there's no reason to think that there's anything else behind his inability to answer and during the cross-examination –

KÓS J:

It must be implicit.

MR CONDER:

Yes, it is. During the cross-examination, that point comes out a little bit further.

- 5 There's actually a question directly about, I'll just find the question and answer, so there's the discussion at the beginning of page 3, about not having gone through elements step by step, it was effectively a binary guilty or not guilty decision and never went through the statements to formally accept them, but there's a discussion, sorry, I'll just find it now. Sorry, the one thing I hadn't
- 10 written down in my notes. The discussion is about the fact that he doesn't, yes, sorry here: "... you refer in your affidavits to the inability to articulate answers or drawing a blank, you didn't have any reason to think that he was just choosing not to engage with you at that time?" "No, far from it. Not at all." Just a lack of –

15 **COOKE J:**

Page and line?

MR CONDER:

- Sorry, this is page 2 and we're looking at lines 22 and onwards. It's just a discussion about the back-and-forth communication and the fact that it was very
- 20 difficult to get these answers and what I again would say is implicit in the answers there, is there's no recognition from Mr Bourke at that stage that this is evidence of something else that's going on behind the scenes. He's taking –

WINKELMANN CJ:

- More than that, he's actually saying he thought in the absence of any expert
- 25 evidence to suggest some sort of pathological explanation for this, he assumed that he didn't have a response.

MR CONDER:

That's precisely it, your Honour. It's him reaching the conclusion that because of what he can see, he goes, well, there's just no answer to this. It's a

reasonable inference to draw until you understand just how impaired Mr Webster is and that seems to be what's happened here.

5 The way the Court of Appeal approached this was to, as I say, ask the right question at paragraph 76, the question is whether or not the error which appears to have been effectively accepted by the Court of Appeal led to a potentially different plea. The Court then goes through the objective evidence that suggests there is an inference and concludes effectively that based on the verbal statements that are made, based on the degree of injury, that the facts
10 only permit one conclusion which is that there has to be recklessness. It effectively applies an objective standard there.

In my submission, the Court of Appeal has failed to do what it said it was going to do which is assess whether or not the plea would've been different. It's
15 formed a view that this is undefendable and therefore has substituted its own advice, if you like, for that of the lawyer who said he would've given different advice to say, any realistic lawyer would have said there's no defence here. In our submission, that's mistaken. Mr Bourke quite rightly said the advice would've been different. When you look at how the advice was constructed,
20 there is a real possibility of a different pathway and in our submission, that is adequate for section 232.

COOKE J:

So you say the Court was wrong at the end of paragraph 79 in saying that Mr Bourke's advice would have been still the same?

25 **MR CONDER:**

That's correct. That's where we say the error comes in and it's a consequence of taking an almost exclusively objective approach prior to that. They minimise, in my submission, the evidence about mental state and then conclude that the objective evidence is such that there's only one possible outcome. In my
30 submission, that's wrong for the reasons that Ms Dyhrberg will shortly address, but also the advice of Mr Bourke that he would've given different advice should be accepted here.

That's all I propose to say about the intent defence, and I think I've covered off all the issues about section 232.

WINKELMANN CJ:

5 Yes, thank you.

MR CONDER:

With your leave, I'll pass off to Ms Dyhrberg to address the defence as it would be put.

WINKELMANN CJ:

10 Thank you, Mr Conder.

MS DYHRBERG KC:

Yes, may it please your Honours. We respectfully submit that the legal issue here is straightforward, and as I've already said, it's not an acquittal, it's a matter of whether manslaughter, in all the circumstances following the knowledge of
15 the foetal alcohol spectrum disorder came to light, was section 167(b). Could that be proved beyond reasonable doubt or was there a defence to that particular aspect but still be liable for manslaughter?

1210

20 And it appears the Crown has two pathways in terms of the murder, principal liability for the farm assault. That itself would raise or support the manslaughter. But also, which is not accepted, party liability for what we will call the Candy-led dragging aspect of it and both of those do depend upon Mr Webster's actual state of mind, impaired as it was. And in the party phase, please excuse me,
25 the Crown also had to prove that Mr Webster appreciated Mr Candy's reckless state of mind.

So, when the suggestion is made that death was utterly obvious, this jury point is something that the Crown can make, but it's not the legal answer. The jury

still has to decide whether it has been proved to be obvious to Mr Webster given his age, impairment and role in each phase and I move onto that later.

5 So that's why the FASD evidence really matters, not as a separate and total defence, but as evidence bearing directly upon the subjective element for murder and I don't address or deal with the whether or not he meant to cause death. I suggest that the evidence, and it is accepted we are looking at reckless murder in this case.

10 If I can now turn just and summarise the experts' evidence is that the suggestion is that there is no expert evidence saying that Mr Webster lacked murderous intent. So, it's accepted that no expert gives that ultimate opinion, but that's not fatal because the expert evidence mattered. It explained Mr Webster's functioning in the areas directly relevant to subjective foresight and it's not for
15 the experts, of course, to state what the ultimate issue is. It's a jury issue whether this aspect of subjective foresight is proved or not.

The reports identify, along all of them, looking at them all, for Mr Webster's slow processing, executive dysfunction, concrete thinking, difficulty forecasting
20 consequences, difficulty understanding cause and effect, communication problems, suggestibility, compliance, vulnerability to Mr Candy and theory of mind difficulties. I'm not going to traverse those later, but that's all that emerges in culmination from the various expert reports.

25 So, in my respectful submission, there is expert evidence that casts doubt on whether or not Mr Webster did indeed have murderous report.

The theory of mind is the ability to understand what others – by ascribing mental states to them. So that's not only relevant to Mr Webster's ability to understand
30 consequences, but also it's relevant to his understanding of what Mr Candy was thinking, particularly in that dragging aspect of it, and understanding not only thinking, intending and appreciating what is required when you look at the party requirement. So the matters aren't just really fitness or sentence. They are really relevant to the trial issue was whether Mr Webster actually appreciated

that death could well happen and consciously ran that risk, and the various reports, if I just briefly summarise those, they are all relevant.

1215

- 5 Dr Barry-Walsh first identified that Mr Webster's presentation was likely explained by neurodevelopmental impairment, not simply youth, poor education, shame or reluctance to engage. Now his updated report at paragraph 3 is where that comes from.
- 10 Ms Fon's precise scores, there's some caution thrown on that by Dr Nuth but that again is a jury issue, but her report still identified important functional features, Mr Webster as a follower, vulnerable to pressure, easily led and poor at foreseeing consequences, and they are her paragraphs at 78, 87 and 88.
- 15 Dr Nuth narrows the argument but does not eliminate it. He did not assess Mr Webster and he did not say he was not impaired but importantly he accepted that the relevant features of impairment could be considered as mental impairment or specific difficulties affecting Mr Webster's conduct without relying on arbitrary clinical cut-offs, and those matters can be found at his report at
- 20 page 43, 44, 47, 48 and 49.

Dr McFadden is the safest foundation. She identified slow processing, non-linear accounts, difficulty in Mr Webster assessing his own actions from others' actions –

25 **WINKELMANN CJ:**

Can I just take you back? Is it the case that Dr Nuth didn't meet with the appellant, is that what you're saying?

MS DYHRBERG KC:

- No. No, he didn't personally assess. He looked at the paperwork of Dr Fon,
- 30 yes.

WINKELMANN CJ:

Thank you.

MS DYHRBERG KC:

I'm sorry...

5 **WINKELMANN CJ:**

So you were dealing with – I'm sorry, I interrupted you.

MS DYHRBERG KC:

No, not at all.

WINKELMANN CJ:

10 Ms McFadden.

MS DYHRBERG KC:

Again, I just said Dr McFadden is the safest foundation and that's if we look at her paragraphs at 144, 145, 146 to 147 and 153 as well as her early paragraph 14, and the difficulty she pointed out was Mr Webster's difficulty
15 integrating details into a meaningful whole. So that matters because the Crown's case would require the jury to infer that Mr Webster processed the significance of what was happening, connected act and consequences, and appreciated the real risk of death. It also matters because the Crown's party case requires or would require the jury to infer that Mr Webster understood
20 more than just physical sequence. The jury would have to be sure that he appreciated Mr Candy's reckless state of mind, and Dr McFadden's theory of mind evidence, that goes directly towards any inferences that could be safely drawn as to parties.

COOKE J:

25 The paragraphs of her report you've just referred to, they're in the section of her report that deal with fitness to plead?

MS DYHRBERG KC:

I'm sorry, I can't quite hear you.

COOKE J:

5 The paragraphs you've just drawn our attention to in the McFadden material, they deal with fitness to plead. They don't deal with the actual understanding of the offending, do they? Does she ever address the comprehension of the events themselves?

MS DYHRBERG KC:

Dr Panckhurst? Sorry, Dr McFadden.

10 **COOKE J:**

McFadden.

1220

MS DYHRBERG KC:

15 Sorry, I've skipped over. Here is that – well she identifies the impairments that would go to whether or not the mental element of section 167(b) were at risk, so she does definitely –

WINKELMANN CJ:

She does at paragraph 110. We were taken to paragraphs 109 and 110, I think.

MS DYHRBERG KC:

20 Yes. So – yes, and she does provide the matters that would affect his ability to look at whether or not he did appreciate the risk, and then decided nonetheless to take that risk nonetheless.

WINKELMANN CJ:

At paragraph 109 she relates that his narrative of events seem to “jump around”.

25 **KÓS J:**

I presume you're going to come to this, but at some point you're going to have to deal with the EVI statement.

MS DYHRBERG KC:

Yes.

KÓS J:

Where Mr Candy said to him “this is really serious”, “he could be dead by the
5 time we get to the end of the track”.

MS DYHRBERG KC:

I could jump and come – I could deal with that now if your Honour wishes?

KÓS J:

Well it’s the elephant in the room, isn’t it?

10 **MS DYHRBERG KC:**

Yes, it is. And at first, looking at it, none of this is substantiated elsewhere so that simply comes from Mr Webster himself. So it’s not conceded that it actually was said, but in the event that – we will say, well, the jury may well accept yes, it was, that’s what was said to him, all we have by way of reaction for or from
15 Mr Webster is he said, and I thought, oh, this is not good, but there’s no evidence at all that Mr Candy responded apart from making this statement, nothing that Mr Webster responded, nothing that he said out loud or gave any sort of encouragement or, yes, I’m here with you or I understand this. It’s just silence, and –

20 **KÓS J:**

But what relevance could that possibly have? The question is whether Mr Webster appreciated the potential consequence of his actions.

MS DYHRBERG KC:

Yes, yes. And the relevance is that at least what we’ve got now on the experts
25 is that he’s a slow processor, that he requires things to be repeated. He might understand something if it’s really concrete, but he – if that –

KÓS J:

This is pretty concrete, frankly.

MS DYHRBERG KC:

Yes –

5 **KÓS J:**

If it's said. I mean obviously one point that you haven't made but which was hinted at I think in the written submissions, there's an argument that this could be struck out so the jury wouldn't hear it. Now you might want to address that point.

10 **MS DYHRBERG KC:**

Yes. It could still be something that you would say – for example, when he said himself, Mr Webster said, that's when I clicked, so it's almost sort of saying prior to everything else that's happened, whatever he's done, whatever he has seen, and this is someone who has never been in a fight or knows about fighting, then
 15 it's just clicked to him maybe – he's saying what we're doing or what's happening, Mr Ramsay could die, or could be. Now he's – again, to absorb that and to process that we can't just assume that that's something in his condition, he will immediately recognise what that means, and so that could well be how you could say that to a jury and say it's a matter for you what you make of that,
 20 but you have to keep in mind all the things that the experts have said about him processing thoughts.

