NOTE: PUBLICTION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

ORDER MADE IN THE DISTRICT COURT FOR PERMANENT NAME SUPPRESSION FOR APPELLANT IN CA322/2014 REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA872/2013
[2015] NZCA 403

BETWEEN	GRAEME MARTIN HALL Appellant
AND	THE QUEEN Respondent

CA322/2014

BETWEEN	H (CA322/2014) Appellant
AND	THE QUEEN Respondent

Hearing:	6 and 7 May 2015
Court:	Ellen France P, Randerson, Stevens, White and French JJ
Counsel:	A M Simperingham and H B Vaughn for Appellant Hall L B Cordwell and G Ghahraman for Appellant H B Horsley and S K Barr for Respondent J H M Eaton QC and V Scott for New Zealand Bar Association S J Bonnar QC for New Zealand Law Society K H Cook and N J Sainsbury for Criminal Bar Association M F Laracy and N P Chisnall for Public Defence Service D Howden for Legal Services Commissioner as interveners
Judgment:	2 September 2015 at 3 pm

JUDGMENT OF THE COURT

A Extension of time to appeal is granted to Mr Hall. Mr Hall's appeal against conviction is dismissed.

B Mr H's appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Ellen France P and Randerson J)

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Challenges to the conduct of trial counsel

[1] Appeals raising issues about the conduct of trial counsel now form a significant proportion of criminal appeals before the Court. The decision of the Supreme Court in *R v Sungsuwan* emphasises that the "ultimate question" where trial counsel conduct is in issue is whether justice has miscarried.[1] This Court's judgment in *R v Clode*[2] and the Court of Appeal (Criminal) Rules 2001 set out procedures currently applicable to appeals challenging the conduct of trial counsel.

[2] For a variety of reasons we have decided to review the processes applicable to these appeals to ensure they are effective and promote the overall interests of justice. As the number of appeals raising the conduct of trial counsel has increased, it has become apparent there is a mismatch between current procedures and practice.

[3] In approaching matters of process, we recognise that any procedures must reflect, first, the right of an appeal against conviction[3] and, second, the right to a fair

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1 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [70] per Gault, Keith and Blanchard JJ; and see Criminal Procedure Act 2011, s 232(2)(c) and (4).

2 *R v Clode* [2008] NZCA 421, [2009] 1 NZLR 312.

3 Criminal Procedure Act, s 229 and New Zealand Bill of Rights Act 1990, s 25(h); and see *Marteley v The Legal Services Commissioner* [2015] NZSC 127 at [19]–[25] and [55](a) per William Young J for the majority and [101] per Elias CJ dissenting.

trial.[4] A key aspect to a fair trial is the right to be represented at trial by competent counsel who should meet the relevant standards and comply with the various relevant statutory, regulatory and common law obligations imposed on trial counsel.

[4] We have chosen to reconsider our approach to appeals of this nature in the context of the present appeals which demonstrate some of the issues arising. We deal first with the current position. Next we discuss some changes in approach before turning to the two appeals before us.

The current position

[5] We first briefly set out some relevant facts before describing the principles applicable to these appeals and current procedures.

The factual background

[6] In 1996, four appeals in this Court raised issues of trial counsel conduct.[5] Since that time the number of appeals has increased and over the last six years the number of appeals raising this issue has ranged from 35 in 2009 to 50 in 2011. Over the period from 2009 to 2014, on average, appeals raising trial counsel conduct formed 19 per cent of appeals against conviction.

[7] To assist in preparation for the appeals we provided counsel with statistical information as to the appeals raising issues as to trial counsel conduct.[6] This material provides some background to our consideration and so is usefully recorded as tables 1 to 3 of the appendix to this judgment.[7]

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4 New Zealand Bill of Rights Act, s 25(a). Section 24(c) and (f) of the Bill of Rights protecting the rights of persons charged to legal assistance are also relevant. The Supreme Court in *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [76] noted the rights in s 24 "are what in Europe are treated as constituent elements of the right to a fair trial".

5 Stephen James O'Driscoll "Conduct of counsel causing or contributing to a miscarriage of justice" (PhD Thesis, University of Otago, 2009) at 14.

6 *[H] v R* CA322/2014, 22 April 2015 (Minute of the Court).

7 The material has been amended from that provided to counsel in that we have included the outcomes in these appeals as a comparison to outcomes generally.

The relevant principles

[8] The relevant principles applicable to appeals raising issues about the conduct of trial counsel are now well-settled. These principles are set out by the Supreme Court in *R v Sungsuwan*. In delivering the judgment of the majority in *R v Sungsuwan* Gault J stated that:[8]

> [C]onsideration of whether there was in fact an error or irregularity on the part of counsel, and whether there is a real risk it affected the outcome, generally will be an appropriate approach. If the matter could not have affected the outcome any further scrutiny of counsel's conduct will be unnecessary. But whatever approach is taken, it must remain open for an appellate court to ensure justice where there is real concern for the safety of a verdict as a result of the conduct of counsel even though, in the circumstances at the time, that conduct may have met the objectively reasonable standard of competence.

[9] The effect of *Sungsuwan* was summarised by this Court in *R v Scurrah*.[9] Arnold J in that case noted that, generally, the judgments in *Sungsuwan* "indicate that the focus should be on the trial process and its outcome rather than on the characterisation of counsel's conduct".[10] The Court observed that in the majority judgment, Gault J initially identified two cases at opposite ends of the spectrum. The first was where "the alleged counsel error could not have affected the outcome of the trial. In that type of case, there was no need to go further."[11]

[10] The case at the other end of the spectrum was where counsel's alleged error had "effectively prevented the accused person from presenting a defence. In that type of case, prejudice would readily be found".[12] Gault J in *Sungsuwan* identified a further class of case where counsel's conduct was judged to be in the interests of the accused person at the time. In those cases, this Court said:[13]

> Even though such conduct may possibly have affected the outcome, an appeal would not be allowed if the judgment exercised by counsel was a judgment that another competent counsel might exercise in the course of a further trial … . However, the Judge recognised the possibility that in rare cases counsel's conduct, although reasonable, might have led to a miscarriage of justice, so that an appeal would have to be allowed … .

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8 *R v Sungsuwan*, above n 1, at [70].
9 *R v Scurrah* CA159/06, 12 September 2006.
10 At [13].
11 At [14].
12 At [14].
13 At [15].

[11] The focus is on whether there has been a miscarriage of justice. Arnold J stated:

> [17] The approach appears to be, then, to ask first whether there was an error on the part of counsel and, if so, whether there is a real risk that it affected the outcome by rendering the verdict unsafe. If the answer to both questions is "yes", this will generally be sufficient to establish a miscarriage of justice, so that an appeal will be allowed.
>
> [18] On the other hand, where counsel has made a tactical or other decision which was reasonable in the context of the trial, an appeal will not ordinarily be allowed even though there is a possibility that the decision affected the outcome of the trial. This reflects the reality that trial counsel must make decisions before and during trial, exercising their best judgment in the circumstances as they exist at the time. Simply because, with hindsight, such a decision is seen to have reduced the chance of the accused achieving a favourable outcome does not mean that there has been a miscarriage of justice. Nor will there have been a miscarriage of justice simply because some other decision is thought, with hindsight, to have offered a better prospect of an outcome favourable to the accused than the decision made.
>
> [19] This analysis will be sufficient to deal with most cases.
>
> [20] But there will be rare cases where, although there was no error on the part of counsel (in the sense that what counsel did, or did not do, was objectively reasonable at the time), an appeal will be allowed because there is a real risk that there has been a miscarriage of justice.

[12] We turn now to describe the current procedures.

Current procedures

[13] The Court of Appeal (Criminal) Rules 2001 (the Rules) and this Court's decision in *R v Clode* deal with current procedures.

The Rules

[14] Rule 12A(1) of the Rules requires notice of a complaint about the conduct of trial counsel to be included in the notice of appeal or in a memorandum to be filed and served within 30 working days after filing the notice of appeal.

[15] Rule 12A then provides timeframes for the filing of affidavits relating to that ground and as to the giving of notice that a deponent is required for cross-examination. Rule 12A(2) requires the appellant, within 30 working days after

filing the notice of appeal, to file and serve any affidavits relating to this ground of appeal. The prosecutor has 15 working days after service to file and serve any affidavits in reply.[14]

[16] The rule also requires notice to be given where a party wishes to cross-examine a deponent.[15] Rule 12A(5) provides that a party on whom a notice of cross-examination is served must advise the deponent and ensure the deponent is present at the hearing for cross-examination. Finally, r 12A(6) deals with waiver of privilege by an appellant in respect of communications with his or her trial counsel.[16] Rule 12A(6) states that if the appellant wishes to waive privilege under s 65 of the Evidence Act 2006, the appellant must provide the prosecutor with a written waiver. The Rule provides for this to be done within 30 working days after filing the notice of appeal.

R v Clode

[17] In *Clode*, the Court set out the steps counsel should take where an appellant indicates that the trial was unfair because of the conduct of trial counsel. The Court envisaged instructions being taken from the appellant, followed by an approach to trial counsel inviting a response to the complaints. It was anticipated trial counsel would then respond. Once appellate counsel had evaluated the response, the appellant would be advised either that the complaints cannot be sustained or that there is an arguable case.[17]

[18] The Court said appellate counsel should only pursue issues of counsel conduct if satisfied there is an arguable case. Chambers J, delivering the judgment of the Court, put it this way:[18]

> Appellate counsel should then evaluate defence counsel's response. If his or her assessment is that the defendant's complaints cannot be sustained, then strong advice to that effect should be given to the defendant and should

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14 Court of Appeal (Criminal) Rules 2001, r 12A(3).

15 Rule 12A(4) requires notice of cross-examination to be given within 15 working days after service of the affidavit.

16 For examples of cases where the appellant did not waive privilege see *Lawson v R* [2012] NZCA 426; *Hills v R* [2010] NZCA 483; *R v E (CA113/2009)* [2009] NZCA 554; and *R v Ford* [2007] NZCA 173.

17 *R v Clode*, above n 2, at [29].

18 At [29].

> equally be reported to the Legal Services Agency. Only if appellate counsel is satisfied there is an arguable case based on trial counsel incompetence should that ground of appeal be pursued.

[19] The Court recognised the difficulties of making these inquiries within the timeframes prescribed in the Rules. Accordingly, the Court said:[19]

> If there are grounds of appeal other than trial counsel incompetence, the notice of appeal specifying those other grounds should be filed within the statutory time limit. If, subsequently, trial counsel incompetence emerges as a proper ground of appeal, a memorandum can be filed seeking leave to add a further ground of appeal. If trial counsel incompetence is the only possible ground of appeal, then generally counsel should hold off filing an appeal against conviction based on it until he or she is satisfied an appeal on that ground can properly be mounted. This Court would always look favourably on an application to extend time for appealing in circumstances where appellate counsel was carrying out due diligence as to whether a ground of appeal could properly be advanced.

What changes should be made to current procedures?

[20] Against this background, we turn to consider possible changes to current procedures. It is common ground between the parties and the interveners that a *Clode* type process is desirable. We agree that is desirable and that it is appropriate for the Court to suggest how these appeals may be progressed.[20] The approach envisaged by *Clode* has the benefit of ensuring issues about trial counsel conduct that should be considered by the appellate court are put before the Court and are properly developed. As the submissions for the New Zealand Law Society noted, the *Clode* approach has the advantage of ensuring appellate and trial counsel "confront and evaluate" the appellant's allegations at the outset. This is also consistent with appellate counsel's professional obligations to the court, client and trial counsel.[21] For example, where evidence as to counsel's instructions is necessary, this approach helps to ensure that evidence is before the Court in a way that enables a proper assessment of whether justice has miscarried.

[21] Further, this Court has commented adversely on appeals where trial counsel error has been pursued inappropriately with resultant unnecessary adverse impact on

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19 At [30].