Also, you'd look even to what his boss says, you know, the boss of the farm, where he says I can only give him very basic things because I have to repeat step by step by step. So that's someone that's outside an expert that has daily
 25 dealings with Mr Webster and has already figured I can't give him these great tasks, he forgets, he doesn't know, and he keeps saying what do you mean? So that's some evidence that you would put to a jury and say that it's all very well to say shock, horror, he clicked. But what is he, in his impaired state, actually working out what does that mean and then by the time, if he does reach
 30 that, he then reaches the view that I don't want to be here but what can I do?

This is someone who's already threatened someone. Keep out of this or else you'll, you know, you'll get the same dealing. All of those things, they're happening really fast. You know, they're happening very fast for someone who is incredibly slow at working it out and it will come down to a jury question. So

5 I would submit it's not that clear-cut on the face of it. When you first – if you first read it, you would think, you know, game over, but not when you tease it all out and put it in the evidence already, the evidence that's available and what his impairments are.

1225

10 **KÓS J:**

What would the basis be for seeking to have the statements struck out?

MS DYHRBERG KC:

Well, overall, whether or not you would be able to have just that single statement struck out, the argument about the admissibility issue is that, again,

15 just briefly focusing on force but coming back, is that as a whole, I can sort of come to that later –

WINKELMANN CJ:

Well, isn't it just that he needs communication assistance to be interviewed?

MS DYHRBERG KC:

20 Well, the statement itself, the fact of the matter is there it is, you've got the statement. So, to say that with communications assistance he may not have said this or he may have said that, what the argument before the Court would be, a pre-trial would be given all his difficulties and as I say is that, you know, what his lack of understanding is, is this a matter where the argument is that

25 the whole of the interview is unreliable. When you look at the whole of the interview, he's incapable of being able to be reliable. He will have mental gaps. He will try and please authority. We had the police officer on numerous occasions saying hey, you're really doing well, you're great, you know, awesome and so forth, that how can you rely on any of what he says in that

30 particular statement?

He didn't have, with respect, a realistic opportunity to exercise, properly exercise, his right to silence or have a lawyer.

5 Now, he's able to repeat and say yes, I don't have to talk, or yes, yes, I can have a lawyer, and you've got a list, you know, of a lawyer. But does that actually also go to that in his condition he understood what a lawyer could do, how a lawyer could help. Why? Why would he have the right to silence? Why would he say nothing and work out that he should not say anything and
10 understand the consequences of what the statement would be. So, it becomes a question, not cherry-picking, about you might be left with that statement, you know, and not make a good argument to get rid of just that particular statement. The argument could be mounted that it's objectively unfair throughout, that he really didn't exercise his rights properly given his impairment and, therefore,
15 you can't rely. There's times where he takes responsibility for something he didn't do. It's not linear.

On the one hand, there's good points for the Crown, they may say. But there's also matters that the defence will say well, this just shows just how impaired he
20 was and you can't rely on it. He's not lying. Like, of course, he's not setting out to lie, but he just cannot – you can't rely on what he is saying given his impediment.

1230

25 So it would be under the umbrella of it's either perhaps in or out and I'm not sure you would succeed in cherry-picking that particular part. That would be – you would need a bit more finesse than, you know, that I've quite got at the moment. But what I would be suggesting is that the interview, I will turn to that issue now, it was mixed, it was difficult and we've already – there's evidence
30 that people with FASD, they want to please authority, they want to help out. He would have no idea of speaking to the police how it would actually, could actually adversely impact on himself and his reliability. There's confusion about sequence. He doesn't know why. He just says I don't know in a lot of ways. So, one argument might be he has no answer because he knows the answer

but he doesn't want to say it. But, on the other hand, with his impairment, the jury can be also asked to say he truly doesn't know, he doesn't remember and just look at him thinking he's just going to give him a few punches. So that's where I would, with respect, put that statement and say that it's open to
5 challenge at pretrial, warts and all, unfortunately.

COOKE J:

The alternative view about that –

MS DYHRBERG KC:

Sorry?

10 **COOKE J:**

The alternative view about the significance of the part of the interview where he says he "clicked" is to say that that goes two ways because it suggests he hadn't clicked before that moment and that's – and what happens after he says he's clicked, there is a more minor aspect of his involvement in the offending.

15 **MS DYHRBERG KC:**

Yes.

COOKE J:

That's after he's done the hitting and kicking.

MS DYHRBERG KC:

20 Yes.

COOKE J:

There's still the dragging to the final place where the victim was left.

MS DYHRBERG KC:

Yes, yes.

COOKE J:

Whether there was injury by that dragging, I'm not sure, and there's the leaving of him there without assistance.

MS DYHRBERG KC:

5 Yes.

COOKE J:

But that might require a degree of sophisticated thinking that might be compromised.

MS DYHRBERG KC:

10 Yes.

COOKE J:

So, it might go two ways.

MS DYHRBERG KC:

15 I know and whenever, as counsel, you do have a statement and you think I really wish that wasn't there, but nonetheless, but I really want this there. So, you do make those choices along the way and that's what trial counsel, knowing what they did, you know, about the impairment, would be tick box, you know, tick, cross, tick, cross and then you'd make a good decision about whether you challenged the statement. As I say, it's mixed.

20 **WINKELMANN CJ:**

I mean, there's no suggestion that the officer was leading him in any way, just asking him completely - questions.

MS DYHRBERG KC:

25 No, no, no, this is not a question where you're saying it's in bad faith because they didn't know either. You know, the police officer didn't know ahead of time, so no, that would not be an argument. It is just objectively unfair based on his impairment.

WINKELMANN CJ:

Right, okay.

MS DYHRBERG KC:

I will move on from admissibility, thanks. If I could just pick up some more, just
 5 finish off the value really of the experts' reports and that there was – there is
 certainly evidence that would support the impairment and go to the issue of
 making an argument at trial at that stage. I mean, you could almost say, look,
 if I had to go to trial now, I would be able to use those reports, you know, that
 we have already.

10

I go on to Dr Panckhurst who also identified clinically significant neurocognitive
 impairment and likely FASD-related executive function deficits and he goes on
 to say why they matter in a criminal trial and as we see, he sets out much the
 same, the poor judgement, difficulty in foreseeing consequences, impaired
 15 abstract reasoning, difficulty weighing information in an evolving situation,
 vulnerability to influence, an impaired ability to understand the mental states of
 others.

1235

20 That is evidence, admissible evidence, expert evidence that goes deftly to the
 ability under section 167(b) and again with the party liability pathway, and again
 all those matters come in. Now, any reports – the reports show that he needed
 help. He needed propping up. He needed what they call scaffolding and that
 the evidence has to be broken down into and sequenced, checked for
 25 understanding, and linked. So there is evidence that you have an 18-year-old
 and he is impaired certainly in areas of the mental issue, the mens rea.

So I intend now to move on from the experts. I think that's there. I can cover
 how the defence would have applied to the facts phase by phase at this stage,
 30 and the Ōakura phase, that's the first phase, Mr Webster's not involved so he
 doesn't know the history of what's already gone, although we do have
 statements from Mr Webster where he says he was obviously – if he's not
 unconscious he's certainly close to it and he's in that state. So we've certainly

got that from Mr Webster. But the question is, what really then follows is what does he understand in a very fast-moving situation that Mr Candy had already created? So Mr Ramsay is presented by the sole actions of Mr Candy, and what does Mr Webster truly take into account of what he does and what effect
 5 that will have, and whether what he's doing is likely to cause death and doesn't care, you know, doesn't care about the risk.

Now if we look at the farm assault, certainly we know the level of attack. There is a dispute about whether it's 10 minutes or three minutes. One would say to
 10 the jury just to think about just how long 10 minutes is, that's a very long time, but nonetheless doesn't take away from Mr Webster's own acceptance that he punched then kicked and then stomped, but does that take him to saying what I'm doing presents, you know, as a real risk that could cause death but I don't care? Because you also have the later evidence from Mr Webster: "I didn't
 15 mean for him to die," and in being interviewed talking about that, becoming emotional, being upset, and the jury may well accept that maybe, you know, by the time you get to whether – the reckless aspect, well he clearly didn't want him, you know, he didn't – he did care whether he, you know, was going to die or not, so you can put that into any trial that you would have and it deftly does
 20 go both ways. Again, it's that subjective appreciation. We can't lose sight of that. It has to be with this impaired defendant.

The party liability, I don't intend going through that because I think it is clear-cut, you know, on the law as what's required, that Mr Webster of course has to – he
 25 hops in the car but he has to intentionally in some way by word or action to support, encourage Mr Candy in what he's doing. He has to be in a situation where he can't escape, no power to get away from the situation. He has to understand Mr Candy's intention was reckless and he was guilty of reckless murder. He has to be able to take that into account and then keeping in mind
 30 that irrespective, Mr Candy was doing what he was going to do with or without Mr Webster.

So, unless your Honours have any questions about what I call that aspect of him being present. It's not enough for him just to have jumped in the car and been present. There's nothing, no way, no evidence really to support that he intentionally acted and engaged as a party. He just simply was in the car and

5 there has to be more and that would be, of course, again, another jury issue, you know, what they made of that either way.

So the closing really would've been quite simple, you know, to a jury. It would be, you know, to the jury you may think that the warning was at the point in

10 which the risk came to his mind, as we've already pointed out, but then you have to also look at what he processed before then and then decide, this is you would be saying to a jury, by remaining in the car, was that intentional assistance with appreciation –

WINKELMANN CJ:

15 I think we've got that.

MS DYHRBERG KC:

Pardon?

WINKELMANN CJ:

I think we've got that, Ms Dyhrberg.

20 **MS DYHRBERG KC:**

Oh, no, that's good, thank you. I will move on from there. Thank you.

Now the next aspect is what I've got at page 27 is again, I've covered the admissibility aspect, but there's just some other points about how it would be run at trial.

25 **ELLEN FRANCE J:**

Could I just ask, in terms of the statement Mr Webster says that Mr Candy makes –

MS DYHRBERG KC:

Sorry?

ELLEN FRANCE J:

In terms of the statement that Mr Webster says that Mr Candy makes about,
 5 you know, getting in the car, although initially saying he doesn't remember that,
 Mr Candy does accept that was possible that he said that to him.

MS DYHRBERG KC:

Yes and your answer would just simply be, well, he says he doesn't remember,
 but it's possible I could've said something like that. I would suggest that that
 10 would be very unreliable to rely on what Mr Candy has said. It's more like yes,
 I could easily have said that, but yes, only because of the situation, but I
 certainly don't remember saying it. And I would suggest that's very unreliable
 to take any real account. It's not as strong evidence as saying oh, yes, yes,
 yes, I'm sure, I probably did. It's just a mere possibility and that's all.

15

I'm not sure if your Honours are interested in whether Mr Webster giving
 evidence would have mattered or whether that's an issue that we don't really
 need to cover at this stage.

WINKELMANN CJ:

20 I don't think it's central, no.

MS DYHRBERG KC:

No, no and also cross-examination, how that would be directed, I don't –

WINKELMANN CJ:

No.

25 **MS DYHRBERG KC:**

No, good, and that's fine. If I could move then to just getting towards the end
 there, if I could just really sort of finish up to why, you know, FASD mattered to
 the plea and it's not saying a jury of course would inevitably return manslaughter

just based on that. Nor does it say that the Crown case was weak and he doesn't need to say – we don't need to say trial counsel acted carelessly at all.
1245

5 Once the impairment and the FASD is understood, then what our argument is, manslaughter, not murder, was available as a defence and again, it doesn't depend on proving innocence or incapacity, it's just the normal ordinary burden of proof and it's the Crown, is that could the Crown, given all we know about Mr Webster, prove that he actually appreciated that death could well happen
10 and consciously ran that risk. So that's the issue. That's why it is important all around and it's not a simple, it solves all the issues, but it provides that background and it provides why there could be reasonable doubt about whether Mr Webster actually, because of his impairment, is guilty of murder and has the Crown proved it beyond reasonable doubt, given that background.