20 It may be consideration should be given to including these procedures in the Court of Appeal (Criminal) Rules.

21 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

trial counsel involved, on the interests of finality, and on resources. In *Carruth v R* this Court said it had doubts about the truthfulness of the appellant's allegations against his counsel.[22] O'Regan P for the Court continued:[23]

> In the circumstances, we do not believe his counsel should have been faced with the burden of defending his performance. As this Court said in *R v Clode*, allegations against trial counsel should not be made if there is not a proper foundation for them. In this case the attack on [trial counsel] was wholly disproportionate to the nature of the alleged shortcoming, and the evidence available demonstrated that the allegations were unlikely to be substantiated in fact.

[22] Similar observations have been made in numerous other cases where the issue of trial counsel conduct has been raised but has no proper foundation.[24]

[23] The New Zealand Bar Association submissions noted the reputational issues for trial counsel inappropriately impugned in this way and the requirements of natural justice. In addition, as we shall discuss, the decisions of trial counsel to which a challenge is directed are often just matters of judgment which it is sought to reassess in hindsight. These aspects also support the need for some safeguards in procedure.

[24] Finally, as the Crown submits, clarity about the procedures benefits all those directly involved in the court process. No doubt these advantages explain the adoption of similar procedures in Canada and the approach taken in England, both of which we will consider in more detail below.

[25] There was also general agreement amongst the parties and the interveners that some refinements to the current process should be made. We discuss the approach to be taken in two parts. First, we focus on procedure and, second, we address the obligations of both trial and appellate counsel.

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22 *Carruth v R* [2013] NZCA 296 at [18]; see also, for example, *R v Moore* [2009] NZCA 78 at [30].

23 At [18] (footnote omitted).

24 Examples include *DST v R* [2014] NZCA 602 at [47]–[60]; *Morton v R* [2013] NZCA 667 at [135]–[149]; *Te Rito v R* [2013] NZCA 147 at [31]; *Gobindlal v R* [2012] NZCA 512 at [17]; *Koornneef v R* [2009] NZCA 402; and *Emirali v R* CA177/06, 12 December 2006 at [15]–[16].

Procedural steps

[26] We consider the essential steps set out in *Clode* remain appropriate and should be followed.[25] Accordingly, we envisage the steps set out below will be applicable in appeals raising allegations of trial counsel conduct.

[27] The first step is for appellate counsel to take instructions from the appellant and make a preliminary assessment.[26]

[28] As the second step, appellate counsel should, as soon as reasonably practicable, approach trial counsel (in writing) setting out the appellant's complaints and seeking a response. We agree with the Crown submission that, if appellate counsel has identified any issues not raised by the appellant, these should be put to trial counsel at the same time. Any other course defeats the purpose of ensuring that all matters that should be before the Court are put and are properly developed.[27]

[29] The third step is for trial counsel to respond as soon as reasonably practicable. Again, we agree with the Crown that there should be a written record of the response. As *Clode* provides, "[t]rial counsel should then respond, fairly conceding what should be conceded but equally resisting those complaints which are without foundation".[28] It is helpful if trial counsel focus on providing a factual response, for example, explaining as appropriate what instructions were given or proposed witnesses explored.

[30] Finally, appellate counsel will need to evaluate the response and advise the appellant. We discuss the approach to be taken by appellate counsel under the heading of "the obligations on counsel".[29]

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25 A broadly similar approach is envisaged in both the British Columbia Court of Appeal *Practice Directive (Criminal): Ineffective Assistance of Trial Counsel* (12 November 2013) [the British Columbia Court of Appeal Practice Directive] and in the Court of Appeal for Ontario *Procedural Protocol: Re Allegations of Incompetence of Trial Counsel in Criminal Cases* (1 May 2000) [the Ontario Court of Appeal Procedural Protocol].

26 These guidelines are intended to apply only to appellants who are represented by counsel.

27 If other issues arise later then we generally expect that this exercise will need to be repeated.

28 *R v Clode*, above n 2, at [29].

29 At [53]–[59], below.

Related issues

[31] We now address related issues arising in respect of these steps where some refinement or clarification is appropriate.

(a) Application

[32] There may be cases where, on receipt of instructions and having undertaken the necessary preliminary assessment of the circumstances including the court record, appellate counsel's advice is that the complaints are without foundation. In those cases the matter may be able to be resolved without taking any of these steps.

(b) File of trial counsel

[33] The second issue concerns appellate counsel's access to trial counsel's file.[30] We consider that, if necessary, trial counsel should allow appellate counsel access to trial counsel's file. We say "if necessary" because it may be the challenge to counsel's conduct can be dealt with on the basis of the court record or by agreement on a statement of facts to be submitted to the Court.[31] We interpolate here that in those cases it may be possible to proceed without any affidavit evidence.[32]

[34] Trial counsel's file may include a range of documents such as court records, correspondence, instructions, briefs of evidence and file notes. There has been a debate about whether some parts of the file can or should be disclosed. Rule 4.4.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Client Care Rules) provides that a client has the right to uplift all the documents and records held by their former lawyer on their behalf. Hence, in *Dougherty v R*, trial counsel was directed that copies of his personal notes ought to be disclosed to the appellant's counsel for assessment of their significance to the challenge to

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30 The Ontario Court of Appeal Procedural Protocol and the British Columbia Court of Appeal Practice Directive both make similar provision for appellate counsel to receive the entire trial file.

31 Where the court record on trial counsel's file is not complete, appellate counsel may access the trial court file under the Criminal Procedure Rules 2012, pt 6. The appeal in *McLaughlin v R* [2015] NZCA 339 proceeded on the basis of an agreed statement of facts.

32 *R v Sungsuwan*, above n 1, at [68].

counsel conduct.[33] Trial counsel in that case had maintained his personal notes did not have to be disclosed.

[35] The Ontario Court of Appeal Procedural Protocol provides for trial counsel who objects to production of the file to make an application to the Court to determine the objection.[34] We see no need for formal provision for this step to be made. It risks adding undue formality and unnecessary cost.

[36] Practical difficulties have frequently arisen where trial counsel has provided the file to appellate counsel and is then left without copies of materials necessary to respond to the allegations about his or her conduct. For this reason appellate counsel must facilitate access to the file by trial counsel.[35] Where trial counsel will have to provide affidavit evidence trial counsel should be provided with a copy of the file for this purpose. We suggest limiting the circumstances in which copies are made to avoid unnecessary copying and expense. Trial counsel may keep the original of their own notes but provide copies.

[37] Problems arising in this respect will be assisted by the helpful indication in submissions from counsel for the Legal Services Commissioner that legally aided appellate counsel can claim the costs of copying the trial file as a disbursement, even where only an interim grant of aid has been made.

[38] The Legal Services Commissioner also advised that he will review the question of funding for trial counsel. That would greatly assist because otherwise trial counsel may be faced with the need (depending on the nature of the trial and the allegations raised) to make an extensive review of the file for which they are currently not funded.

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33 *Dougherty v R* CA8/2014, 9 July 2014 (Minute of Telephone Conference).

34 Neither the Yukon Territory Court of Appeal *Criminal Practice Directive: Ineffective Assistance of Trial Counsel* (2006) nor the Nova Scotia Court of Appeal *Protocol for Appeal Proceedings Involving Allegations of Ineffective Trial Counsel* deal with this aspect.

35 Both the Ontario Court of Appeal Procedural Protocol and the British Columbia Court of Appeal Practice Directive provide for trial counsel to retain copies of their file but at their own expense. After the file has been transferred to appellate counsel, he or she has an obligation to facilitate access.

(c) Waiver of privilege

[39] As to the scope of waiver, it was common ground that waiver of legal privilege by an appellant can be limited to the matters in issue on the appeal. That seems appropriate and reflects current practice. As Mr Simperingham for Mr Hall notes, there is precedent for this approach in the British Columbia Court of Appeal Practice Directive and in the Ontario Court of Appeal Procedural Protocol.

(d) Timing

[40] On the issue of timing, this Court in *Clode* envisaged counsel holding off filing a notice of appeal until completion of the *Clode* process where counsel conduct was the only ground of appeal.[36] Our preference is for counsel to file a notice of appeal indicating that counsel conduct may be a ground but noting that the *Clode* process is still to be followed. We say that because this provides an early indication to the Court that there may be a need for case management of the appeal.

[41] We consider appellate counsel should approach trial counsel as soon as reasonably practicable. We have included a similar indication in relation to trial counsel's response. We have accepted the Crown's submission on this because of a concern at the seemingly inevitable delays in these appeals. A more timely approach and response also has the benefit that the matters in issue will be fresher in counsel's mind closer to the events.[37]

(e) Case management

[42] All counsel agreed that additional case management of these appeals would be of assistance. There is precedent for that approach in the overseas protocols. All of the Canadian protocols provide for case management. The Ontario and British Columbia Courts of Appeal are quite prescriptive in relation to the matters to be addressed at case management conferences.

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[36] *R v Clode,* above n 2, at [30].

[37] The Ontario Court of Appeal Procedural Protocol and the *Superior Court of Justice (Ontario) Protocol: Allegations of Incompetence* (16 February 2015) similarly direct appellate counsel to complete their inquiries as soon as possible.

[43] We agree that case management can assist in progressing these appeals and in ensuring matters are properly developed and prepared by the time the case comes to a hearing. We do not, however, see a need for the Court to be prescriptive about this. We envisage that where counsel conduct is raised on the papers at the time of determining the mode of hearing, the Court will make directions and, if it appears it will be helpful, hold a telephone conference at that point. Once legal aid has been granted, the Court will again consider holding a telephone conference if that has not already occurred and/or if there is non-compliance with existing timetables. We anticipate that responsible appellate counsel will consult with counsel for the respondent and preferably agree on any necessary timetabling to be included in a joint memorandum for approval by a Judge.

(f) Timeframes in Rule 12A

[44] The timeframes in r 12A tend to be honoured in the breach. Indeed there is almost no compliance. This may reflect a number of factors such as the fact the decision on legal aid may not have been made at the time the appeal is filed. Further, some of the inquiries necessary to pursue the ground may simply take a longer period to complete. There was general agreement some change should be made to the Rule. We intend to recommend r 12A(1)(b) should be amended by providing that the 30 working day timeframe run from the date of filing of the notice of appeal or from the date the appellant is granted legal aid, whichever is the later. A similar amendment would be required to r 12A(6) dealing with the timeframe for the filing of any waiver. The Court can use telephone conferences to monitor the need for any adjustments to the timetable as the matter progresses.

[45] The Crown submissions favour a requirement that, where waiver has been given, the Court be provided at an early stage with copies of the relevant parts of the *Clode* materials being pursued on appeal. It may be that in a particular case it will assist if these materials are filed prior to a telephone conference or to assist the Court in determining whether a telephone conference is necessary. But we consider this can be dealt with as the need arises. Rule 12A will continue the requirement the Court be notified when trial counsel conduct is in issue.

Other questions

[46] We now briefly deal with some associated questions that arose in submissions or in the course of the hearing before us.

A two-stage process?

[47] It was submitted by Mr Bonnar QC for the New Zealand Law Society that one option was for the Court to hear the parties on an initial question. That is, whether the challenges, if accepted, could give rise to a miscarriage. If so, a second hearing could be convened to address the facts. We doubt this approach would achieve its desired effect, that is, to reduce time taken up with unmeritorious appeals. The facts may often be determinative.

Role for the trial Judge?

[48] The New Zealand Bar Association submitted that the trial Judge could play a role in ensuring accused persons are advised about the election to give evidence. The proposition is that prior to trial the Judge would ask counsel whether advice had been given to the accused person about the election. We see this approach as problematic. It confuses the role of Judge and counsel. We consider it is preferable for the profession to emphasise the importance of counsel recording the giving of advice and the client's instructions.[38] This is demonstrated by Mr H's appeal where written instructions were not obtained on the question whether Mr H would give evidence.[39]

Evidential issues

[49] We reiterate a point made in earlier cases but often overlooked about evidence which, on appeal, the appellant says should have been called at trial.[40] If

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[38] See, for example, Ministry of Justice *Practice Standards for Legal Aid Providers* (October 2011) at [5.4].

[39] See [170] below and *Din v R* [2014] NZCA 316 at [45]; *Loffley v R* [2013] NZCA 579 at [41]; and *Chambers v R* [2011] NZCA 218 at [1].

[40] The principles relating to the admissibility of evidence in affidavit form in support of these types of appeals are now well-settled. For recent application see *Yu v R* [2013] NZCA 332 at [48]; and *Gosnell v R* [2014] NZCA 217, [2014] 3 NZLR 168 at [15].

the appellant seeks to rely on such evidence, then unless the proposed evidence is in affidavit form, there is simply nothing for the Court to assess.[41] As the Court said in *Michaels v R*, absent such evidence, the proposition the proposed witness might have helped the defence "is speculative at best".[42]

[50] An associated issue relates to the scope of trial counsel's obligation to investigate issues that may assist the defence. That has to be assessed in a practical way bearing in mind an accused person should put his or her best case forward to counsel.[43]

Application of principles to counsel assisting appointed at trial?

[51] Difficult practical issues may arise where an accused person is unrepresented at trial but counsel is appointed to assist the Court. These issues are discussed by this Court in *R v McFarland*.[44] Problems may arise where, as occurred in *McFarland*, there is a lack of clarity about the role of counsel assisting.

[52] In *McFarland*, the Court noted that the role of the counsel assisting had "expanded" during the trial, at the request of the appellant so that counsel conducted much of the case on the appellant's behalf.[45] But, the Court noted, counsel did not act for Mr McFarland "in the way he would have had he been instructed" by him.[46] Because of the different relationship with the accused person, we do not see the *Clode* approach as apt for complaints relating to the conduct of counsel assisting at trial.

The obligations on counsel

[53] It was common ground that, having received a response from trial counsel, appellate counsel should diligently assess whether or not there is a basis to pursue a ground of appeal based on trial counsel conduct and advise the appellant accordingly

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41 *Michaels v R* [2014] NZCA 258 at [32].
42 At [34]; and see *Devries v R* [2014] NZCA 324 at [28].
43 See, for example, *Yu v R*, above n 40, at [15]; and *R v K (CA421/2008)* [2009] NZCA 176 at [27]–[28].
44 *R v McFarland* [2007] NZCA 449; and see also *Ipo v R* [2012] NZCA 178 at [69].
45 At [58].
46 At [58].

on the prospects of success. We agree with counsel that this approach is consistent with counsel's obligations to his or her client and to other counsel. It is also consistent with counsel's overriding duty as an officer of the Court to bring an independent judgment to the assessment of the appellant's instructions.[47] The reasons we have given for suggesting a particular procedure for these appeals also support the need for such an assessment.

Advice on whether the appeal ground is arguable

[54] At the time of the hearing there was general agreement amongst the parties and the interveners that appellate counsel should assess the response from trial counsel on the same basis as the decision whether legal aid should be granted. That is, to consider whether there is an arguable case.

[55] Counsel's professional obligations necessarily require consideration and advice on the merits of any proposed ground of appeal.[48] Where counsel considers a ground of appeal is not arguable, a client should be advised of that view. Thereafter if the advice is not accepted, it is for counsel to consider his or her position in light of the relevant professional obligations. Beyond that, it is not appropriate in the present context to make any further observations given the Supreme Court's emphasis in *Marteley* on the right of appeal and the discussion of the test for the grant of legal aid.[49]

[56] There have been occasions where counsel has been retained to argue part of an appeal and the appellant the balance. However, while that may be a pragmatic solution in some cases, it is not a practice we encourage. Another option has been to appoint counsel to assist where an appellant has no legal representation. Again, that

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47 Lawyers and Conveyancers Act 2006, s 4; Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, r 2.1; Anthony Willy and James Rapley *Advocacy* (Thomson Reuters, Wellington, 2013) at [2.6]; and G E Dal Pont *Lawyers' Professional Responsibility* (5th ed, Thomson Reuters, Sydney, 2013) at [17.10].

48 In England and Wales, the Criminal Appeal Office *A Guide to Commencing Proceedings in the Court of Appeal* (2008) says that appellate counsel should not sign or settle grounds of appeal unless reasonable or having some prospects of success. We acknowledge that is in the context of a right of appeal with leave: Criminal Appeal Act 1968 (UK).

49 *Marteley v The Legal Services Commissioner,* above n 3.

course may be necessary in some cases but cannot provide an answer in every such case.

[57] Brief elaboration is warranted for two situations which the Crown submits are relevant in determining whether an appeal is arguable. In particular, the argument that in these situations there should, effectively, be a presumption trial counsel's account was accurate.

[58] The first is where trial counsel is alleged to have failed to follow an accused person's instruction on a fundamental trial decision and the allegation is contradicted by trial counsel's contemporaneous records. In that situation, the Crown submits there will generally not be an arguable case unless there is a factual foundation for the allegation apart from the appellant's instructions on appeal. Second, it is submitted that where the appellant alleges that trial counsel gave erroneous advice as to a fundamental trial decision, with which the appellant agreed or acquiesced at trial, generally any record of that advice contained in trial counsel's contemporaneous records will be preferred to the appellant's account on appeal unless there is a factual foundation for the allegation apart from the appeal instructions of the appellant.

[59] We do not support either approach. Where there is a contemporaneous written record contradicting the appellant's assertion experience shows the Court hearing the appeal is likely to reject the appellant's account. But we do not consider this necessarily means appellate counsel should conclude in advising the appellant at this early stage that the ground of appeal is not arguable. As Ms Laracy for the Public Defence Service submits, there is no presumption trial counsel is necessarily more credible. Further, Mr Bonnar for the New Zealand Law Society makes the point there are inevitable limits on appellate counsel's role in assessing how the contested factual matters will be resolved.

[60] We turn now to address the differences between the Crown and other counsel over the Crown submission that the Court should give guidance as to the approach to be adopted when the challenge to trial counsel conduct is one based on a failure to follow instructions.

Submissions on the effect of a failure to follow instructions

[61] The Crown submission on this aspect is twofold. First, Mr Horsley submitted there were three fundamental matters on which the failure to follow instructions would almost inevitably result in an unfair trial and so a miscarriage. These matters are, first, instructions as to plea, second, the election as to whether or not to give evidence and, third, counsel must not deprive an accused person of the opportunity to advance a defence based on his or her account of the facts. Counsel submits the appellate court will in these cases primarily focus on "determining as a matter of fact whether trial counsel has failed to follow the relevant instruction". If so, the submission is, it will generally follow that an error has resulted in an unfair trial in terms of s 232(4)(b) of the Criminal Procedure Act 2011.

[62] The second aspect of the Crown's submission is that, in relation to other trial decisions, a miscarriage will not necessarily follow from trial counsel's actions. Rather, in this category of cases, the focus will be on the effect of counsel's conduct on the trial. The submission is that this approach reflects the fact that in these cases an accused person will be bound by trial counsel's decisions about the general conduct of the trial and tactical decisions made in the course of the defence. In these cases, the Crown says, on appeal the Court will primarily be focused on considering:

> … [W]hether the decision was open to competent trial counsel for either legal or tactical reasons. If the decision was wrong then the question for the Court will be whether the decision has created a real risk that the outcome of the trial was affected to the detriment of the defendant.

[63] In developing the latter submission, the Crown posits that an accused person will be bound by the decisions made as to the general conduct of the proceedings and tactics made in the course of the defence, in particular as to:

(a) whether to object to prosecution evidence;

(b) whether to object to prosecution applications;

(c) whether to make defence applications;

(d) the tone and content of cross-examination;

(e) the tone and content of the defence opening and closing addresses;

(f) whether the defendant will call available and admissible evidence from defence witnesses (other than the defendant); and

(g) the decision whether the defendant will or will not make formal admissions (s 9 of the Evidence Act).

[64] This approach was not supported by other counsel. Essentially it was seen as undermining fair trial rights and a difficult exercise to undertake in the abstract.

Our analysis

[65] We agree with the Crown submission that it is helpful to identify the three fundamental decisions on which trial counsel's failure to follow specific instructions will generally give rise to a miscarriage. The fundamental decisions are those relating to plea, electing whether to give evidence and to advance a defence based on the accused person's version of events.

[66] The Supreme Court in *Sungsuwan* did not need to deal with failure to follow instructions because the challenge in that case did not relate to instructions.[50] The issue was however referred to by the Supreme Court in *R v Condon* where the Court said trial counsel were obliged to present the defence an accused person wants to run.[51]

[67] The starting point in terms of the authorities in this Court is *R v McLoughlin*.[52] In that case the Court said that the "plain unvarnished fact" was that counsel "most certainly had no right to disregard [the client's] instructions".[53] The Court said that after giving advice, counsel's duty was either to act on the

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50 *R v Sungsuwan,* above n 1.
51 *R v Condon*, above n 4, at [28]; see also *Cooper v R* [2013] NZCA 551 at [20]–[21].
52 *R v McLoughlin* [1985] 1 NZLR 106 (CA).
53 At 107.

instructions received or to withdraw.[54] As Cooke J said in *R v Pointon,* decided soon after *R v McLoughlin*, the latter case was "in the extreme category … of counsel acting contrary to express and definite instructions to call certain witnesses (as to an alleged alibi)".[55]

[68] There may be cases where a failure to follow instructions on a fundamental decision does not give rise to a miscarriage but they will be rare. One example is this Court's decision in *R v Chin*.[56] The Court in that case said that even if there had been a "firm instruction" to trial counsel that Mr Chin was to give evidence, failure to call him would not, "in the particular circumstances" of the case, have resulted in a miscarriage of justice.[57] That was because the Court heard from Mr Chin as to what he would have told the jury if he had given evidence. The Court found that his evidence "would have invited incredulity from the jury".[58]

[69] In an appeal based on a failure to follow instructions as to these fundamental decisions, the focus will be on whether, as a matter of fact, there was a failure to do so. "Instructions" in this context mean a clear direction as to how the trial or an aspect of it is to be run.[59] This Court in *R v S* drew a distinction between "an expression of the client's views on a particular matter" and "directions to be observed and implemented by counsel".[60]

[70] The authorities suggest there is a valid distinction to be drawn between fundamental decisions and other trial decisions. In *R v McLoughlin* the Court concluded a miscarriage of justice had resulted from a failure to follow instructions to advance an alibi defence in a rape trial.[61] Two alibi witnesses had been briefed and notice was given that they were to be called. Trial counsel began to advance the alibi defence in cross-examination but then decided not to pursue it. Instead, he

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54 At 107.
55 *R v Pointon* [1985] 1 NZLR 109 (CA) at 112.
56 *R v Chin* CA43/04, 10 June 2004.
57 At [34].
58 At [34].
59 *R v S* [1998] 3 NZLR 392 (CA) at 394; see also *R v Williams* CA427/01, 27 June 2002 (although this case and some of the others we discuss analyse the matter in terms of a search for a radical error from *R v Pointon*, above n 55, a test which is no longer followed, that does not detract from the observations on which we rely); and *R v Hookway* [2007] NZCA 567 at [21] citing *R v Momo* CA115/02, 23 July 2002.
60 At 394.
61 *R v McLoughlin*, above n 52.

sought to rely on the, incompatible, defence of consent.[62] Not surprisingly, the Court said counsel had no right to disregard instructions.[63] The Court in *Pointon* contrasted the type of conduct in issue in *McLoughlin* with "a mere mistake in tactics in the conduct of the defence".[64]

[71] The Client Care Rules relating to counsel's duties to take and follow instructions also refer to the taking of instructions on "significant" decisions. Rule 13.3, which is subject to counsel's "overriding" duty to the court, states that a lawyer:

> … must obtain and follow a client's instructions on significant decisions in respect of the conduct of litigation. Those instructions should be taken after the client is informed by the lawyer of the nature of the decisions to be made and the consequences of them.[65]

[72] Importantly, r 13.13 refers to the defence lawyer's obligation to "protect his or her client so far as is possible from being convicted (except upon admissible evidence sufficient to support a conviction for … [the relevant offence] …)". The rule says that in doing so, the defence lawyer must:

> *(a)* put the prosecution to proof in obtaining a conviction regardless of any personal belief or opinion of the lawyer as to his or her client's guilt or innocence; and
>
> *(b)* put before the court any proper defence in accordance with his or her client's instructions–
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> but must not mislead the court in any way.