15

With respect, all the defence would be coming to is saying the facts all have to be assessed through the lens of his functioning, which is not only the FASD related, but his youth, all of those things just as normal, can't read and write, aspects. It wouldn't have guaranteed manslaughter, but it would have provided
20 at least the opportunity to run that as a defence in a trial and that the jury would, they would be responsible for making that the real issue. It comes down to the jury issue, and what we would be doing as a defence is presenting Mr Webster as he is, along with all the other evidence. It's not what is objective to an ordinary person. It is what is subjective to Mr Webster himself. It helps explain
25 the impairment, his functioning, his ability to instruct, all of those, make decisions, all of those things throughout and because that was not known before and he's pleaded guilty, he really has in effect been denied the opportunity to run that defence with what we now know. We would certainly be a lot more tailored and directed on experts' opinion, but as I say, if we had to
30 go to trial now, with what we've got, we've got enough with respect to at least say, this impaired 18-year-old and that's why I would be saying to a jury that the murder conviction can't safely stand.

WINKELMANN CJ:

Thank you, Ms Dyhrberg, anything else?

MS DYHRBERG KC:

Thank you, your Honours. I could talk about trials all day long and how we
 5 would run them, but that's not what we're here for so thank you. I think
 Mr de Groot is going to – I keep forgetting the Crown, I must apologise. You
 are here, a party. I was about to ask Mr de Groot to summarise the response.

WINKELMANN CJ:

It's an easy thing to do.

10 **MS DYHRBERG KC:**

I can only plead that I slightly wasn't thinking, thank you.

MS EWING:

When Mr Webster pleaded guilty to murder, no one knew he had FASD, but
 that fact alone cannot undermine his guilty plea for any of the reasons raised.
 15 First of all, it does not mean he now has a defence. He and another man,
 Mr Candy, jointly attacked the head of an already unconscious man, were told
 he needed to go to hospital, but instead dragged him away from any prospect
 of help to a rubbish pit almost a kilometre away. If Mr Webster wants to
 establish that in his mind the victim might well have gotten up and walked home,
 20 he will need expert evidence tailored to that point to do so. Without expert
 evidence on that point, he has no tenable defence to a murder charge.

1250

Second, Mr Webster was fit to enter his plea despite his impairment. Because
 25 of his decision to plead guilty, we don't need to inquire into his ability to
 withstand a jury trial at some hypothetical point in time and in 2024, the time
 that he was assessed, he could understand the prosecution evidence. He could
 understand the complex distinctions between murder and manslaughter more
 than adequately. He could remember what recklessness meant two months
 30 after being told. He could give a comprehensive and detailed account of what

had happened and Dr Maxwell Panckhurst at least found him fit to stand trial, a full trial in 2024, despite his impairment. So, we know that his FASD did not preclude him understanding any of those things and a helpful question then might be well, what was different in 2022?

5

The concern, it seems, is that he may have been more passive back then, more inclined to defer. But we do have objective evidence from that time from 2022, his police interview and his interactions with Mr Bourke and those two sources of evidence suggest he wasn't passive, at least, not all of the time and he didn't always defer if he didn't agree with what was being said. If he didn't understand what the police officer was saying to him, he spoke up, if he didn't agree with what another witness had said, he spoke up and if he didn't agree that he could be guilty of murder, he spoke up and for those reasons the Crown submits his plea remains valid.

10

15

Just in terms of sequence, my submissions address tenable defence first and fitness and the associated issues second and I propose to proceed in that way unless the Court prefers I approach it differently. Okay, I will take that as agreement.

20

KÓS J:

Yes.

MS EWING:

I have both good news and bad news. The bad news is that Ms Duckett will not be speaking today. The good news is at least you know you can direct all of your questions to me.

25

So, let's start with tenable defence and I will really be following the structure of my written submissions and engaging with questions obviously as they arise.

To be clear, the question here is whether Mr Webster was unaware of an arguable defence. That is what he has to establish. If he was unaware of an

30

arguable defence, if his lawyer didn't tell him about that, then the Crown would agree that that constitutes a miscarriage.

WINKELMANN CJ:

How do you formulate that question?

5 **MS EWING:**

In terms of the statute?

WINKELMANN CJ:

Yes.

MS EWING:

10 To be honest, the simple way of saying it is that I don't disagree with anything
my learned friend said. It's possible to approach it under either limb. For my
part – many cases approach it as a section 232(4)(a) issue. For my part, I
don't – the key distinction between section 232(4)(a) and section 232(4)(b) of
course is whether the proviso can apply and I struggle to see how anyone could
15 apply the proviso if something has gone wrong with someone's guilty plea. So,
I would have no issue with saying it can be treated as a section 232(4)(b) issue.
But the key point – although courts haven't necessarily. They use both
conceptions.

1255

20

But the key point is that before there has been an error affecting the plea, which
is necessary to miscarriage, you have to show that there was an arguable
defence. It's not enough to say my lawyer didn't tell me something, but it turns
out that defence was never going to work anyway. That's how the error test
25 works. The tenable defence is relevant because it would have, the law
assumes, affected the plea. Does that answer your Honour's question?

WINKELMANN CJ:

Yes, it does, thank you.

KÓS J:

Even if the trial is unfair, which is the presumption if we're going under subsection (b), which you accept?

MS EWING:

5 I'm sorry, I didn't quite – could you ask that again?

KÓS J:

Even if you're proceeding under subsection (b) with an unfair trial.

MS EWING:

10 My point is that to get to an unfair trial, there has to have been an arguable defence of which you weren't aware.

KÓS J:

That seems a very unusual idea.

WINKELMANN CJ:

15 Ms Ewing, I was going to say, because it was put to you – put against you that there are two pathways to get to that. One is that because of deficits which were not scaffolded to use the report writer's, given Mr Panckhurst's evidence, were not scaffolded to be met or mitigated, the plea was not fully informed and therefore it's an unfair trial. That's one pathway, and the other is the pathway that you seem to just be focusing on which is that the lawyer did not advise of
20 this available defence which was perhaps tenuously available but achieved acquired life with the diagnosis of FASD.

MS EWING:

I wonder if it's just helpful for me to explain the pathways that I see.

WINKELMANN CJ:

25 Yes.

MS EWING:

If I can just pause and answer Justice Kós' question first, that the trial here is the guilty plea. That's what section 232(5) says. So my point is that to get to the point of a miscarriage before the plea is unfair, it has to have been
 5 undermined by advice that would've affected it and the law assumes that if you had a tenable defence that you weren't aware of, that's what the *Merrilees* category 4 captures, that that is a form of miscarriage or that that plea becomes unfair at that point. Again, I don't say that it's wrong to approach it under section 232(4)(a), I just think the test ends up being the same either way.

10 **WINKELMANN CJ:**

Is this formulation due to the fact you say that there is no other pathway because he was –

MS EWING:

Fit.

15 **WINKELMANN CJ:**

– fit.

MS EWING:

Yes. In terms of a plea being uninformed, that would normally be treated as an example of the first category of *Merrilees*, that is, not aware of the nature of the
 20 charge and in that first category, obviously, the plea, well, I would see fitness as falling in that first category and as being an example of one of the ways that a plea can be uninformed because the criteria for the capacities that you have to have to plead and the things that you have to understand to plead, are designed to ensure that the plea is informed.

25 **WINKELMANN CJ:**

Your simple response on that pathway is that it's not available because the evidence doesn't make out that he wasn't fit to plead, is that your point?

MS EWING:

Yes, correct. I only see two pathways here. I don't see an intermediate pathway involving the plea being uninformed in some way that doesn't engage one or the other. Does that make sense?

5 **WINKELMANN CJ:**

Yes.

MS EWING:

Yes.

WILLIAMS J:

10 What about the impairment point that, perhaps it's Dr Panckhurst makes, that whatever one says about fitness, this man's impaired in the ways that I am describing here, and they are relevant to his engagement with this process?

MS EWING:

Well, it's the second part that I would take issue with, Sir.

15 **WILLIAMS J:**

Well, you disagree with the doctor?

MS EWING:

No. No, sorry, I don't disagree with the – what they say about his impairment. My point is that for a guilty plea to be overturned on appeal, you have to show
20 that the impairment affected the plea in one of those two ways. That it made it uninformed or that you were deprived of a defence you could've run and would've run.

COOKE J:

That treats them as only two categories and they're watertight. Isn't this case
25 in-between the two?

MS EWING:

Look, I accept what her Honour Justice France said about Solicitor-General's reference in that it's the categories are designed to exemplify miscarriage and there might be some intermediate category. I guess my concern is that it's

5 clearly articulated enough, so if I ask your Honour to articulate, for example, what do you say has gone wrong here?

1300

COOKE J:

Well, that neither the counsel or the defendant knew about the impairment and

10 so, therefore, the guilty plea wasn't fully informed.

MS EWING:

But it's that second limb that the appellant has to establish and that's where I say they fall short. So, your Honour is accepting that it has to, the impairment has to affect the plea and make it uninformed and my point is that the fitness

15 reports, well obviously I say he's fit, but it has to affect the plea in a way that could have undermined it and those are, for example, lack of awareness of what you are pleading to, lack of awareness of what the elements of the, you know, what the charge means, lack of understanding of the prosecution evidence. The exact same things that inform the fitness inquiry and that's why I say fitness

20 is one way a plea can be uninformed. If someone doesn't have the capacity to understand those things, then their plea can't be informed. But the questions you are going to ask for those two categories, fitness and uninformed, are essentially the same.

WINKELMANN CJ:

25 Lunch adjournment.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.17 PM

WINKELMANN CJ:

Ms Ewing.

MS EWING:

- 5 Thank you, your Honour. Just before lunch, to recap where we were at, my submission to Justice Cooke was that you can't simply say I had an impairment and therefore my plea wasn't informed. You have to also ask and answer, uninformed about what? If you were uninformed about your trial prospects then you're in *Merrilees* category 4 and you have to show an arguable defence that
- 10 you weren't aware of. If your plea was uninformed about more fundamental matters such as an understanding of the charge and the evidence that you faced, then that's what the fitness reports in this case address. The same question really arises, did this person understand what they needed to understand to plead guilty, to enter a valid plea. So –

15 **KÓS J:**

And do we analyse that second situation under the *Merrilees* categories or the broader Solicitor-General's reference categories, or do we deal with it elsewhere?

MS EWING:

- 20 It's not one of the – sorry, I'll retract that. Fitness to plead has been treated as – unfitness to plead has been treated as falling in the first category of *Merrilees*, but on any view, if someone is unfit there's a miscarriage. If they don't have the capacities or they weren't informed about those core requirements then there's a miscarriage.

25 **COOKE J:**

I thought your point before lunch was you were arguing that there was no error so you don't get to the second part of the question about miscarriage. There is just no error, is that your argument, or not?

MS EWING:

Yes. So it might be helpful to have section 232 of the Criminal Procedure Act 2011. That's the second step your Honour is talking about?

COOKE J:

5 Yes.

MS EWING:

Yes. So, I think the reason my learned friend and I agree that it doesn't matter which category you approach it under is that both categories require an error in relation to or affecting the plea and in the context of wrong advice about trial
10 prospects, that requires you to show I wasn't aware that I had a defence, but I do. So, the same, the statute, that part of the statute is doing the same work whether you apply section 232(4)(a) or section 232(4)(b).

WINKELMANN CJ:

And does that mean that you accept that if you were under either, you don't
15 then go on and say and even if you pleaded in that way, you would have been convicted, you had no defence?

MS EWING:

Yes, I accept that.

WINKELMANN CJ:

20 Okay.

MS EWING:

The assessment of an arguable defence is aimed at assessing whether the defendant got wrong advice about his trial prospects and – sorry, perhaps I can put that more simply. The presence of an arguable defence that wasn't known
25 is the error and so it's not a question of the Crown then saying well, but you would've been convicted anyway. I accept my learned friend's –

WINKELMANN CJ:

That was a bad defence. It doesn't go to that point, yes?