[73] Finally, r 13.13.1 states that when taking instructions, including those relating to a plea or to the election to give evidence, a defence lawyer must:

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62 At 107.

63 See also *R v Condon*, above n 4, at [28] where the Supreme Court said trial counsel were obliged to present the defence an accused wants to run. *R v McLoughlin,* above n 52, has been followed in numerous cases including *R v Reti* CA396/91, 22 November 1991 at 9–10 (where the Court concluded there was no miscarriage because the proposed evidence in issue was not helpful); *R v Walling* CA355/05, 20 March 2006 at [17] (the failure to comply with the instruction to apply for a voir dire was critical); *R v Hookway*, above n 59, at [18]; and *Davidson v R* [2012] NZCA 391 at [54].

64 *R v Pointon,* above n 55, at 114.

65 For example, a lawyer should never seek or agree to a consent order without the client's authority, nor should a lawyer for the defence in a criminal trial disclose, without the client's authority, the fact that the client has previous convictions or other charges pending.

> … ensure that his or her client is fully informed on all relevant implications of his or her decision and the defence lawyer must then act in accordance with the client's instructions.

[74] There are trial decisions on which there is some discretion for trial counsel. As this Court has said previously, an appeal is not the time for "a minute dissection of whether some aspects could have been dealt with differently or better".[66] The context of the instruction will also be relevant.[67] This position reflects both the practicalities of running a trial and the nature of counsel's obligations.

[75] As this Court said in *R v Pointon*, "[t]he effective conduct of a client's case would be impossible if he had to be consulted at every turn during preparation and at the trial itself".[68] And, the authorities are clear, counsel have to exercise some judgment on matters such as the approach to cross-examination.[69] Both of the cases on appeal illustrate this point. Mr Hall, for example, on one aspect submits trial counsel's cross-examination could have been "stronger" although there is no suggestion the defence was not put. That is not a proper basis for challenging counsel conduct.

[76] In this respect, counsel other than Crown counsel were critical of the approach in *R v Farooqi*, a decision of the Court of Appeal of England and Wales on which the Crown relied.[70] The Court in *Farooqi* made the point that trial counsel had responsibilities for the conduct of the case and was not simply "the client's mouthpiece".[71] Further, although the facts of *Farooqi* were at the extreme,[72] there is merit in the point made in that case about the need to keep in mind the broader obligations on counsel in cross-examination. As this Court in *DST v R* noted:[73]

> Counsel is under special obligations to the Court and to the witness when it comes to cross-examination. …

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66 *Michaels v R*, above n 41, at [49]; and see *Loffley v R,* above n 39, at [53].

67 A good example of the importance of context is whether counsel should investigate a relevant witness or evidence or instructions of client: *Ede v R* [2010] NZCA 358, [2010] 3 NZLR 557 at [57]; *Hu v R* [2011] NZCA 412 at [21]–[23].

68 *R v Pointon*, above n 55, at 112; see also *Manukau v R* [2013] NZCA 605 at [3] referring to trial dynamics.

69 *Z (CA589/2011) v R* [2013] NZCA 118 at [55]; *S (CA361/2010) v R* [2013] NZCA 179 at [60]–[61]; and *Loffley v R*, above n 39, at [53].

70 *R v Farooqi* [2013] EWCA Crim 1649, [2014] 1 Cr App R 8.

71 At [108].

72 The Crown accepted the conduct of the defence was "deserving of substantial criticism": at [22].

73 *DST v R*, above n 24, at [56]–[57] (footnotes omitted).

> These special obligations apply to counsel in New Zealand by virtue of their fundamental obligations as lawyers and their specific duties as counsel in the conduct of cross-examination. Counsel are not entitled to proceed on the basis that everything contained in a client's instructions and brief of evidence is to be believed without question. The duty of counsel is to measure the instructions against the test of what is reasonable in all of the known circumstances of the case.

[77] It follows we agree with the Crown submission that if counsel fail to follow instructions in making less fundamental trial decisions, a miscarriage of justice will generally only arise if the decision was not one a competent lawyer would have made and if what occurred may have affected the outcome. However, we do not consider we should go further in seeking to characterise the other types of decisions on which an accused person will be bound by the decisions made by trial counsel as the Crown submission invited us to do. That is because we agree with Mr Eaton QC for the New Zealand Bar Association that whether a decision is a significant one in the context of a trial cannot meaningfully be defined in advance without a factual context. As the very helpful analysis of the authorities in the Crown's written submissions illustrates,[74] the ultimate test is whether there has been a miscarriage of justice.

Conclusions on *Clode*

[78] Our conclusions on the approach which should be followed in appeals based on trial counsel conduct can be summarised as follows:

(a) The steps in *Clode* remain applicable and counsel should undertake these steps as soon as reasonably practicable;[75]

(b) Appellate counsel, where necessary, should be able to obtain a copy of trial counsel's file where there has been a waiver or partial waiver of privilege but must facilitate access to copies of the file by trial counsel;

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74 *R v Sungsuwan,* above n 1; *W (CA702/2010) v R* [2011] NZCA 529; *R v Scurrah,* above n 9; *Michaels v R*, above n 41; *Morris v R* [2014] NZCA 383; *Gosnell v R*, above n 40; and *Malofie v R* [2014] NZCA 419.

75 See [79]–[81] below.

(c) Amendment of the timeframes in r 12A will be sought to recognise that legal aid may not be granted until a later point in the appeal process; and

(d) The Court will use telephone conferences to assist in the case management of these appeals as necessary.

[79] For completeness, we record that the steps envisaged commence with the taking and preliminary assessment of instructions. Appellate counsel should next promptly contact trial counsel in writing setting out the complaints including any additional matters identified by appellate counsel and seek a response.

[80] If a waiver or partial waiver is provided, trial counsel should provide appellate counsel access to the trial file but appellate counsel must facilitate access to the file by trial counsel. Where trial counsel will be providing an affidavit, appellate counsel must provide trial counsel with a copy of the file.

[81] Trial counsel should promptly respond in writing addressing the factual issues raised by an inquiry from appellate counsel. Appellate counsel will then need to evaluate the response and the other relevant material, including the trial record, and advise the appellant accordingly.

Acknowledgement of assistance from counsel

[82] Before turning to the individual appeals, we acknowledge the assistance we have received from all counsel. In particular, we record our appreciation to counsel for the Crown, and counsel for the interveners and the organisations they represented for their submissions on the *Clode* procedures. We found the submissions, written and oral, of great benefit.

The cases at hand

[83] Both appeals fall to be determined under pt 13 of the Crimes Act 1961. In terms of Mr Hall's appeal, we first note two preliminary matters. First, Mr Hall needs an extension of time to file his appeal. The delay is explained and there is no

objection to an extension. An extension is granted. The second point to note is that Mr Hall's notice of appeal included an appeal against sentence. That is not pursued and is formally dismissed. We turn now to consider Mr Hall's appeal and then that of Mr H.

***Hall v R* (CA872/2013)**

[84] Mr Hall was convicted in the Hamilton District Court after trial by jury of one count of sexual violation by unlawful connection and one count of sexual violation by rape. Mr Hall was subsequently sentenced to nine years and nine months imprisonment.[76] Judge Burnett presided over the trial. Both of the charges faced by Mr Hall related to his relative, S, when she was between 14 and 16 years of age. The Crown case was that the offending took place in 2002 and 2003 when Mr Hall was aged between 38 and 40.

[85] Count 1 related to an incident in 2002. The complainant went to stay with Mr Hall and his son in Rotorua when Mr Hall was working on some local sideshows. S said that one afternoon Mr Hall drove her to a public toilet at Kuirau Park where he told her to go into the men's toilet where people would look at her through holes in the walls. S said no. She said Mr Hall then forced his penis into her mouth. Her evidence was that Mr Hall told her not to tell anyone. S sent a text message to her mother and was picked up the next day and taken back home.

[86] Count 2 related to an incident occurring in 2002–2003. The evidence was that Mr Hall was staying at S's home in a sleep out. Mr Hall told her to get her cat out of his room or he would hurt it. S came into the room and she said Mr Hall forcibly raped her on the bed. She left the bedroom and went to the bathroom. Her evidence was that Mr Hall followed her in and told her not to tell anyone or he would harm her.

[87] The trial of these two charges was completed within two days. The Crown case commenced on 1 August 2013. The Crown called S, her mother and the police officer who spoke with Mr Hall at the police station about the allegations. In

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[76] *R v Hall* DC Hamilton CRI-2011-004-009221, 14 October 2013.

addition, evidence was read by consent from Constable Nicholas Voysey who had taken photographs of the toilet block and surrounding area at Kuirau Park, and from Garry Page. Mr Page is employed by the Rotorua District Council as the Parks Manager. His evidence included a very short description of the toilet block, the available vehicle parking and a previous road that ran past the toilet block.

[88] The defence case was that the offending did not occur. Emphasis was placed on S's failure to make a disclosure to anyone between 2002–2010 although she saw counsellors over this time and entered a relationship with the man who later became her husband shortly after the offending was alleged to have occurred. Mr Hall gave evidence. He described his contact with S and her family. He denied the events described by S took place.

Issues on appeal – *Hall*

[89] Mr Hall's appeal raises a number of issues concerning: trial preparation; an alleged failure to advance an alibi; the adequacy of cross-examination; failure to take instructions on various matters; failure to call additional witnesses and lead additional evidence; the adequacy of the closing address on count 1; and the omission of a warning about reliability under s 122(2)(e) of the Evidence Act 2006. We deal with each issue in turn.

Failure to consult prior to trial and failure to brief

[90] The appellant submits that his trial counsel, Ms Green, did not consult properly with him beforehand and that a miscarriage has occurred because she did not prepare a more formal brief of his evidence. The former complaint focuses on matters such as the number of meetings prior to trial, failure to appear at callovers and a failure to discuss the case in any "deep or meaningful way".

[91] We can deal with this aspect fairly briefly. We are satisfied, having heard evidence from both Mr Hall and Ms Green and having had the opportunity to review her notes of their discussions, that the complaint about preparation prior to trial cannot be sustained. We accept Ms Green's evidence as to the nature of her preparation and consultation. There were a number of meetings and the relevant

issues were canvassed. Ms Green's account is supported by notes made at the time which we have read. We deal with the specifics of allegations about ascertaining whether Mr Hall had an alibi as a separate point.

[92] Initially Mr Adam Couchman was acting for Mr Hall. When Mr Hall ran out of funds, he turned to legal aid and Ms Green was assigned to act. They lived in different cities, Mr Hall in Hamilton and Ms Green in Auckland. Mr Hall accepts there were five or six meetings prior to trial and a meeting at the end of the first day of trial. He says though there was no great discussion beforehand about what he would say when he gave evidence. Ms Green says that she tried to take a brief on three occasions but gave up because Mr Hall was a poor historian. It was not until the end of the first day of trial that it was decided he would give evidence. Ms Green explains that this course became necessary, she considered, because S was more compelling in oral evidence than in her evidential video statement. On the night before Mr Hall was to give evidence, Ms Green says they worked on a previously prepared brief and she gave Mr Hall notes which formed the basis of his final brief to take away and read overnight.[77] She took the notes back the next day. Her assessment was that he had done well when giving evidence. Her only concern was that he was too quiet at some points.

[93] Having heard Mr Hall being cross-examined before us, we accept Ms Green's assessment that he is "a poor recollector of the truth". His standard response when pressed about dates was to revert to the fact that matters were outside the dates of the indictment. Although the document headed "Brief" is not a typed formal document, it does contain the essentials of Mr Hall's case dealing with his contact with the family and his defence to the charges. Further, there were two earlier documents, a fairly lengthy email from Mr Hall and another document with similar details, which also reflected part of the material that could be used as part of the briefing process.

[94] As this Court said in *Morris v R*, there is no prescribed standard for obtaining instructions.[78] In that case the Court said: "[a]dequacy always depends on the

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[77] A document headed "Brief".
[78] *Morris v R*, above n 74, at [47].

circumstances of the case and defence to be advanced."[79] Trial counsel in that case was able to run the defence the appellant "equipped her to run".[80] Similarly, in *O'Donnell v R*, Arnold J noted that different counsel prepare in different ways.[81] A failure to follow "best practice" did not necessarily equate with incompetence.[82] As in that case, Ms Green understood the appellant's position and knew what he would say.

[95] The Practice Standards for Legal Aid Providers state that counsel must record the client's factual instructions in a signed brief of evidence "unless there is a good reason not to".[83] Here there was good reason, namely, Mr Hall's poor ability to recount what had occurred.

Failure to adduce alibi evidence

[96] Mr Hall submits trial counsel erred in not advancing alibi evidence for each of the two counts. We deal with each count in turn.

Count 1

[97] This count of sexual violation by unlawful sexual connection arises from the incident by the public toilets in Kuirau Park. The original indictment alleged this offending occurred over the period from 1 January 2002 to 30 September 2002. In the amended indictment, that period was extended to encompass 1 January 2002 to 1 January 2003.

[98] The incident, as we have noted, was said to have occurred when S went to stay with Mr Hall and his son for a week. S was vague about exactly at what point in 2002 the visit had taken place but said it was when she was 14, and in the school holidays after her father died earlier in 2002.[84] She also said it was while Mr Hall was working on some sideshows.

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79 At [47].
80 At [47].
81 *O'Donnell v R* [2010] NZCA 352 at [15].
82 At [15].
83 Ministry of Justice, above n 38, at [5.1].
84 The complainant turned 15 in July that year.

[99] S's mother said in her evidence that in 2002, around the time her husband died, S stayed with Mr Hall and his son in the school holidays while Mr Hall was working on the sideshows. She confirmed the visit came to an end when S contacted her and asked to be collected.

[100] On appeal, Mr Hall says that he was working on the sideshows in late December 2002 to mid-February 2003 and S stayed with him for a week during the 2002–2003 season. He also states that S would not have stayed with him until after 1 January 2003, that is, just outside the period in the amended indictment.

Discussion

[101] There are a number of difficulties with Mr Hall's new evidence. First, it is contrary to the evidence he gave at trial. In his evidence-in-chief and in cross-examination at trial he said he went back to working at the shows at Christmas time and he took his son and S with him for a week. At the end of his evidence he was asked by Judge Burnett when he took S and his son for the week's visit. He said that was in December 2002.

[102] When asked in cross-examination before us about the differences between his evidence at trial and that on appeal, Mr Hall's response was as follows:

> At this time sir we're talking about dates outside the indictment which at the time was – and which was confusing me even more. The indictment was still saying the dates from the beginning of 2001 to – I haven't got the actual date with me but it wasn't until after I hopped off the stand that the Judge changed the indictment, sir.

[103] This response, that dates were outside the indictment, was a consistent theme of Mr Hall's evidence before us. For example, when asked about his opportunity to discuss these matters with Ms Green prior to trial he responded:

> The Rotorua sideshows are at Christmas time sir, and all the evidence is it was not the very first indictment, the first indictment is the – Rotorua was first. Her second allegation was three to six months after the first allegation which puts it into 2003. Which is way outside the indictment which is why I'm assuming because this is all dates that were being talked about were outside the indictment. The confusion – I had no pen and paper to keep track of all these dates that were flying around, um and it was very confusing when I hopped on the stand.

[104] This explanation for the differing accounts was not convincing. Second, nor do we find convincing his explanation as to why it was he said S would not have stayed with him in December. In answer to a question in cross-examination before us he said:

> Well their father had just died and I don't – and I know for a fact that the family wouldn't have – it was a big Christmas that year for them without their father so they can't have been staying with me sir.

The evidence at trial suggested S's father died in April 2002.

[105] Third, although Mr Hall refers to other witnesses who might support his new evidence, Mr Hall did not provide any supporting evidence.

[106] Against this background, we do not find Mr Hall's new account credible. Further, we accept Ms Green's evidence that Mr Hall did not tell her that the visit did not take place until later than 1 January 2003. Mr Hall does not say he told her and she was not cross-examined about this. There was therefore no basis for her to pursue this line of enquiry. Moreover, Mr Hall accepted in evidence before us that he was aware of the dates in the indictment, of the serious nature of the charges he faced and that it was important to give instructions as carefully as he could about his whereabouts. There is no merit in this challenge to counsel's conduct.

Count 2

[107] In relation to the count involving rape in Hamilton, Mr Hall says that the allegation must relate to a period between October 2002 and early 2003 during which time he was not living in Hamilton.

[108] The original indictment contained an allegation of rape between 1 October 2002 and 30 November 2002. The end point of that period was subsequently extended to the following year, that is, November 2003.

[109] In his affidavit filed on the appeal, Mr Hall says that S's evidence at trial indicates the allegation forming count 2 must have occurred between October 2002

to early 2003. He accepts that at trial his evidence was that he lived at S's family home in Hamilton from April 2002 to mid-2003.

[110] His evidence on appeal is that he only lived at S's family home in Hamilton from April 2002 to October 2002. He refers to an employer for whom he worked after October 2002 and to a drink-driving offence occurring in April 2003 dealt with by the District Court in Rotorua.

[111] Ms Green says that Mr Hall did not tell her that he was not living at S's family home over the period from October 2002 to early February 2003.

[112] There has been no counsel error.

[113] First, we accept that Mr Hall did not tell Ms Green that he had an alibi. He does not say that he did. Further, her notes include an indication in Mr Hall's handwriting that he lived with S's mother before 2002. It was for him to say he did not live with her after that time and he had ample opportunity to do so.

[114] Second, what he says now is obviously not consistent with his evidence at trial. The reason he gives for his change in testimony is not convincing. He says that he has had the opportunity to reflect and time to track down his employer. However, there is nothing from his employer to support his case. Nor does the drink-driving matter advance the position because that was something he discussed with Ms Green.

[115] Third, Mr Hall was aware of what was at stake and had every opportunity to raise this matter with Ms Green. Instead, he appears to have been fixated on the dates in the indictment. The excerpt from the evidence before us that we set out below illustrates the point. This passage is in response to a suggestion from Mr Barr, who cross-examined Mr Hall, that he had advanced a variety of different accounts of times and dates and places and the accounts were often inconsistent. Mr Hall said:

> I have been – cooperated fully with dates Sir, what I have been trying to do is try and factual dates which we can base the allegations to. I would like to know what's going on myself for the whole event. As we are talking years here and indictments that moves years not days and you are now going down

> to days and nitty gritty on me. I would like to find out what was going on sir. We are talking – you are talking 2003, well this after the indictments been changed again and – the only evidence on her on the video link sir was 2005. Those dates were been mentioned twice, and then the indictment comes out for 2001 to 2002.

[116] Finally, in any event, Mr Hall's amended account is not necessarily inconsistent with S's evidence, which was that this incident took place in October or the beginning of November.

Adequacy of cross-examination

[117] Under this heading we consider the various matters on which it is said cross-examination of S was inadequate. We can address this in two categories. First, whether Ms Green should have done more in relation to the allegation made by the complainant of sexual offending by another man whom we shall call Mr X. Second, whether there should have been more extensive cross-examination of S about her psychological health, ongoing contact with Mr Hall, and as to S's recollection of dates.

False complaint

[118] The first issue arises because prior to trial the police disclosed a police record showing S had made an unrelated historic allegation of sexual offending against Mr X. Mr X was not prosecuted. It appears from the police record that this was because there was "insufficient evidence to take this matter to court".[85]

[119] On this Mr Hall says that Ms Green should have called Mr X to confirm that the allegation was untrue as a means of undermining S's credibility. It follows, Mr Hall submits, that Ms Green ought to have cross-examined the complainant in relation to this previous allegation.

[120] We are satisfied, having heard from both Mr Hall and Ms Green, that Ms Green did follow up on this matter. In particular, she made enquiries of the

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[85] This is taken from the Police National Intelligence Application (NIA) record. The police file is no longer available.

police. The material obtained includes a partially redacted note from S's counselling session that provided some further detail. Ms Green deposes:

> Some attempts were made by Mr Couchman to get further information about [this] complaint … given it was not necessarily a false complaint this was not to be of any great moment and I explained the law to him on this point. We did get some notes about her counselling disclosed to the defence … Mr Hall was kept abreast of this. The best use we could make of her having psychological problems I refer to below. I made a decision based on the laws of evidence, to bring up she had been involved in another complaint, of which there was no firm evidence it was false, had little use for Mr Hall.

[121] The fact there was some discussion between the two is not consistent with Mr Hall's suggestion to us that Ms Green "did not really want to know about" this. Mr Hall does not now advance any evidence to support the claim that the complaint was false. It is not sufficient to say, as he does, that he "understands" it to have been falsely made.[86]

[122] For completeness, we note some reference was made at the hearing before us to an email Mr Hall sent Ms Green that copied a message sent to a woman called Kirsty from "Rochelle's mum". The email referred to Graeme (Mr Hall) needing help. Presumably Kirsty was a potential source of assistance.

[123] Ms Green explained, and we accept, that she asked Mr Hall to give Kirsty her phone number. She mentioned to Mr Hall that Kirsty had not got in contact with her. In the circumstances, it was for Mr Hall to follow up on this matter.

[124] None of this can possibly give rise to a miscarriage. Ms Green made appropriate enquiries and, for good reason she reached the view that this matter could not be taken any further. She explained that to Mr Hall.

Cross-examination about S's psychological health

[125] We next address the challenge based on the extent of cross-examination about S's psychological health, ongoing contact between S and Mr Hall and S's recollection of dates.

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[86] *Best v R* [2015] NZCA 159 at [26].

[126] The short answer to this challenge is that S's psychological health and that of her parents and the fact of ongoing contact with Mr Hall after the incidents were matters before the jury. Mr Hall refers us to Ms Green's cross-examination but says that it was "weak" and, if stronger, Ms Green could have submitted to the jury that S's failure to disclose the allegations during counselling cast doubt on her credibility. In other words it is said that more could have been made of the point.

[127] Ms Green's closing submissions, drawing no doubt on her cross-examination, did make this very point. This is the sort of criticism of trial counsel that should be avoided.[87] We say that because there was cross-examination and the relevant issues were sufficiently raised in order to form a basis of closing submissions. The fact that someone else may have made a greater or stronger challenge to some of these matters is neither here nor there.

[128] To illustrate the point, during the cross-examination, S accepted:

(a) Both her parents suffered from mental illness over that relevant time (2002);

(b) Her father's problems were brought on by head injury and he committed suicide in early 2002;

(c) S was devastated by these events and went to counselling for a year from April or May 2002 to May 2003; and

(d) Her mother also was struggling over this period.