MS EWING:

Yes. Yes, I accept my learned friend's point that it's the defendant's choice and
5 that if they weren't – if their plea was uninformed in that way, then there's a miscarriage.

So, all of the argument that follows is me encouraging the Court to find that there was no error here because even on the evidence now available, there is
10 no sign that Mr Webster's impairment would have prevented him from forming murderous intent. Does that make sense?

WINKELMANN CJ:

Yes and what are you going to do? Are you going to go to the reports first or the facts?

15 **MS EWING:**

Which would your Honours prefer? I mean, for my part I would go to the facts because it's the context, the context in which he formed –

WINKELMANN CJ:

Well, you do it the way you want to do it, Ms Ewing.

20 **MS EWING:**

All right, thank you.

COOKE J:

Can I just check one thing before you do? It's difficult not to think of the psychologist's advice that Mr Bourke did get here as being erroneous.

25 **MS EWING:**

Yes.

COOKE J:

Because he advised, he effectively advised there is no impediment to thinking.

MS EWING:

Oh, I'm not sure. I agree that that report has its limits, as all the other experts
5 have noted. I don't think though that Mr Bourke said he relied on it. I think he
said for him it confirmed that there were no issues as to fitness and that's why
he felt secure about proceeding to plea. I'm happy to be corrected on that point
if your Honour has a different view.

WINKELMANN CJ:

10 Yes. I don't think that is quite what he said.

KÓS J:

"Mr Carlyon's conclusion on this aspect provided me suitable comfort that there
were no impediments to Mr Webster entering a plea."

MS EWING:

15 Yes, that's the part I was thinking of.

COOKE J:

But also, I thought the point was that the only explanation that could be thought
of for the conduct was youth and there was nothing else that could explain why
Mr Webster did this and that Mr Carlyon, I think it's, or however you pronounce
20 his name, had really said that in his report. His report said it was wilful and
callous conduct and there was no explanation he could identify for it.

MS EWING:

Yes, but I suppose I'm not sure we need – I'm not sure the report really has any
relevance today because the question for the Court is knowing what we know
25 now, did he have a defence? So there's no question that Mr Bourke didn't think
there was one and, in a way, the reasons for that are kind of by the by. The
question is whether there's a discrepancy between what he was told about his

trial prospects and what we now know they are and that's not something we need to –

WINKELMANN CJ:

Well, it's hard to see that there isn't a discrepancy though if he doesn't know
5 he's got foetal alcohol syndrome, which is well-known to have an impact on executive functioning.

MS EWING:

It's well known to have a very individual impact in individual cases, your Honour.
So, depending on the timing of consumption of alcohol during gestation,
10 different parts of the brain are affected.

WINKELMANN CJ:

Perhaps we should go to reports upfront?

1425

MS EWING:

15 Well, okay, but can I – I will – I appreciate your Honour is eager to get to that part of the argument, but I am going to just quickly recap the context, the factual context in which any defence of lack of murderous intent would sit because I think it's important.

COOKE J:

20 Can I just put to you one proposition?

MS EWING:

Yes.

COOKE J:

That rather than saying there's no error this is really saying there's no error that
25 has created a real risk that the outcome of the plea has been affected, as it seems to me odd to say there's no error here.

MS EWING:

Well, we don't care about errors that didn't affect the plea, is probably the fastest answer to that question.

COOKE J:

- 5 Which means that it's created no risk that the outcome was different.

MS EWING:

- I just don't think section 232(4)(a) seems aimed at trying to understand how juries might have approached an error because it's in that context that the appeal court just has to look for risk that something would've been, would've
10 contributed to a conviction.

WINKELMANN CJ:

But isn't it that the plea was different, not what the jury would've done? So no risk –

MS EWING:

- 15 Yes, yes, I accept that, but I guess –

WINKELMANN CJ:

I think that's what Justice Cooke's asking you.

MS EWING:

- Well, I think, I guess, what I'm saying is that section 232(4)(a) is awkwardly
20 drafted when you apply it to the situation that we're applying it to now. Because what I'm saying is that all you need is an error affecting the plea. That's why I'm inclined to say it's a section 232(4)(b) issue, because someone pleading guilty when they don't know all the things they need to know to validly plead guilty is unfair and so there's not sort of two stages to that enquiry, there's only
25 one. But I just think it's, these categories have probably, I can't remember when *Le Page* was decided but I think they've been around since before the CPA and so it's just kind of trying to fit a square peg into a round hole, in a way.

WINKELMANN CJ:

The force of your argument is here, that there is nothing in the reports which suggests that the advice would've been any different.

MS EWING:

5 Yes, that is my –

WINKELMANN CJ:

Even though it's implicit, I think, in Mr Bourke's evidence that it would've been different.

MS EWING:

10 Well, he says, I would've given different advice, to which I would respond, you can't say what the advice would've been, because we don't have any evidence that would've changed it. So, I don't think his opinion on that point takes us anywhere. The question is the Court's opinion on whether he now has a defence.

15 **KÓS J:**

But how can we examine this when we haven't had – all we have is the face value of these reports. They haven't been cross-examined so a platform or a foundation has been laid for saying that there may be a consequence from this undiagnosed status and what more can we say than that? We can't definitively
20 say one way or another.

MS EWING:

Well, I suppose to put it bluntly and without intending any criticism of my learned friend, what may have changed the Crown's –

WINKELMANN CJ:

25 Which learned friend?

MS EWING:

Sorry, all of them. What might have changed the Crown's approach in this case, is an expert opinion tailored to this point, taking into account the situation that Mr Webster found himself in and his impairments. At that point, depending
5 on what the expert said, we would have admissible evidence that would create an arguable defence.

WINKELMANN CJ:

Then you would've objected to his admissibility on the basis that it was ultimately –

10 **MS EWING:**

Well, no, I wouldn't have.

WINKELMANN CJ:

– on ultimate question.

MS EWING:

15 Because I couldn't take the position I'm taking now –

WINKELMANN CJ:

But also –

MS EWING:

– if I had taken that stance. But my –

20 **WINKELMANN CJ:**

Yes, but it's also, there's problems with such evidence, isn't there? Because how could they ever give such detailed evidence and isn't it really sufficient for them to say, look, he has a diagnosis of foetal alcohol syndrome and it does affect his executive functioning in quite a significant way, if you take, if you
25 accept the evidence of Ms McFadden.

MS EWING:

In all of these questions of impairment there will be a spectrum and for someone to be so impaired that in Mr Webster's shoes they didn't understand a risk of death or didn't understand that Mr Candy had just told him that he was being
 5 reckless with the victim's life, the depth of impairment that would be required to as – you know, to create doubt about murderous intent, there's just no evidence of that.

KÓS J:

Isn't that something –

10 **WILLIAMS J:**

Well, except that Mr Maxwell [*sic*] seemed to think there might be.

MS EWING:

Okay so I feel like we're getting a bit –

WINKELMANN CJ:

15 We are.

MS EWING:

We've gotten a bit off my plan. Perhaps –

WINKELMANN CJ:

It might be best, so you have a more peaceful time, to go to the reports first and
 20 make your best-case scenario.

1430

MS EWING:

Yes, okay. Can I, before we do that, again can I just say very key points about the Crown evidence in this case that underpin that submission that I've just
 25 made about how impaired he would have to be to miss this risk. These are all laid out at paragraph 15 of my submissions so I won't take you through them in detail, but the first point is Mr Ramsay is unconscious from the outset and never

regains consciousness. Despite this, there's an attack to his head by two men that is prolonged, and I share Mr Bourke's view that it doesn't much matter whether it was four minutes or 10 given the nature of the attack with fist and feet.

5

Someone during the incident screams: "I'm going to kill him." Mr Torpey says "stop" and "take him to hospital", so they're told this person needs medical assistance, they're in trouble, and it's at that point that the chain comes out. So again Mr Ramsay is unconscious throughout this entire period. He's dragged almost a kilometre. He's left with no shirt on on a July night in a state that no one could think he was going to recover from. I've explained the details of the position he was in at paragraph 15.7.

10

Mr Webster comes back and is telling people he doesn't care if he loses his job, tending to imply that he does have a mind to the consequences of what he's just done, at least for him, and he tells Mr Candy he's "never caved [someone's] head in before". So how someone could say that out loud without understanding what's just happened is perhaps difficult to understand.

15

And then of course at paragraph 16 I mention his interview. They key –

20

KÓS J:

I have to say, I think the losing the job observation tends to support the defence rather than you. If that's what he thought he was facing, then he was completely oblivious to what he'd done.

25 **MS EWING:**

I accept that's an alternative lens that could be applied. But I suppose my point is the suggestion here is that he can't understand consequences, he can't assess risks, and he seems to be doing just that.

WILLIAMS J:

Well he's assessing something.

30

WINKELMANN CJ:

The difficulty for you with that though is that some of the evidence suggests that he even has time – he even has difficulty putting things coherently in a time and space order, which is a pretty fundamental failure of executive functioning.

5 **MS EWING:**

Well I think, as your Honour has repeatedly told me, it's time to go to the reports so that we can talk about this in more detail.

WINKELMANN CJ:

10 But can I just – before you do, in his interview the appellant referred to Mr Ramsay being conscious when he begins, when the appellant begins to attack Mr Ramsay. Is that – is his the only account of it? He has Mr Ramsay replying to him.

MS EWING:

15 Yes, I recall that part of his interview. So in this aspect he says a couple of things. At one point, and I'm working from memory here, I can get the references if you'd like, at one point he says he was lying down in the back of the car, he was in a bad –

WINKELMANN CJ:

And he asked him for his money and he says I'm not going to.

20 **MS EWING:**

Yes. He was in a bad state.

WINKELMANN CJ:

Yes.

MS EWING:

25 At another point he suggests he's standing when he gets out of the car briefly, but then falls down.

WINKELMANN CJ:

And he says he had asked him to pay his money and he says he's not going to.

MS EWING:

Correct. And I accept – like the Crown case would be that Mr – based on
5 Mr Torpey's evidence that Mr Ramsay was unconscious from the outset and
never – may have been making noises but certainly wasn't speaking. So then
certainly for anyone of normal functioning, as Mr Bourke assessed, this would
be a pretty difficult case to meet, particularly when Mr Webster acknowledges
10 that the penny dropped for him part-way down the track when he was told about
the risk of death. And that acknowledgement, my learned friend suggested
today that he – it might be thought that he only registered some time afterwards.
In my submission, that's not the thrust of his interview. When you read it, that
was a turning point. On his account that was a turning point for him and he
immediately realised the significance of what he was doing to the point that he
15 thought I shouldn't be here, I need to get out of the car and for that reason I
tend to agree with your Honour that this interview cuts both ways. So, for
myself, I don't know whether I would try to exclude it if I was his counsel.

1435

COOKE J:

20 Because it does tend to suggest that the penny hadn't dropped when he hit and
kicked him.

MS EWING:

Yes.

COOKE J:

25 Which is the worst violence he inflicts.

MS EWING:

Himself, yes, quite right.

COOKE J:

Yes, and the only violence he's involved in after that is the dragging to the pit from the car.

WINKELMANN CJ:

5 Which is serious violence.

COOKE J:

Yes.

MS EWING:

10 Yes. I am conscious I need to address the admissibility of the interview. Is now a good time to do that?

WINKELMANN CJ:

Yes.

MS EWING:

15 Okay. So, my learned friends, in their written submissions, suggested that any challenge would have been under sections 29 and 30 of the Evidence Act. But the focus today has very much been on reliability under section 28 and of course, foetal alcohol spectrum disorder has featured in cases involving high profile false confessions. *Pora v R* [2015] UKPC 9 obviously is a significant one. Another is *R v Fawcett* [2021] NZHC 2406. And, in those cases there
20 have been concerns about the reliability of the evidence. But those cases are not this case for the reason that Mr Webster's interview – the interviews in those cases tended to be manifestly inconsistent, riddled with falsities, difficult to understand and critically, were the only evidence of the defendant's involvement. Obviously, in Mr Pora's case, it was his own confessions that
25 resulted in him being tried for Ms Burdett's murder.