[129] Similarly, S was cross-examined about the extent of ongoing contact after the incidents with Mr Hall as was S's mother. S's approach to this line of questioning about ongoing contact was not to dispute it occurred but to say that she had learned to live with it. The only matter that Mr Hall mentions in his affidavit that Ms Green did not ask S about was whether Mr Hall was invited by her to her wedding. However, there is no evidence that S made that decision. Further, Mr Hall in his

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87 See [74]–[75] above.

evidence at trial said on more than one occasion that he went to her wedding. When he was cross-examined on the basis that the contact was not initiated by S, Mr Hall did not tell the jury that she had invited him to S's wedding although he said she would come round to his place.

[130] In closing, Ms Green made what could be made of this. She emphasised that despite the various opportunities provided by counselling and even later on after S's marriage there was no disclosure. As Ms Green said, she also had to think about not reinforcing any impression S was unwell from the time of her contact with Mr Hall.

[131] The focus of the complaint about cross-examination as to S's recollection relates to the fact that in S's evidential video she said that count 2 occurred in 2005. Further, S gave her age as 15. She was aged 15 between July 2002 to July 2003.

[132] The complainant gave her evidence-in-chief viva voce. Her evidential interview was not played. It is clear that the reference to 2005 in the evidential interview is a mistake. In her evidence-in-chief she said this offending occurred when she was 15. Other references, as the Crown submits, make it clear she was not intending to refer to 2005. We cannot see that cross-examination on this would have had any impact. S's evidence at trial was that she was uncertain about dates and in any event, seeking to establish the offending occurred in 2005 would not have fitted the defence case. In particular, it would not have assisted the defence submission that there was no complaint despite opportunities to do so in counselling over 2002 to 2003 or at the time of the formation of S's relationship with her husband. The other statement in her evidential video is not inconsistent with her evidence at trial.

Reading of Mr Page's brief

[133] The focus of this complaint is on the evidence of Mr Page, the Parks Manager for the Rotorua District Council. His brief of evidence was read. The focus of his evidence was that there had been no change since 2002/2003 to the exterior of the toilet block building near where the incident forming the basis of count 1 was said to have occurred.

[134] Mr Hall says that Ms Green should have obtained his instructions as to whether to read Mr Page's brief by consent. He also says that Mr Page should have been cross-examined to reflect Mr Hall's belief that the Kuirau Park surroundings were different in 2002. In particular, Mr Hall states that because of things like the presence of a Toot'n Whistle train this would have been a busier location.

[135] Ms Green in her affidavit said that it is unlikely she would have consented to the brief being read without consulting Mr Hall. Her evidence, which we accept, is that they had a discussion about this. She accepts Mr Hall objected to the photographs of the park that were produced in evidence by Rotorua District Police Photographer Nicholas Voysey and her notes reflect that. However, she says that she thinks the matter was resolved by making it clear that the scene in 2002 was not as it is now depicted. Hence, in the course of S's evidence-in-chief, the prosecutor in referring to the photograph noted that there was a road in the past that was not there now. S confirmed that. An aerial photograph was produced that did accurately depict the scene including the pre-2007 access road.[88] That photograph shows the nearness of other cars in the proximity of the toilets to the rest of the park.

[136] Our view of the evidence is that what occurred reflected the agreed approach, that is, Ms Green and Mr Hall agreed to deal with the situation by making it clear that the current scene did not reflect the scene as it was in 2002. That approach may provide the explanation as to why, although asked in evidence-in-chief and in cross-examination about the toilet block, Mr Hall did not say anything about the surrounds being busier at the time. Finally, there is nothing before us to indicate what Mr Page might, in any event, have been able to say about this.

No instructions about amendment of dates in the indictment

[137] At the end of the defence case, the Judge amended the indictment to incorporate dates given by Mr Hall in his evidence. The Judge in her minute noted that there was no opposition and that there was no prejudice to the defence from this course.[89]

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[88] The aerial photograph appears to have been included in Mr Voysey's photograph booklet.

[89] *R v Hall* DC Hamilton CRI-2011-004-009221, 2 August 2013 (Minute of Judge Burnett).

[138] Mr Hall says Ms Green should have obtained his instructions before agreeing to this course. Ms Green's response is she has no recollection about the circumstances of the amendment but cannot see how she could have identified any prejudice. We agree there is no basis on which she could have reasonably challenged this amendment.

[139] In any event, this is not a situation where obtaining instructions would have altered matters. The argument seems to be that taking instructions might somehow have elicited his alibi for both counts. We have already dealt with that. Mr Hall had the opportunity to raise that material on a number of occasions. He did not do so. In any event we do not accept that the new evidence of alibi is credible.

Failure to lead evidence about the Ford Falcon

[140] This issue relates to count 1. S said Mr Hall drove her to the toilet block. She said Mr Hall parked the car and forced her to give him oral sex. In her evidential interview, S said the car was a peach coloured old Ford Falcon. On appeal, Mr Hall says Ms Green should have elicited this fact from S. That is because his evidence on the appeal is that, while he did own such a car at one point, he sold it in September or October 2002.

[141] Ms Green says Mr Hall did not tell her that he did not own a Ford vehicle at the time.

[142] Consistent with his obligation to put his best case forward, Mr Hall should have told Ms Green about this. We cannot see how it would have assisted in any event. That is because S's evidence is that this count occurred when she was 14, that is, prior to September/October 2002 when Mr Hall now says he sold the car. We add that his proposed questions could well have backfired given he did own a car of that type.

Failure to call defence witnesses

[143] Mr Hall now says a number of witnesses should have been called. These witnesses were P, who is S's sister; S's husband; her brother; and Mr Sullivan, an associate of Mr Hall's.

[144] The short answer to these challenges is that, absent any evidence from these witnesses as to what they would say, this is speculative. Further, Mr Hall accepted that while he was aware of these people, he did not tell Ms Green to call them. This cannot amount to a miscarriage. We add there is no reason to think that calling any of these witnesses would have had any impact. One illustration will suffice.

[145] In relation to S's husband, it is said he should have been called to give evidence about the way in which disclosure evolved and the ongoing contact with Mr Hall. Ms Green said she did not call him for obvious reasons and had no instructions to do so. The point Mr Hall would now wish her to pursue related to an alleged inconsistency about S's husband making S go to the police station. But it is accepted that any inconsistency was a minor matter.

[146] Given the absence of any evidential basis, appellate counsel should not have pursued this point.

Failure to mention count 1 in closing

[147] The submission is that a miscarriage has arisen because Ms Green did not mention count 1 specifically in closing. However, the context is of a short trial where the defence is that the events did not happen. That defence was quite clear. It was open to Ms Green to conclude that it was better to focus on overall credibility rather than the specifics of count 1. Points which were applicable to both counts were made. We can see no merit in this submission.

[148] In conclusion on this part of Mr Hall's appeal, a number of the allegations made about trial counsel's conduct illustrate some of the concerns we have discussed

earlier including the need to substantiate claims based on proposed new evidence.[90] We see no merit in the challenge to Ms Green's conduct.

Failure to give s 122 warning

[149] Section 122(2)(e) of the Evidence Act requires a trial Judge to consider giving a reliability warning when evidence is given about an accused person's conduct if that conduct allegedly occurred more than ten years before trial. No warning was given in this case.

[150] This was not an issue raised by Mr Hall on the appeal. However, we raised it with counsel given the recent Supreme Court decisions in *CT (SC88/2013) v R*[91] and *L (SC28/2014) v R*.[92] The Court in *CT (SC88/2013) v R* pointed out that "in cases of long-delayed prosecution there will almost always be a risk of prejudice".[93] In those circumstances, the Court said, "unless the judge takes personal responsibility for pointing out that risk and adds the imprimatur of the bench to the need for caution, the jury will be left with competing contentions from counsel" and no "real assistance" in dealing with them.[94]

[151] The events in this case took place some 11 years prior to trial. The defence was fabrication. We are satisfied that if a warning should have been given in this case no miscarriage of justice arises from the failure to do so. First, nothing is pointed to in this case from which it is said a miscarriage arises. Certainly, there was nothing at trial to suggest any prejudice or disadvantage to Mr Hall from the loss of background details about the events. The defence relied on S's delay in making a complaint as supporting the defence submission she was lying.

[152] Second, the Judge distinguished between credibility and reliability in her summing up. She made it clear that the jury had to be satisfied as to both credibility and reliability and she highlighted the defence case relevant to the jury's assessment of the evidence.

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90 See [49] above.
91 *CT (SC88/2013) v R* [2014] NZSC 155, [2015] 1 NZLR 465.
92 *L (SC28/2014) v R* [2015] NZSC 53.
93 *CT (SC88/2013) v R*, above n 91, at [51].
94 At [51].

Conclusion – *Hall*

[153] We grant an extension of time to Mr Hall to file his notice of appeal. For these reasons, none of the matters raised give rise to any risk of a miscarriage. The appeal against conviction is accordingly dismissed.

H (CA322/2014) v R

[154] Mr H appeals against his conviction on a number of sexual charges involving two of his step-grandchildren. The convictions followed a jury trial in the Tauranga District Court before Judge Rollo between 3 and 17 March 2014. Mr H was subsequently sentenced to nine and a half years imprisonment with a minimum period of five years imprisonment.[95]

[155] There are three grounds for Mr H's appeal alleging errors by his trial counsel:

(a) Wrongly taking it upon himself to decide that Mr H should not give evidence or otherwise giving inadequate advice in relation to that decision;

(b) Not conducting the defence according to Mr H's instructions. In particular, not advancing the defence that the complainants were lying; and

(c) Informing the jury during his opening address that the complainants had been sexually abused by other men and had mistakenly attributed that abuse to Mr H.

Background facts

[156] Mr H originally faced a total of 12 counts involving three step-grandchildren, S, B and G. Mr H was convicted on six charges that related to B and G. Of the remaining charges, he was discharged under s 347 of the Crimes Act 1961 on one and acquitted on the other five, including the only charge involving S.

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[95] *R v [H]* DC Tauranga CRI-2011-70-6788, 28 May 2014.

[157] Of the six charges relating to B, Mr H was convicted of four offences over the period 1 January 2007 to 30 April 2011 when she was aged between seven and 11 years:

(a) Count 3 – a representative charge of doing an indecent act on her by touching her genital area;

(b) Count 4 – a representative charge of doing an indecent act by moving her hand towards his penis;

(c) Count 5 – a representative charge of sexual violation by unlawful sexual connection, namely introducing his finger or fingers into her genitalia; and

(d) Count 7 – a representative charge of doing an indecent act by touching her breasts and genitalia.

[158] There were five counts involving G, alleging offending over the period 2 May 2008 to 30 April 2011 when she was aged between five and seven years. Mr H was convicted on two of these:

(a) Count 8 – a representative charge of doing an indecent act by touching her on the top of her genital area with his hand or finger or fingers; and

(b) Count 11 – a representative charge of sexual violation by unlawful sexual connection, namely the introduction of his finger or fingers into her genitalia.

[159] The complainants are all children of E, who is the daughter of Mr H's wife. Mrs H is therefore the grandmother of the complainants and Mr H is their step-grandfather. The offending first came to light on 2 November 2011 when a disclosure was made to E. A forensic interview was conducted with B the following day and with S and G on 11 November 2011. By that stage, S was 14, B was 12 and G was eight.

[160] The Crown case is conveniently described in the factual findings made by the trial Judge at sentencing. The complainants would stay with Mr and Mrs H without their parents, although not necessarily all at the same time. Sometimes they were accompanied by their own friends. These visits enabled Mr H to commit the sexual offences against the two victims over a period of several years. The offending involved Mr H sitting B on his lap while he touched her genitalia while they were both seated in front of the computer, pulling her hand towards his penis when naked in her presence, and sexually violating her by digital penetration of her genitalia when she was in bed at Mr H's home. He also touched her breasts and genital area with his hand and fingers while she was showering.

[161] In relation to G, Mr H repeatedly touched her on top of her genital area with his hand and fingers, particularly when she was sleeping, and sexually violated her by introducing his finger or fingers into her genitalia.

[162] Mr H's defence was that the alleged sexual activities did not happen.