The difficulty my learned friends will face under section 28 of the Evidence Act is that every other person who was present tells the same story. So, present for the initial assault was Mr Torpey, Ms Hughes, Mr Candy and Mr Webster.

Their four stories line up almost entirely. And my learned friends make the point that Mr Candy couldn't remember saying what he said to Mr Webster in the car. When you read his interview, that's not surprising because there's a lot that he doesn't remember. If anything, you would say Mr Webster's account is the
 5 more complete.

So, where there are external indicia of reliability, it is going to be difficult to have the interview excluded. The overwhelming picture that emerges is that Mr Webster was able to give a truthful and relatively complete account. So, for
 10 my part, I don't see – the Crown's position is very much that it remains a part of the Crown case. Does that answer that point?

WINKELMANN CJ:

Yes, thank you.

MS EWING:

15 So let's talk now about – so I suppose my submission that I was building up to was that there is going to have to be some persuasive expert evidence about how his impairment impacts his intent and my learned friend really has isolated out comments in each of the psychological reports with a view to suggesting that Mr Webster's impairments would preclude him from recognising
 20 consequences and I suppose there's several problems with that.

The first is the one that I've already alluded to. None of these experts were asked to consider that question. None of them were asked to consider the very specific question in the circumstances that Mr Webster found himself in, did his
 25 impairment stop him from appreciating the risk to the victim's life, to Mr Ramsay's life?

WILLIAMS J:

One problem with that is that they all seem to say two years after the event it's just too hard to reconstruct.

MS EWING:

So, I'm talking here not just about the fitness reports, your Honour, but about the other psychological reports that my learned friend relies on.

WINKELMANN CJ:

- 5 So, what exactly is the question you say they should have been asked because it seems like the kind of question that we would not ask an expert to answer because it is so specific to the case?

1440

MS EWING:

- 10 Yes, so, the question I suggest they should've been asked to answer is that given Mr Webster's impairment, is it or how would Mr Webster's impairment affect his ability to foresee what's in Mr Candy's mind and appreciate the likelihood that Mr Ramsay may have died as a result of what they were doing.

WINKELMANN CJ:

- 15 So they have kind of addressed issues about that, but they haven't come straight down to the facts, so they've given more general evidence that a jury might be entitled to take into account in terms of theory of mind and understanding cause and effect. But you're saying that's not enough at this point, when we're just talking about a plea.

- 20 **MS EWING:**

I suppose I'm saying that I suspect these experts would be horrified to hear that their reports were being relied on for something so far outside their brief, and Dr Fon says that herself. If we look at, if we can bring up case on appeal at page 16. So Dr Fon, my learned friend relies on her opinion about Mr Webster's
 25 concrete thinking, and I'll come to the other issues with Dr Fon's report in a moment, but at paragraph 5, sorry it must be page 15, yes. Paragraph 5: "The opinions expressed in this report are ... only valid for the purpose and nature of this assessment..."

WINKELMANN CJ:

Which assessment?

MS EWING:

5 The assessment of Mr Webster's cognitive functioning and level of risk. So what she was briefed to do was ascertain whether he was intellectually disabled or had foetal alcohol spectrum disorder, and: "The brief also requested an opinion on Mr Webster's level of risk," level of offending risk, "an appropriate rehabilitation pathway, and the impact of a lengthy imprisonment sentence."

10 So she's briefed for a sentence appeal and her comments are designed to indicate – her comments about whether he's intellectually disabled and various matters relevant to sentence. They're not about his ability to appreciate risk and she specifically says, her opinions shouldn't be taken outside the context they were given in.

15 **WINKELMANN CJ:**

Well, she says she's given opinions on these things, which is quite a standard sort of a thing.

MS EWING:

Yes, but it does signal, I mean, that the –

20 **WINKELMANN CJ:**

Because I must say, it's quite usual for juries to get information, which is in this kind of case, which is just saying, this person has these features in their reasoning processes and then for the jury to be invited to combine that with a situation the person's in. So if this is a regular feature of their mental functioning
25 and deficiency in their mental functioning and sometimes objection is taken if you ask the expert to be too specific.

MS EWING:

Yes, I –

WINKELMANN CJ:

Because it's beyond their competence.

MS EWING:

Indeed. So they can't express an opinion on whether he would have formed
5 intent or not, but they can be asked to consider and to express their view on
how his impairment would've affected that. So the question Dr Fon is answering
is quite different and that has to –

KÓS J:

But this is a situation where the defendant hasn't had an opportunity to put his
10 point to the jury because it was never perceived. So when do they, when and
in what circumstances should the defendant give it, this point, its best shot?

MS EWING:

Now.

KÓS J:

15 Well, that seems odd to me. I mean, it seems to me that the obligation of
appellate counsel is to lay a foundation of the point and then unless we could
say it could not possibly in a million years impact on the jury assessment, it
should be left to the jury –

MS EWING:

20 It's not the jury's assessment –

KÓS J:

– on a retrial.

MS EWING:

– it's the defendant's assessment at the time he pleads guilty, so when –

25 **KÓS J:**

Well, yes, but I mean, that's going to be informed by a perception of what if, you
know, whether this is something you could take to a jury.

MS EWING:

Yes, but the difficulty with that test, that lowered test, if I can put it that way is the issue that Justice Williams raised earlier about floodgates. So my learned friend has said that at the trial, they will call an expert on FASD, but we don't
5 have the brief and what if by the time we – what if his conviction appeal is allowed and the expert is briefed and they say you know what, even with his level of functioning this would have been obvious.
1445

WILLIAMS J:

10 What if they don't? How helpful is this proposition?

MS EWING:

Well, the point is we should know that now, Sir.

WINKELMANN CJ:

Well, we've got quite a lot, actually.

15 **MS EWING:**

Yes.

WINKELMANN CJ:

We know what Ms McFadden says.

MS EWING:

20 I'm happy to deal with what we have, but the point I was making was just that you can't ask to explore a defence after you've had your conviction appeal overturned. You have to explore it as part of your appeal.

WINKELMANN CJ:

But, I would be happy to take some of this material to a jury to mount a defence.
25 Ms McFadden: "Mr Webster was oriented to person and place, but his sense of time was poor. He often mixed up the day and month and struggled to identify the year of his arrest. His accounts were not linear, and he showed little insight

into the challenges this might pose to the listener. Sometimes, it was unclear if Mr Webster's recollections related to his own experiences/actions or the actions of others."

- 5 Another person I think talks about his theory of mind which, that means that he is operating, that he has a poorly developed theory of mind which means that he is operating in that part about the level of a toddler. That's quite a severe impairment.

MS EWING:

- 10 It may be quite a severe impairment, but the difficulty with taking –

WINKELMANN CJ:

Bits and pieces.

MS EWING:

- Yes, perhaps it's just better if I come in order to the reports and talk about why,
15 about their limits.

WINKELMANN CJ:

Okay.

MS EWING:

- So, I was talking about Dr Fon's report and there's another reason that we need
20 to exercise caution.

WINKELMANN CJ:

With her report?

MS EWING:

- With her report. So the first reason is she specifically said don't take my
25 opinions outside my brief, please and she's working on a sentence appeal as far as she knows.

The second reason that we need to be careful about what she says about concrete thinking is that her testing of Mr Webster was invalid, according to Dr Nuth. So, she administered neuropsychological tests which assessed his executive function and these appear to be the basis of her opinion that his thinking is concrete. So those tests are described at case on appeal, sorry, additional materials page 28 at paragraph 71. So she's assessed his executive function and she notes: "When language demands were reduced, he appeared better able to understand metaphors." And further down the paragraph: "On a task that was discontinued due to administrator error, Mr Webster displayed very concrete responses." So, my point here is the idea that he has got concrete thinking comes from her neuropsychological testing.

And the difficulty with her report, in Dr Nuth's opinion, is that the testing was invalid. So just to break this down in simple terms, what Dr Nuth says is that a key part of testing someone's cognitive ability is performance validity testing, or PVTs and these are non-optional. This is case on appeal additional materials at page 44 paragraphs 17 and 18.

So, he explains that the threats to the validity of testing of this kind includes suboptimal effort and motivation to underperform which: "...is especially true in the criminal justice contexts where incentives to underperform are potentially high..."

So, a person doing neuropsychological testing has to apply performance validity testing to check that the person is trying because if they're not trying, then the data is worthless.

WINKELMANN CJ:

Yes.

MS EWING:

So these tests are designed to be so easy that even someone intellectually disabled can pass them if they are applying adequate effort and they feature

cut off scores. So anyone scoring below the cut off is not trying hard enough for the data to be valid.

- 5 Dr Fon, in Dr Nuth's opinion, used gold standard performance validity tests, but Mr Webster failed them. He scored below cut off and sometimes at chance.

WINKELMANN CJ:

Sorry, Dr Nuth?

MS EWING:

Yes.

- 10 **WINKELMANN CJ:**

He didn't administer any tests?

MS EWING:

What's that?

1450

- 15 **WINKELMANN CJ:**

Dr Nuth didn't administer any tests, did he?

MS EWING:

No, but he received Dr Fon's data and analysed it and found that it was unreliable.

- 20 **WINKELMANN CJ:**

Right, okay.

MS EWING:

So his conclusion is expressed at page 50 of the additional materials, paragraph 43.

- 25 **WINKELMANN CJ:**

I thought you were just referring to him having administered tests.

MS EWING:

Oh, no, sorry. So Dr Fon administered the right performance validity tests. There was nothing wrong with that part of her assessment, but Mr –

WILLIAMS J:

5 And the results were illogical.

MS EWING:

The results showed that Mr Webster –

WILLIAMS J:

Because they showed underperformance at higher levels.

10 **MS EWING:**

Correct.

WILLIAMS J:

And average or even above average performance for his percentile at the lower levels.

15 **MS EWING:**

Yes, yes.

WILLIAMS J:

But on the other hand, Dr Panckhurst says this man presents as a disarmingly “honest historian”. He is not capable of malingering, is the impression one gets.

20 **MS EWING:**

Performance validity testing – if you fail a performance validity test it doesn’t necessarily mean you’re malingering.

WILLIAMS J:

So we can put that to one side because no one suggests he’s a malingerer.

MS EWING:

Yes, we can – I'm not suggesting and Dr Nuth does not suggest he's malingering, to be clear. The point though –

WILLIAMS J:

5 And also Dr Panckhurst and – is she a doctor, Fon?

MS EWING:

Yes.

WILLIAMS J:

Both reflect on this man's personality and his vulnerabilities in the same way.

10 **MS EWING:**

Well –

WILLIAMS J:

I wonder how, I just wonder how important the PVT is when you're dealing with these – and I know the PVT tests say this is how you, you know, the
15 statistically-personal assessments are unreliable too, but these people actually sat down with the man for a good long time and spoke with their families and Dr Nuth didn't.

MS EWING:

Yes. My focus just now is on trying to explain why Dr Fon's report is unreliable,
20 and I'll come to the other reports in due course.

WILLIAMS J:

So my recollection of Dr Nuth was that he said there are some issues with it because of the failure of the PVT. He did not say you couldn't rely on it. He just said there are issues with it that make one be cautious about relying on it.

25 **MS EWING:**

I don't – I'll take your Honour to the paragraph that I'm going to – which I say encapsulates what he says.

WILLIAMS J:

Good.

MS EWING:

5 So basically paragraph 43: "... [Her] assessment methodology is, broadly
sound ... [but] the data upon [which] she has based her opinions are clinically
unreliable ... Mr Webster underperformed on at least two well validated
performance validity tests, and this therefore casts significant doubt on the
validity of his entire test performance ... I can only assert that [his] data are
likely invalid and, therefore, may mildly, significantly, or perhaps grossly
10 misrepresent his true everyday abilities." So for me, that's –

WILLIAMS J:

Yes, so that was the point that struck me, that he does not say that this is – the
result is completely wrong. He just says it could be terribly wrong or it might be
relatively close. You can't tell.

15 **MS EWING:**

But how can you rely on it if you don't know which of those two things it is?

WILLIAMS J:

Because there are other indicators.

MS EWING:

20 Sure. So – but –

WILLIAMS J:

There are other indicators, not just from that particular doctor but from other
doctors that appear to corroborate what she's saying.

MS EWING:

25 Yes. I suppose my point is as follows. My learned friend relies on Dr Fon's
assessment of Mr Webster's concrete thinking. That assessment involved
neuropsychological testing which another expert has said was invalid.

WILLIAMS J:

Was problematic, yes.

MS EWING:

Yes. So you may have other things but Dr Fon is not going to help you much,
5 is my submission.

WILLIAMS J:

On that point.

MS EWING:

On that point, yes.

10 **WILLIAMS J:**

That's fair.

MS EWING:

So my learned friend also spoke about Dr Justin Barry-Walsh's comments in
her discussion, and my submission on this point is simpler and really captured
15 in my written submissions. Dr Justin Barry-Walsh didn't really express any
views on how impairment might affect the formation of intent. He raises it as
an issue and he notes that given Dr Fon's findings, which as I've just explained
are problematic, that – he notes that given those findings the question may
need to be explored.

20 **WINKELMANN CJ:**

Well one expert says they're problematic.

MS EWING:

Well –

WINKELMANN CJ:

25 None of this has been cross-examined.

1455

MS EWING:

Dr Fon herself acknowledged the issues with the performance validity testing and she said, I'm overriding, in her opinion, this is paragraph 52 of her opinion, I'm going to ignore that because I think he presented as if he was trying. So

5 just on the face of the report she has ignored a non-optional measure that is designed to test the validity of her data and she's focused instead on her own impression of whether he was trying.

WINKELMANN CJ:

But still, none of it's been tested on cross-examination, I think is the problem.

10 **MS EWING:**

No. No, it hasn't. So the comments Dr Justin Barry-Walsh make, again are in the context of a sentence appeal and simply refer to Dr Fon's findings and the fact that intent may need to be explored.

15 My learned friend also refers to various parts of the fitness reports and I just need a moment to find my notes on this point. So is it helpful for me to take your Honours through every last reference in my learned friend's written submissions and say why it doesn't take us anywhere or how would you like me to address it?

20 **WINKELMANN CJ:**

Well, I mean, the thing that troubles me is that there seems to be a reasonably consistent theme that this individual needs assistance to fully understand things and he seems to have significant issues with his executive functioning, so those bode both to his fitness to plead and also for the possibility of the defence and

25 one can sort of pick out, knock over one leg, and another, but there are multiple legs.

MS EWING:

Yes, sure, so I'll respond globally and then I won't tax your Honours on this point any further, I think. The difficulty with cherry-picking parts out of the fitness

reports is that, well, it's twofold. The first, it wasn't the lens the expert had in their mind at the time and second, and possibly more importantly –

WINKELMANN CJ:

Can you just say what you mean by that?

5 **MS EWING:**

So when an expert is assessing someone for the purpose of understanding their fitness, that will naturally be the focus of their inquiry and while they may note contextual findings about the defendant's functioning, they haven't been asked to address the point and naturally, their inquiry won't have engaged with it. So
10 their opinions are for the purpose of a fitness report, not for the purpose of assessing foresight of risk.

The second, that's the first objection, and the second objection is again that these things are all on a spectrum and the spectrum or the position on the
15 spectrum the fitness assessors were thinking about was whether he could understand verbal advice, complicated legal elements, et cetera, et cetera, but the fact scenario Mr Webster faced was quite concrete. It was physical, it was able to be seen, it was something he was experiencing himself, and I don't think we can say that assessors would reach the same conclusions necessarily about
20 his ability to understand that kind of situation. So, it's – the second point is really a variant of the first, I think.

WINKELMANN CJ:

This –

WILLIAMS J:

25 Can I just check the logic of that? The experts do say going forward if this were to, if this process were to begin again, he would need a communication assistant.

MS EWING:

One of the experts says that. Dr McFadden says that.

WILLIAMS J:

Okay.

WINKELMANN CJ:

And so does Dr Panckhurst.

5 **WILLIAMS J:**

But it doesn't – yes –

MS EWING:

I read Dr Panckhurst as saying it would need to be considered but not that his fitness is contingent on it. So I differ –

10 **WILLIAMS J:**

Yes, well, we're dealing with contingencies and possibilities here on a conviction for murder, so these things count.

MS EWING:

Yes.

15 **WILLIAMS J:**

That conclusion or those conclusions depending on how you read Dr Panckhurst, are following on two years of improvement in functioning and resilience and all of the – both experts say, it's very difficult to know what sort of state he was in at the point of the interview, the point of arrest.

20 **MS EWING:**

Yes.

WILLIAMS J:

It's too hard to reconstruct that but what we do know is he's better now.

1500

25 **MS EWING:**

Are we talking about fitness now or are we still talking about...

WILLIAMS J:

Fitness, we're talking about fitness.

MS EWING:

Yes, okay. I think I'm on a different part of my argument.

5 **WILLIAMS J:**

No, just bear with me.

MS EWING:

Okay, yes.

WILLIAMS J:

10 So the concerns they expressed about, you know, understanding consequence and executive functioning and so on, all led to the conclusion that if this were to start again, even though he has improved, assistance will be required?

MS EWING:

15 Yes, on my assessment of the reports one of the experts says that. The other thinks he's currently fit.

WILLIAMS J:

Okay, the other one says it's possible.

MS EWING:

Yes.

20 **WILLIAMS J:**

But that's probably enough for our discussion.

MS EWING:

Yes.

WILLIAMS J:

Which means assistance was required, must mean assistance was required two years ago, four years ago now, whenever it was. Must do.

MS EWING:

5 I don't –

WILLIAMS J:

Because he was in a more vulnerable state then.

MS EWING:

10 I'm just wondering if we're – are we still talking about the tenable defence point
or are we –

WILLIAMS J:

Yes.

MS EWING:

Because I'm planning to address the fitness –

15 **WILLIAMS J:**

I'm talking about his ability to process, and, of course, you say, well, that's a different question and we shouldn't mix them up. But these fitness reports talk about ability to process –

MS EWING:

20 So your Honour's talking –

WILLIAMS J:

– and there's no getting away from that, even if, you know – there is an overlap between the question we're discussing now and the fitness question, or them say in order to plead, if this were to start again, assistance would be required.

MS EWING:

Yes, but if I can loop back to the evidence of his functioning at the time of the murder, if he was fit to stand trial in 2024, he can understand complicated abstract concepts like the difference between murder and manslaughter –

5 **WILLIAMS J:**

With help.

MS EWING:

Well, without help in his interview with Dr Maxwell-Panckhurst.

WILLIAMS J:

10 Well, you see, because the doctors would not say that.

MS EWING:

So Dr Maxwell-Panckhurst says right now he is more than adequate, he more than adequately understands the complex –

WILLIAMS J:

15 With help.

MS EWING:

No. He didn't have help in his interview with Dr Maxwell Panckhurst. It was just a chat with the psychiatrist.

WILLIAMS J:

20 Sorry. Okay, no, participating in the...

MS EWING:

No, yes, so he's – so his assessment of him based on his own interview of him is he's more than adequately able to understand the difference between murder and manslaughter, he's able to understand the consequences of his plea, he
25 can give a detailed account, et cetera. So that's his level of functioning on abstract things despite his impairment.

WILLIAMS J:

Yes.

MS EWING:

5 So what is it that he couldn't understand about dragging someone behind the car?

WILLIAMS J:

Well, so, the more striking point I think is that neither of the two assessors was prepared to come to firm conclusions about his executive functioning abilities and so on two years earlier.

10 **MS EWING:**

So you're saying they may have been less?

WILLIAMS J:

Well, the doctors seem to suggest that they were less.

MS EWING:

15 Yes.

WILLIAMS J:

Whether they were less in this particular way, who knows? But they were less.

MS EWING:

Yes, and that's really my submission in a nutshell is who knows?

20 **WILLIAMS J:**

But isn't that enough for us to be worried?

MS EWING:

25 So to my mind the fact that Mr Webster can understand completely fictional abstract concepts of that kind does rather beg the question of why he couldn't understand something that's on a dairy farm pretty every day.

WILLIAMS J:

Well, you and me as lawyers might think that but the doctors wouldn't make that leap.

MS EWING:

- 5 Mhm, but my point is they just haven't, they haven't addressed his ability to grapple with those very concrete situations. They've been tasked with –

WILLIAMS J:

We're here assessing risk, aren't we?

MS EWING:

- 10 We're talk – yes.

WILLIAMS J:

Not certainties. We're assessing risks.

MS EWING:

Absolutely, yes, although –

- 15 **WILLIAMS J:**

Because a conviction for an offence that is too high for the level of culpability reflects on all of us.

MS EWING:

- 20 Yes, so my point though is we cannot allow a conviction appeal because someone might have a defence. They have to show –

WILLIAMS J:

Well, it depends on how big the "might" is.

MS EWING:

- 25 Yes, and when you look at the test in section 232(4), that is an area where choosing (a) or (b) might conceivably make a difference.

KÓS J:

Absolutely.

MS EWING:

Because one is real risk and one is an unfair trial has actually occurred. But,
5 as I said to Justice Cooke, the point we're grappling here really is with whether
there is an error. So, the law is pretty clear. There needs to be an arguable
defence. I don't say it has to be likely to succeed. I don't say it has to be proved
beyond reasonable doubt on appeal. It has to be arguable and my point here
is simply that to have an arguable defence based on lack of intent, he's going
10 to need some expert evidence that he doesn't yet have.

WINKELMANN CJ:

Well, thank you.

MS EWING:

Okay, have I covered that point?

15 **WINKELMANN CJ:**

I think you have, Ms Ewing.

ELLEN FRANCE J:

So in relation to that, I was just trying to think about in the appellate context how
you approach that where there is no cross-examination and that is presumably
20 because it might have been thought, well it's not addressing the right point in
any event and so apart from Dr Nuth, you can proceed on the basis that, as the
Court of Appeal accepted, it doesn't go far enough.

MS EWING:

Yes.

ELLEN FRANCE J:

But what does that mean in terms of what we can do? I'm thinking about your criticism that, you know, you can't just take snippets and I suppose my query is well, is that right, in terms of appellate function?

5 **MS EWING:**

Yes. Well, I suppose underlying all of this is an argument that they wouldn't have been admissible in that form because expert opinion has to be substantially helpful. It can't just be relevant. It has to be substantially helpful and when you're assessing substantial helpfulness, you'll look at what was the
10 brief? Did they, you know – is this being taken out of context?

ELLEN FRANCE J:

Well here it's slightly tricky because it seems to me, reading the Court of Appeal judgment, it's come in for two purposes, hasn't it? The fitness one and then what we're currently talking about.

15 **MS EWING:**

I think that's right. I think that's probably a very neat encapsulation of the difficulty here. That's really my criticism, that they haven't been separated out and dealt with separately. So, in answer to your Honour's question, I don't know that – I don't know why there wasn't cross-examination in the Court of Appeal.
20 It may have been that there was –

ELLEN FRANCE J:

And I'm not suggesting there's any, you know, criticism in relation to that. I'm just trying to think about it in terms of all right, well, that is the position, so what are you saying are the limits then on what the appellate court can do with that
25 evidence.