[163] The principal evidence for the prosecution came from the complainants and E. Mr H did not give evidence but called Mrs H, his son M, his brother SH, and a school friend of the complainant S.

The decision not to call Mr H to give evidence

[164] This aspect of the case raises, at least potentially, a fundamental decision of the type described at [65] above. As such, it requires attention to the nature of the instructions Mr H gave to trial counsel and the advice counsel gave. Mr H and his trial counsel Mr Bogiatto each filed two affidavits in this Court. Five other deponents including Mrs H also swore affidavits supporting Mr H's case. The deponents were extensively cross-examined before us.

[165] Before outlining the evidence and our findings, we set out some background material that either is not, or cannot, be disputed. Mr H originally instructed Mr Evgeny Orlov to represent him. In the last quarter of 2013, it became clear that Mr Orlov would not be able to represent Mr H. Accordingly, Mr Bogiatto was instructed. His first meeting with Mr and Mrs H took place on 20 November 2013.

Thereafter, he had meetings with Mr and Mrs H on 11 further occasions prior to the commencement of the trial on 3 March 2014. Although some of the meetings were relatively brief, others extended for a number of hours. A detailed statement of evidence some 40 pages in length was prepared. Mrs H typed the statement although Mr H said it was effectively a joint statement to which he contributed. Mr Bogiatto also interviewed a number of witnesses suggested by Mr and Mrs H, although not all of these were ultimately called.

[166] Mr Bogiatto attended to several interlocutory matters in the District Court prior to trial and, at one point, unsuccessfully sought an adjournment. Despite that, Mr Bogiatto denied there was insufficient time for preparation and Mr H did not advance this as a ground of appeal. There is no doubt that Mr and Mrs H were both intimately involved in preparation for trial. They kept in very close consultation with Mr Bogiatto both before and during the trial when they stayed in adjoining rooms at a local hotel. As Mr Bogiatto put it, they were "[living] in each other's pockets". The trial Judge allowed Mr H bail overnight during the trial and during adjournments as well. This enabled Mr Bogiatto to maintain close communication with Mr and Mrs H throughout.

[167] There is a sharp divergence of evidence about the decision taken not to call Mr H to give evidence. The essence of Mr H's evidence is that he always wanted to give evidence himself, particularly because he considered the complainants were lying and because he considered it was important to give his account of what had happened. Despite this, he said Mr Bogiatto was adamant both before and during trial that Mr H would not give evidence. In his affidavits, Mr H said Mr Bogiatto did not explain to him the reasons for this, did not go into the advantages and disadvantages of giving evidence, and did not explain to him that the ultimate decision was for him (Mr H) to make.

[168] Mr Bogiatto disputed the evidence of Mr H on this issue. He said the question whether Mr H should give evidence was canvassed on many occasions both before and during trial. Before trial, Mr Orlov had expressed the view that Mr H should not give evidence. As preparation for trial continued, Mr Bogiatto said there

was a developing strategy that Mrs H should give evidence on the key issues rather than Mr H. However, no final decision would be made until after the trial began.

[169] It is not in dispute that Mr Bogiatto had concerns about Mr H giving evidence which he discussed with Mr and Mrs H and Mr H's brother SH. Mrs H and SH confirmed they had concerns that Mr H might "lose his cool" during cross-examination and that this would be detrimental to his case. Another witness spoke of Mr H being "over engaged" by which he meant that if Mr H gave evidence, he might say too much and damage his case. On the other hand, Mr H readily accepted that Mrs H had a superior memory for the details of dates, times and places.

[170] Mr Bogiatto's evidence was that a final decision not to call Mr H was not made until the second week of the trial after the Crown case closed on Monday 10 March 2014. The day before, on Sunday 9 March 2014, Mr Bogiatto met Mr and Mrs H at the Tauranga motel where they were all staying. There was a discussion about whether Mr H would give evidence. Mr Bogiatto said Mr and Mrs H told him they had decided Mr H would not give evidence. Mr and Mrs H denied this was so but Mrs H eventually conceded in cross-examination that the topic had at least been discussed on that occasion. Mr Bogiatto did not keep a written record of his advice or of Mr H's instructions on this point. He accepted that, in hindsight, it would have been good practice to have done so.

[171] Mr Bogiatto said that, during the trial, he and Mr H would walk together to Court each morning. On Monday 10 March 2014 Mr H seemed relieved the decision had been made. The defence case was to begin the next day, Tuesday 11 March 2014. Mr Bogiatto said Mr H confirmed his decision not to give evidence as they walked to Court that morning.

Discussion

[172] We have no hesitation in accepting the evidence of Mr Bogiatto. His evidence was clear and concise and remained consistent under cross-examination. In contrast, the evidence given by Mr and Mrs H lacked precision and was inconsistent on material issues. For example:

(a) There is an inconsistency between Mr H's evidence that Mr Bogiatto told him at all times that he would not be giving evidence and his acceptance that Mr Bogiatto had also told him that no decision on this would be made until the end of the prosecution case, at which time the position would be re-evaluated if the case was not going well.

(b) Mr H's evidence that he did not know the decision about giving evidence was his to make does not lie easily with his evidence that he was insisting that he give evidence but Mr Bogiatto would not let him.

(c) Mr H's evidence that Mr Bogiatto had made up his mind at an early stage that he would not be giving evidence is inconsistent with Mr Bogiatto's advice to the Judge at the close of the Crown case on the afternoon of Monday 10 March 2014. Although Mr Bogiatto had intimated on the Friday before that Mrs H would be called (with the implication that Mr H would not), he told the trial Judge on the Monday afternoon that a final decision about whether Mr H would give evidence would be made after discussion with him overnight. The Court would be informed of the election the following morning.[96]

[173] Mr H, his wife and some of the other deponents made significant concessions under Crown cross-examination which undermined Mr H's assertion that the advantages and disadvantages of his giving evidence had not been discussed. Mr H accepted that Mr Bogiatto told him he thought his wife would be the best person to give evidence. Mr Bogiatto had also told him that he did not have to prove his innocence and that he did not need to go on into the witness box. Specifically, Mr H accepted he had been told that his wife and his witnesses were going to be his "eyes and ears".

[174] Mrs H accepted under cross-examination that Mr H had been depressed prior to trial. He had seen a doctor and had been referred to a mental health specialist who had calmed him down. Mrs H and other deponents confirmed that Mr H had become

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[96] Mr H's evidence that Mr Bogiatto had made a decision not to call him from the beginning is also inconsistent with Mr Bogiatto's memorandum to the Court of 29 November 2013 in which he stated in [31](f) that the defence might elect to call the accused and his wife but a decision would be made closer to his trial.

agitated on a number of occasions during the trial including during the second week. Mr H's difficulties in controlling his emotions were confirmed during the prosecution case. During the playing of a video of the evidential interview of one of the complainants, Mr H asked for and was granted permission to leave the Court during their evidence, such was his state of distress. Mr H's brother SH confirmed he thought Mr H would get too emotional and angry if he were to give evidence. Both he and Mrs H were "afraid of his mental wellbeing on the stand".

[175] In answer to a question from the Court, Mr H accepted that he had trust and confidence in his wife and his brother. We are satisfied Mr H respected their views on whether he should give evidence and that he also relied on Mr Bogiatto's advice. All witnesses accepted that Mr Bogiatto acted professionally at all times and that he was a calming influence on Mr H.

[176] We are unable to accept the evidence of Mrs H that her husband insisted on giving evidence and never accepted Mr Bogiatto's view that he should not. Her affidavit was sworn after Mr Bogiatto's second affidavit sworn some six days before. Crucially, she did not respond at all in her affidavit to Mr Bogiatto's evidence about the instructions he received on Sunday 9 March 2014 to the effect that they had decided Mr H would not give evidence. In cross-examination she initially denied she and her husband had given these instructions to Mr Bogiatto. Then, she began to recall some of the details of the Sunday meeting. In particular, she accepted it was agreed at the meeting that she would give evidence in her husband's defence. She also accepted that Mr Bogiatto had said that if things were going "pear-shaped" then Mr H would be called. She described Mr H pacing up and down during this discussion but Mr Bogiatto had calmed him down.

[177] In an unguarded moment, Mrs H said her husband had said to Mr Bogiatto that he had a "right" to have his say. She then endeavoured to explain that he had not used the words "the right" with reference to the decision to give evidence. Rather, her husband was concerned that people had been saying bad things about her and he wanted to have the right to defend her.

[178] Mr H's brother SH gave evidence that during the second week of trial Mr H had, in his presence, insisted that he needed to give evidence and that he did not hear his brother accepting he would not give evidence. However, SH was not a party to either of the critical occasions when Mr Bogiatto said he received instructions that Mr H would not give evidence. In particular, he was not present at the meeting on Sunday 9 March 2014, nor was he a party to the conversations Mr Bogiatto and Mr H had as they walked to the Court in the following days.

[179] Similar observations apply to the other deponents Mr and Mrs B who accepted they were not parties to all the conversations between Mr H and Mr Bogiatto. We do not attach any weight to the evidence of the deponent Mr G. His evidence was generalised and partisan.

Summary of conclusions on Mr H giving evidence

[180] We accept Mr Bogiatto's evidence that the final decision about whether to call Mr H to give evidence was reserved until after the closing of the Crown case on Monday 10 March 2014. That was an orthodox and sensible approach. The topic had been discussed on numerous occasions prior to that time including a discussion of the advantages and disadvantages of calling him. We reject Mr H's evidence that he was not aware the decision was his to make and his evidence that Mr Bogiatto told him he would not be giving evidence and effectively made the decision for him.

[181] We accept Mr Bogiatto's evidence that Mr and Mrs H instructed him on Sunday 9 March 2014 that Mr H would not be giving evidence and that Mrs H would do so instead. We also accept that Mr H confirmed those instructions to Mr Bogiatto as they walked to Court on Tuesday 11 March 2014, immediately before Mr Bogiatto opened the defence case.

[182] There were good reasons for this decision, given the concerns both Mrs H and Mr H's brother SH had about Mr H's ability to control his emotions in the witness box. There was ample evidence to confirm Mr H's agitated state during the trial which carried with it the risk that he would lose control under cross-examination with consequent damage to the defence case. In these circumstances, there were

distinct advantages in calling Mrs H to give evidence, given her acknowledged superior recollection of times, dates and places relevant to the alleged offending.

[183] Although not fatal in this case, we agree with Mr Bogiatto that he ought to have had a written record of his advice and instructions.

[184] This ground of appeal fails.

Failure to advance Mr H's defence

Mr Bogiatto's instructions

[185] This issue also raises the prospect of an appeal ground on a fundamental issue and the need to examine carefully what Mr H's instructions to trial counsel were. To the extent that trial counsel's conduct is attacked on the grounds of errors of approach in counsel's addresses to jury and to cross-examination this appeal ground raises issues of lesser importance but requires consideration of competence and the potential for miscarriage.

[186] There is no dispute that Mr H asserted from the outset that the complainants' allegations were untrue. However, there were differences between Mr H and Mr Bogiatto in the evidence before us as to the instructions Mr Bogiatto received. In considering this issue, there is of course a distinction between instructions in the sense of directions as to how defence counsel is to run the trial and information supplied or issues raised by a defendant that may assist counsel but which do not amount to instructions in the directional sense. We discussed this issue at [69] above. Indeed, Mr H said that the term "instructions" was not used in his dealings with Mr Bogiatto and that he did not understand what the term meant until after the trial.

[187] The essence of Mr H's evidence was that he had always told Mr Bogiatto that he considered the complainants were lying rather than mistaken. He acknowledged only one exception to this. There was an allegation that Mr H had committed an indecent act while carrying the complainant G on his hip when she was between four

and six years old.[97] He denied instructing Mr Bogiatto to raise the issue of transference but accepted this had been mentioned by Mr Orlov and that he (Mr H) had informed Mr Bogiatto that he believed the children had been abused by at least one of E's former partners.