MS EWING:

On what you can consider, yes. That's a fair question. The enquiry, or the gateway it has to go through is admissibility, in my submission. So, if your Honours find that parts of these reports are admissible for this particular

purpose as expert opinion, then I won't object, I wouldn't object to them being taken into account. My concern is that they're being given a significance the experts weren't trying to give them and that that limits their helpfulness.

WINKELMANN CJ:

5 I just don't understand that from, for instance, reading Panckhurst's report though because he does talk about cognitive functioning in the context of the offending and, you know, he says things that are helpful to you. But he also gives information which is plainly relevant to a defence which is that the appellant: "...has clinically significant neurocognitive impairments ... with a
10 full-scale IQ of 78," which is low, and "...cognitive deficits, principally related to executive functioning, including difficulty with more complex abstract thought and language tasks."

So, I mean, that is the kind of evidence that I have regularly seen produced to
15 a jury for the basis, as a basis for a submission the person didn't have the required function and I've also had Crown counsel object to more pointed case-specific opinion evidence.

1510

MS EWING:

20 I absolutely accept there's a limit to how far they can go. I mean I have really focused on responding to the particular points that my learned friend has raised in his written submissions. I don't at all dispute that Mr Webster is impaired and – but I guess my question is is there an expert opinion in these reports that is sufficiently clearly and carefully expressed about the very point that we're trying
25 to deal with now?

WINKELMANN CJ:

I mean their reports have definitely been something of a moving...

MS EWING:

Indeed, yes.

So unless there are other questions I may leave this there and move onto...

WILLIAMS J:

Your point is really that the way in which Mr Webster's functioning and capacities have been described are such that when contrasted with the
5 powerful facts driving one to consequence, there isn't a disconnect.

MS EWING:

Yes.

WILLIAMS J:

He must have understood the consequence because whatever his deficits they
10 are not that fundamental.

MS EWING:

Yes.

COOKE J:

Which is really what the Court of Appeal said.

15 **MS EWING:**

Indeed, yes.

Okay, so I have 50 minutes to run. I anticipate from this morning that you don't really want to hear me on the legal test.

20 **WINKELMANN CJ:**

I think you've addressed us on the legal test, haven't you?

MS EWING:

Sorry, that was the legal test for the tenable defence. Now we're moving onto fitness.

25 **WINKELMANN CJ:**

I thought you'd also addressed us on that –

MS EWING:

Oh, had I?

WINKELMANN CJ:

– because haven't you accepted Mr Conder's approach?

5 **MS EWING:**

Oh, yes, no, I accepted – Mr Conder's I thought quite neatly encapsulated what an appellant has to show when they're trying to undermine their plea on the basis of a tenable defence that they weren't aware of, and that's the part that I was agreeing with.

10 **WINKELMANN CJ:**

Right.

MS EWING:

So what I am referring to now is the second chunk of my submissions which relates to whether the test on appeal is fitness to plead or fitness to stand trial,
15 and it may be that I can leave that point to my written submission because I think you all agree perhaps it doesn't arise.

WINKELMANN CJ:

Yes.

MS EWING:

20 Is that...

WINKELMANN CJ:

I think that was the – I think we're happy to rest on your written submissions.

MS EWING:

Okay, thank you. Then that brings us to the question of whether Mr Webster
25 was fit in that way.

COOKE J:

By “in that way” you mean fit to plead?

MS EWING:

Indeed, yes.

5

So the three things we’re concerned with are at 27 of my submissions.

Number 1, capacity to convey his version of events to counsel. That’s an issue here. Number 2, an adequate understanding of the nature of the charges he was facing and the evidence it was based on. That’s an issue here. And 3, adequate understanding of what the plea meant and his counsel’s advice. Not an issue here.

So the fitness assessors raised concerns about 1 and 2 but not 3.

15

Again I have to start with a caution about the proper basis for an expert opinion. Both of these assessors have interviewed Mr Webster and he’s said various things about his level of understanding at the time, although equally I think we could agree he’s demonstrated that his recall of exactly what happened in 2022 is relatively poor.

So just to state the obvious, what he says to the assessors about his level of understanding is, of course, not a basis for a finding of unfitness. So if he says, I didn’t understand what was going on, that can’t found an opinion that he was unfit.

1515

And as we have been discussing, myself and Justice Williams, both consider he would be fit to stand trial now with assistance, in Dr McFadden’s case. His FASD and the cognitive deficits that it has produced are predominantly unchanging. That’s what Dr Maxwell Panckhurst says, at 74. So the extent of his impairment is largely caused by the FASD, is largely the same between now and then, and what they say is different and why they’ve reached, why they’re

30

not as clear on his fitness in 2022, is, this is Dr Maxwell Panckhurst, he's matured, he's less likely to defer, and he's more distant from a stressful time in his life. Similarly, Dr McFadden suggests that the key change or what's changed, in her view, is that he now understands that he cannot be passive.

5 That's paragraphs 68 and 74 of my submissions. That to my mind make clear just how finely balanced their opinions are. He is fit now, fit to stand trial with assistance. His FASD is predominantly unchanging and what's changed in the two years passed, is that he's less likely to be deferent and passive.

10 The two areas where they express concerns are first, did he understand the key element of the charge, we're inferring that Dr McFadden was talking about recklessness, and the prosecution evidence.

Dr Maxwell Panckhurst, this wasn't the key – this question wasn't the key focus
15 of his findings, he simply mentions it was unclear if Mr Webster understood the evidence against him.

For myself, I'm not entirely sure why he reaches that view because he does record that Mr Webster's understanding of the evidence now is "more than
20 adequate". So he expresses a concern, it seems he's also concerned about the fact that Mr Webster wasn't sure about whether he could exclude his interview. To my mind, that's not a fitness issue because he wasn't given any advice of that kind in any event, but there's this suggestion that he doesn't understand the evidence and the basis, in my submission, is somewhat unclear.
25 Again, it's awkward to make these submissions when we haven't had cross-examination, and I accept that.

Dr McFadden, this is her sole concern, whether he understood recklessness and whether he understood the evidence against him, and she says in 2022:
30 "... it is unclear whether he understood [that evidence] and processed the element(s) most relevant to his case." She gives various reasons for that conclusion. As I understand them, they are that he lacks insight into these things now, that he's "reliant on retaining" verbal communications from his

lawyer because he can't read and that, he: "... did not signal ... his lack of understanding."

5 So of those three reasons, the Crown would suggest that the first and third don't help much, even if he lacks insight now into what recklessness means, that tells us nothing about what his state of mind was in 2022 when –

WINKELMANN CJ:

On this approach though, they'd never meet that threshold, would you.

MS EWING:

10 Well, I suppose I'm just saying, look, an expert can say, this guy is so impaired that he's just never going to understand recklessness. But she's not saying that. She's saying he'd be fit to plead now with help and it's unclear if he understood the evidence and the charge at the time.

15 So in two years' time, it seems likely that we've all probably forgotten whatever conversations we had with someone else that we talked to, whether about recklessness or not. I just don't see how that's a particularly sound basis for saying he wouldn't have understood it at the time. She doesn't say it comes from his impairment. She just says, he lacks insight into these things now and
20 I'm not sure how far that takes us.

She also says he: "... did not signal ... his lack of understanding." This seems to come from Mr Webster himself. So everyone agrees Mr Webster did not tell Mr Bourke, I don't understand, but what Dr McFadden is doing is relying on
25 Mr Webster's comment to her that "he did not understand".

WILLIAMS J:

What do we make of that?

MS EWING:

So it's not a sound basis for an opinion.

WILLIAMS J:

Why not?

MS EWING:

Because it's hearsay.

5 **WINKELMANN CJ:**

What paragraph are you at?

1520

WILLIAMS J:

Oh, it's her hearsay.

10 **MS EWING:**

It's –

WILLIAMS J:

She's an expert.

MS EWING:

15 No, it's hearsay from Mr Webster. So the point I was making earlier is that –

WILLIAMS J:

It's Mr Webster's evidence.

MS EWING:

It's not admissible evidence about his fitness.

20 **WILLIAMS J:**

Oh, it's hearsay.

MS EWING:

It's hearsay because he's not a witness and can't –

KÓS J:

Well, that depends –

WILLIAMS J:

Well, if we address the substance of it first.

5 **KÓS J:**

There may be.

WILLIAMS J:

The experts say that what he says is – or that he’s a “reliable historian”.

MS EWING:

10 The experts say all kinds of things about that point –

WILLIAMS J:

And guileless. He does not mangle.

MS EWING:

– I mean, but that’s a question about reliability and my point is unquestionably
15 a defendant’s statement to an expert is hearsay and cannot be relied on.
That’s –

COOKE J:

But isn’t that within her expertise to assess?

MS EWING:

20 But there’s case law on this and I can take your Honours through it, if you’d like.

WILLIAMS J:

Yes.

WINKELMANN CJ:

I mean, well, that’s basic –

WILLIAMS J:

We're aware of it.

WINKELMANN CJ:

Yes, that's basic –

5 **MS EWING:**

It's just, it's hearsay.

WINKELMANN CJ:

Which –

MS EWING:

10 It's section 27 and –

WINKELMANN CJ:

But it wasn't – take that point wasn't –

MS EWING:

Section 22.

15 **WINKELMANN CJ:**

Yes. I mean, I had a discussion, we had a discussion about this just the other week in this court but isn't the point the Crown hasn't taken that point earlier on?

MS EWING:

20 But what – but all we could have said about it – I think Mr Lillico did take exactly that point in the Court of Appeal.

WINKELMANN CJ:

Okay.

MS EWING:

So, what I'm trying to do here is say, here are the bases that she offers for her opinion.

WINKELMANN CJ:

5 What paragraph are we at in her report?

MS EWING:

Yes, that's a very good question. So I am using the paragraph numbers from my submissions.

WINKELMANN CJ:

10 Yes.

MS EWING:

But I wonder if it's more helpful if I just give you the reference. So, in fact, Ms Duckett has brought it up for me. So it's right in front of us.

KÓS J:

15 Where in your submissions are you?

MS EWING:

I am in the appendix.

KÓS J:

Right, thank you.

20 **MS EWING:**

At paragraph 66.1.

WINKELMANN CJ:

In paragraph 149, we've got Mr Bourke corroborating this account.

MS EWING:

So, yes, but that's also, I guess, the problem with all this is that she seems to be saying, he told me he didn't understand, and Mr Bourke told me he didn't signal his understanding and based on that, rather than based on the extent of my impairment, I conclude that he doesn't understand the evidence or that he wouldn't have signalled his misunderstanding. Because sitting underneath comment of hers is an assumption that he did not understand.

WINKELMANN CJ:

This is all very slicey, dicey.

10 **MS EWING:**

It is, yes, I know.

WINKELMANN CJ:

That's what I mean, and my concern is that it just really is against the – it kind of – it's a slicey, dicey analysis, but the gravamen of these reports is that this man has serious neurocog – deficits that his counsel wasn't aware of.

MS EWING:

I completely agree, but in cases where we're considering – so you can't approach unfitness without considering that people have impairment and still manage to get through criminal proceedings. It's not a – the fact that you have FASD cannot of itself mean that you aren't fit and indeed, Mr Webster is or was fit in 2024, despite his FASD. He was more, Dr Maxwell Panckhurst's words are, he's more than adequately able to understand and communicate and instruct a lawyer. He sits above, he's not, he didn't seem to see it as borderline, he sits above whatever baseline threshold it is. So what I'm trying to do here, and I know it's granular, is encourage –

WINKELMANN CJ:

Well, but that granularity is the issue I'm seeing because it's a guilty plea. He is convicted on the basis of a guilty plea and now we have pretty compelling

evidence that he has a substantial cognitive deficit, and I think you don't dispute that.

MS EWING:

I absolutely don't, but –

5 **WINKELMANN CJ:**

He's not walking away from his involvement in horrific offending, he's just saying, that I want to present a defence of lack of mens rea for a murder conviction.

MS EWING:

10 Well, it's a, I mean what he's saying here is, I didn't understand what I was doing. He's not saying I want to present a defence. I think we have to separate them out, because he's, what he's saying is, I did not understand the witness statements that Mr Bourke read to me, immediately before I pleaded guilty. I didn't understand the quite simple question about what you have to, what the
15 Crown has to prove, is that you realised he might die. That's what we're talking about, whether he was impaired to that level. So –
1525

WINKELMANN CJ:

He realised he might die and he realised that the principal offender was reckless
20 as to whether – on the Crown's dual pathways. So that's quite – that is complex mens rea. Section 66(1) party liability would be a complex mens rea for him is the point that's made.

MS EWING:

It would be complex, and in 2024 he could understand it.

25 **ELLEN FRANCE J:**

There are at least aspects in Mr Bourke's evidence which, admittedly he's saying well now when I look back, but which are supportive of a lack of understanding and at least of some of those aspects that we're talking about.

MS EWING:

Yes, and I think it would be remiss of me not to mention that – well actually I wonder if that just cuts across something I just said so maybe I won't say that.

WINKELMANN CJ:

5 Oh, no, go ahead, say it.

WILLIAMS J:

Glad you thought that out loud though.

MS EWING:

Yes, yes, it's good to –

10 **COOKE J:**

Disarmingly honest.

WINKELMANN CJ:

You said that out loud, Ms Ewing, so carry on, say it.

MS EWING:

15 Well, okay, so there is a mention in the – I mean the Crown usually makes a big song and dance about needing contemporaneous evidence in this kind of case and the Carlyon report does record him saying that he didn't think the charge of murder was still around. So there's obviously that, for what it's worth.

ELLEN FRANCE J:

20 Yes.

MS EWING:

But – I mean I wonder if I can zoom out a bit here because I can see which way the wind is blowing and just put the Crown position on all this in a nutshell. Given that he was fit in 2024 on Dr Maxwell Panckhurst's assessment at least,
25 the question kind of becomes what changed? And as I've said, the assessor's concerns arise out of the fact that he was less mature, more stressed, and more likely to defer. And the Crown response to that is that when you look at his

interview there's really no sign of him deferring at all, when you look at his police interview.

WINKELMANN CJ:

Although he deferred to Mr Candy, because he was prepared to take the blame
5 for the entire offending.

MS EWING:

Absolutely, absolutely. And I think that's why the phrase "overly honest historian" has some –

WINKELMANN CJ:

10 It's not honesty. That's something else.

MS EWING:

Sorry, yes, you're right. You're quite right.

WILLIAMS J:

Yes, the other characteristic is a "desire to please".

15 **MS EWING:**

Yes, so – but when you read his interview, every time he's asked an abstract question he says: "What do you mean." So he's asked what do your rights mean to you, and he says: "What do you mean." And the police officer puts it more simply and he can immediately respond. He asks: "What do you mean"
20 again, and again, and again in that interview. Every time he doesn't understand, he speaks up. And so while the assessors may have formed a view that he was deferent and passive, the evidence from the time is that he was not. And equally when the police officer puts what Ms Hughes has said to him, he says "nah", that's wrong, that's not what happened, and he's able to
25 immediately resist it. And it's in that context that when you look at his silence with Mr Bourke you can't necessarily take it as incomprehension because he's given a full police interview where he completely agrees with what the Crown evidence says he did.

WINKELMANN CJ:

What's Mr Bourke's –

MS EWING:

So there's nothing to dispute, in a way.

5 **WINKELMANN CJ:**

What's Mr Bourke's evidence about how often he saw him? Because he says to Ms McFadden, and this probably is not right because this is how things kaleidoscope in everybody's memory, that he just met him a couple of times on AVL, one or two AVLs.

10 **MS EWING:**

Yes, no, I mean again that's hearsay, but the –

WINKELMANN CJ:

Mr Bourke would've covered it.

ELLEN FRANCE J:

15 Mr Bourke does talk about that, I think.

MS EWING:

I'm sure he does. I'm just trying to find the reference.

WINKELMANN CJ:

Just trying to recall it.

20 **MS EWING:**

We know that they spoke on September, in September, and then again –

ELLEN FRANCE J:

Paragraph 13 of his affidavit: "Over the following months I attended on Mr Webster multiple times, primarily by booking AVL appointments with him or
25 speaking to him on the telephone."

WINKELMANN CJ:

I mean there is evidence about FASD people not being able to cope particularly well with AVL and phone communications. But experts weren't asked to engage with that, but...

5 **MS EWING:**

Well actually I think Dr McFadden does mention that in her report.

ELLEN FRANCE J:

I was going to say, someone does.

1530

10 **MS EWING:**

Yes. So what I was attempting here was just more of a global submission that if the difference between 2024 and 2022 is the concern that he may have been deferent and passive, then the police interview puts paid to that concern because he's not deferent, even to a police officer having just been arrested for murder.

15

WINKELMANN CJ:

But that nutshell overlooks the fact that Ms McFadden says he's competent with assistance. Even today he would need communication assistance. He would need scaffolding.

20 **MS EWING:**

But he didn't have assistance in the police interview and he was still able to resist other witnesses' accounts.

COOKE J:

But there were things he wasn't able to answer, especially about the mental elements of the offending?

25

MS EWING:

I don't, I don't – I'm not sure I agree. Is your Honour thinking of something in particular?

COOKE J:

- 5 Well, no. Though he was asked why he did things and he would say he wasn't sure, I was just stupid.

MS EWING:

- Oh, yes, he can say he wasn't sure. But in terms of the mental elements, he gives many comments about what was going on in his mind and in Mr Candy's
10 mind. He's able to say, I believe, and this is somewhere in my submissions paragraph 56, he didn't know, this is almost verbatim, he didn't know what Mr Candy's intentions were when he pulled up in the car. My intention was just to throw a few punches at the victim and that's it. He wasn't thinking what was going to happen to the victim if he got dragged and then he talks about how he
15 realised what he was doing was stupid when Mr Candy told him what could happen.

COOKE J:

I remember one time, didn't he say at one point that his mind just went black, or something like that?

- 20 **MS EWING:**

He, yes, he does.

WINKELMANN CJ:

That's associated with anger, isn't it?

MS EWING:

- 25 Yes, yes, he says I was so angry, I was wild. I just, my mind went blank.

So, I think I'm finished. I feel we've covered everything in a digressive way, so I'm not sure whether – are there other things I can assist with?

COOKE J:

Just the question the Chief Justice asked about the evidence is that he would be fit if he had communication assistance.

MS EWING:

5 Yes.

COOKE J:

And we know that he didn't at the time, so, what do you say about that?

MS EWING:

10 Yes, yes, that is a point I had been meaning to address. So, the absence of communication assistance isn't what causes a miscarriage. What causes a miscarriage is the lack of understanding that it creates and so we end up in the same place, asking whether his plea was uninformed because he was unfit. And, of course, when we conduct that assessment, the assessors have taken into account that he didn't have anyone to help him understand what his lawyer
15 was saying. So, this, I've covered very briefly in my submissions because I think the case was very clear that communication assistance, an absence of communication assistance is only a miscarriage if it causes a miscarriage in some other way. It's not a miscarriage in and of itself.

KÓS J:

20 Well, he obviously had a form of assistance from Mr Bourke. It's just that Mr Bourke is not a trained whatever these people are.

MS EWING:

Yes and of course, Mr Bourke says I modified my approach because I could see that he had his limitations.

25 **KÓS J:**

Absolutely.

WINKELMANN CJ:

But in some ways he modified his approach to be less ambitious in what he was trying to convey, is his evidence. He gave evidence that he couldn't do this. He only could give advice in this form because of the – I can find it if you like.

5 **MS EWING:**

Yes, please, that would be helpful.

1535

WINKELMANN CJ:

10 If I can. So he says at, from paragraphs 33 to 35, 36 that if he thought he didn't understand the distinction between sections 167(a) and (b) he would have put the matter off for further discussion, but he never said to him I don't understand the difference. So –

MS EWING:

Yes.

15 **WINKELMANN CJ:**

He makes the point, I proceeded on the point he understood it. I proceeded on the presumption that he understood what I was saying.

MS EWING:

20 Yes, I absolutely don't dispute that Mr Webster didn't signal a lack of understanding and I guess my point is he did in his police interview. Why wouldn't he have in his – in the less stressful context of talking to his lawyer.

WINKELMANN CJ:

During which he was crying, so it could be quite stressful because he's been confronted with the reality of what he had involved himself in and done.

25 **MS EWING:**

Indeed, yes. But, as I say in the submissions, I do – it does seem that signals understanding of his situation.

WINKELMANN CJ:

Right, well thank you very much, Ms Ewing. Thank you for your very helpful submissions.

5 Who is handling the reply?

KÓS J:

There is no one.

COOKE J:

Paper, scissors, rock.

10 **WINKELMANN CJ:**

He rises slowly to his feet. Mr Conder.

MR CONDER:

Thank you. I think we are largely content to rest on our principal submissions. Perhaps all I would say at this stage is in terms of the evidential interview, we
15 would say that there is an unfairness in someone who needs communications assistance to be effective as a communicator who is clearly not understanding the seriousness of the situation with which he is faced when he is giving that interview and that's why he's attempting to take responsibility for things that go well outside of what he is actually responsible for. And, in our submission, that
20 doesn't support a conclusion that he is capable of participating in this process unassisted. Perhaps quite the opposite in that it raises questions about whether that interview is ultimately unfair to him even though it may be through no fault of the people interviewing him and that's probably what we would say about the interview.

25

Other than that, I would simply say, turning back to what seems to be the agreed position on section 232, the questions really are whether there was an error and whether it had an effect on the pathway that this case went down. I think at this point it's relatively uncontroversial that there were errors in the way that this
30 case has developed. The Carlyon report was wrong and formed an important

part of how decisions were made in this case. There was a need for communications assistance and it was absent and there was a diagnosis of foetal alcohol syndrome that was available but entirely missed.

- 5 Fundamentally, the question is whether those two changes would've made a difference to the pathway. But the people most qualified to answer that question, in my submission, say that it would have because Mr Bourke, when asked about it, and this is at page 5 of the notes of evidence says that this information "would have put an entirely different complexion on things and I
10 would have needed to go into all of that and I just didn't". So, he very clearly suggests that this would've changed the complexion, the nature of what he was dealing with and what would have happened.

- In terms of the issues around assistance and fitness, the final report makes it
15 clear that there is a real risk because there are reasonable grounds to consider on the balance of probabilities that there may have been unfitness in 2022. So, in our simple submission, there are plainly errors here and the people best qualified to address the impact of them have the view that there is a real risk they had an impact on what happened next and it is for those reasons that we
20 say the appeal should succeed.

WILLIAMS J:

Well, what do you say to the Crown argument that there is no evidence directly on section 167(b) and foresight and there should've been?

MR CONDER:

- 25 I would echo the comments of the Chief Justice that it would be difficult to bring that evidence in an admissible fashion. But there is significant evidence here about the precise challenges that Mr Webster faced and there are his own comments which were inadequate but indicated that he had a real difficulty in appreciating that this was something that reached that level of seriousness, that
30 he had properly understood what was going on at the time and even, as has been talked about, the fact that it's not until someone expressly points it out to him on the road that at first the penny drops. So there is the combination of

expert evidence about his deficits and some factual evidence that suggests that putting those things together, intent is a real question mark.

1540

- 5 As I say, in my submission, there's clearly an aspect here that has been missed and it clearly is something that could make a difference. It's not necessary for us to demonstrate in this proceeding that it would lead to only one conclusion, but the fact that there are two possible answers is enough to say that this is a process that has miscarried.

10 **WINKELMANN CJ:**

Thank you, Mr Conder.

MR CONDER:

Thank you, your Honour.

WINKELMANN CJ:

- 15 Thank you, all counsel. We will reserve our decision.

COURT ADJOURNS: 3.41 PM