[188] Mr Bogiatto agreed he had informed the presiding Judge at callover prior to trial that the defence was fabrication. However, we accept his evidence that as preparations evolved, there were a number of strands to Mr H's defence. These included the possibility of fabrication but also extended to the possibility that E had instigated or encouraged the complainants to make false complaints after a falling out between her and Mr and Mrs H in April 2011. Mr Bogiatto confirmed Mr H had told him that E had been in violent relationships with one or more previous partners. He raised the possibility that the complainants had been sexually abused by those persons and were mistakenly attributing the blame to Mr H. Mr Bogiatto said he was instructed to advance this. And, although there was no direct evidence of this before us, we are satisfied it is likely that Mr H raised with Mr Bogiatto the possibility of collusion between some or all of the complainants.

[189] Although Mr Bogiatto did not refer directly in his evidence to the possibility that the complainants were mistaken in their recollections, it is evident from his extensive and detailed cross-examination of the complainants and from Mrs H's evidence at trial, that Mr and Mrs H had drawn Mr Bogiatto's attention to a number of discrepancies in the complainants' accounts of what had happened. This was material which defence counsel had available to use in order to challenge the reliability of the complainants' accounts.

[190] Our conclusion is that the only true instruction (in the sense of a direction as to Mr H's defence and how the trial was to be run) was that the complainants' allegations were untrue. Within that broad instruction, we are satisfied Mr H left it to Mr Bogiatto to decide on tactical issues at trial such as the line of cross-examination to be pursued and the evidence to be called.[98] Mr H acknowledged he made no complaint during Mr Bogiatto's lengthy

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[97] At another point in his affidavits, Mr H said this exception related to B but confirmed in cross-examination it related to G.

[98] In terms of the discussion at [74]–[75] above.

cross-examination of the complainants and E. He said he believed Mr Bogiatto was an experienced criminal lawyer and trusted that he knew what he was doing. As Mr H put it:

> I always thought there was a method to Mr Bogiatto's cross-examination because he was the expert not me.

Mr Bogiatto's opening statement for the defence

[191] Mr Bogiatto was permitted to make a lengthy statement on behalf of Mr H at the outset of the trial after the Crown opening. Mr Bogiatto dwelt at some length on what he called the dysfunctional family environment in which the children had grown up with E. He referred to E and the complainants having a long history of supervision by Child Youth and Family (CYF); the history of domestic violence by at least one of E's partners; the possibility that they may have been sexually abused by one or more of E's partners and had wrongly attributed their recollection of events to Mr H; the fact that there had been a falling out between E and Mr and Mrs H; the suggestion that E had said she was "going to get" Mr H and that she was going to "set him up"; and the fact that E had decided to have no further contact with Mr and Mrs H after they had allegedly refused a loan to E and her husband in April 2011.

[192] Mr Bogiatto also suggested in his opening statement that the complainants had either been coached by E or someone within her family or were transposing actual events at another time and place not involving Mr H. He said the evidential interviews with the complainants had not been conducted appropriately, with leading questions being asked.

[193] Mr Bogiatto also informed the jury that Mr H might not give evidence on his own behalf. He explained that was not unusual since Mr H had no onus of proof. He added that any decision as to whether he would give evidence would be his (Mr Bogiatto's). In evidence, Mr Bogiatto explained this unorthodox approach on the basis that he was endeavouring to deflect any adverse inference against Mr H should it be decided he would not give evidence. We accept his explanation.

[194] Mr Bogiatto summarised the defence case in these terms:

> So in respect of those interviews the defence will say the conduct attributed to Mr H is not true, it didn't happen. There appears to be three children acting in concert and speaking in a particular way. The implication is that they've either concocted the story themselves or there has been the involvement of an older person in driving them to it, or possibly they are transposing earlier events with someone else …

Cross-examination of the complainants

[195] We accept Mr Cordwell's submission that in cross-examining the complainants Mr Bogiatto made no direct attack on their credibility by suggesting to them that they were lying or had fabricated their evidence. Rather, his careful and detailed cross-examination focused on the reliability of their recollections. We accept the Crown's submission that the approach Mr Bogiatto took in cross-examining young complainants was orthodox and open to competent counsel. That approach was to explore inconsistencies and discrepancies in their evidence and to suggest their accounts were wrong, implausible or improbable.

[196] It is unnecessary to address the very detailed submissions that counsel on each side made. It is sufficient if we refer by way of example to Mr Bogiatto's cross-examination as to:

(a) The times and places at which the offending was alleged to have occurred;

(b) The number of occurrences alleged;

(c) Inaccurate or wrong descriptions of places such as the bedroom and shower where some of the offending was alleged to have occurred;

(d) B's account of how she fell out of bed at the time of one of the alleged offences (it was suggested her account was unrealistic);

(e) The apparent contrast between the complainants' accounts of what had been happening and contemporaneous evidence in the form of photographs and cards showing their relationship with Mr and Mrs H in a positive light;

(f) The fact that other children and adults were often present during the alleged offending;

(g) The improbability that the complainants would not have complained about what was going on prior to the disclosure in November 2011; and

(h) The prospect that B had spoken with G about her allegations before she was evidentially interviewed.

[197] We are satisfied that Mr Bogiatto's cross-examination of the complainants was both competent and within his instructions. It is well understood that a head-on attack against a complainant in sexual cases, particularly young complainants, can be counter-productive. A firm but sensitive approach is required to avoid this risk while still advancing the essence of the defence.[99] Here, it was open to Mr Bogiatto to focus his attack on reliability rather than credibility and to reserve stronger cross-examination for the complainants' mother E.

[198] Mr Bogiatto cross-examined E extensively. He established that she had become pregnant at a young age and that she had had relationships with a number of men. One of these in particular had been violent towards her and had been in prison. She accepted CYF had been involved with the family on a number of occasions and had given her an ultimatum to the effect that she had to terminate her relationship with this man or risk losing one or more of the children. In 2006, she had married and had remained with her husband from then until the time of trial.

[199] E accepted that the children had visited Mr and Mrs H and stayed with them on a number of occasions and, generally speaking, had a good relationship with them. However, over time, she had become concerned about negative statements she believed had been made about her by Mrs H to the children. She agreed that, in March 2011, she and her husband were seeking $30,000 to fund a new dairy farming venture. She had approached Mr and Mrs H for this loan. She said she was told Mr and Mrs H did not have the money available at the time but could find it if she

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[99] See *R v K (CA531/2007)* [2009] NZCA 97 at [15]; and *Z (CA589/2011) v R* [2013] NZCA 118 at [56]–[59].

was willing to pay interest. She and her husband decided to borrow the money from a bank instead.

[200] E denied any serious falling out over the loan but admitted there had been a major "dust up" in April 2011. B had become upset whilst staying with Mr and Mrs H and E reacted adversely to comments she said had been made by Mr H to the effect that she (E) was upsetting the children. She was also unhappy about remarks Mrs H had been making to her. As a result of this, she had decided to sever all contact with Mr and Mrs H.

[201] Near the end of his lengthy cross-examination, Mr Bogiatto put it to E directly that it was her idea in October or November 2011 to get the children to make complaints about Mr H. It was also put to her that she had decided to cut off all links with Mr and Mrs H because of their refusal to provide money and that she had felt threatened because S wanted to live with Mr and Mrs H. E denied all these allegations. But, by his earlier questions, Mr Bogiatto had successfully established that there had been a major difference of opinion between E and Mr and Mrs H not long before the complaints were made to the police. He had also established a firm basis for his submission to the jury that there had, at least at times, been serious dysfunction in E's family with consequent impacts on the wellbeing of the children.

[202] We are satisfied Mr Bogiatto's cross-examination of E was conducted competently and with considerable success from Mr H's point of view. In particular, Mr Bogiatto had advanced Mr H's belief that E was responsible for instigating the complaints against him following the breakdown in relationships in 2011.

Subsequent events at trial

[203] It is unnecessary for us to canvass the remainder of the Crown case since it has no particular bearing on the appeal grounds and Mr Cordwell did not suggest the verdict was unreasonable or not open on the evidence. The next stage of the trial was Mr Bogiatto's opening to the jury on Tuesday 11 March 2014. He outlined the witnesses to be called and stated explicitly that Mr H's defence was "I never did these things". He described some of the events attributed to Mr H as bizarre and submitted to the jury that there was simply no opportunity for the events described in

the indictment to have occurred. To the extent there had been any contact between Mr H and the children, it was entirely innocent.

[204] The principal defence evidence came from Mrs H who gave evidence about the layout of the homes at which the offending was said to have occurred and how Mr H behaved towards the children. She had never seen anything untoward. She gave evidence of discrepancies in the accounts given by the complainants. For example, she said that Mr H never showered B as alleged and had never given her chocolates as a reward. The relationship between herself, her husband and the children had been good until the relationship with E deteriorated towards the end of 2010 and in 2011.

[205] She blamed E for the deterioration in the relationship. She confirmed that, in March 2011, E and her husband had approached her (Mrs H) and Mr H for a loan but that request had been declined. She also said that around this time S had asked to stay with them. E would not agree to this. She agreed there had been a serious upset in April 2011 and that S and B had been distressed over it. It was after this incident that E had told the children they should have no further contact with Mr and Mrs H. The other defence witnesses gave evidence generally supportive of Mr H as expected.

[206] Then, in his closing address, Mr Bogiatto reiterated Mr H's defence that the alleged offending never happened: at the very least, the jury must entertain a reasonable doubt as to Mr H's guilt. He raised again the possibility of collusion between the complainants as well as the inconsistencies and improbability of the accounts the children gave. And he referred to the existence of the contemporaneous documentary evidence showing there was a good relationship between the children and Mr and Mrs H; the absence of opportunity to carry out the offending alleged and the coincidence that the complaints came after the falling out in April 2011.

Conclusions

[207] Viewed overall, we are satisfied Mr Bogiatto conducted the defence competently and in accordance with his instructions. The fact that Mr H was ultimately convicted of only six of the 12 counts in the indictment tends to support

our view that Mr Bogiatto's representation was effective. No material risk of a miscarriage of justice arises.

[208] This ground of appeal fails.

The mistaken attribution issue

[209] When dealing with the second issue, we determined that one of the strands of Mr H's defence was that the complainants had been abused by one or more of E's previous partners and may have mistakenly attributed that abuse to Mr H. We found that Mr H left it to Mr Bogiatto to raise this issue as part of Mr H's overall defence that the relevant events did not happen.

[210] As already noted, Mr Bogiatto raised the prospect of mistaken attribution or transference in his opening statement to the jury at the commencement of the trial on 3 March 2014. During cross-examination of the complainant S on 5 March, Mr Bogiatto questioned her about E's previous partners. In the absence of the jury, Judge Rollo raised with Mr Bogiatto the prospect that s 44(1) of the Evidence Act was at risk of being engaged given that Mr Bogiatto had opened to the jury on the basis that transference of the sexual allegations had occurred. The Judge observed that no pre-trial application had been made for leave to put questions to S relating to her sexual experience with other persons.

[211] Mr Bogiatto then sought leave to cross-examine under s 44 but eventually acknowledged during argument that he did not need to pursue that line of inquiry. Mr Bogiatto accepted there was no evidence the defence could proffer that would show there had been other sexual abuse of S or the other complainants which would provide a foundation for an argument of transference. The Judge declined the application and the issue was not further pursued.[100]

[212] When the defence case opened on 11 March 2014, Mr Bogiatto referred briefly to the summary of Mr H's position he had outlined in his opening statement. He acknowledged that as the trial process unfolded, there was inevitably a degree of

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[100] *R v [H]* DC Tauranga CRI-2011-070-6788, 5 March 2014 (Ruling 2 of Judge P S Rollo).

refinement and greater precision. He made no further reference to the transference strand of the defence.

[213] Mr Cordwell was critical of the way in which Mr Bogiatto dealt with this issue. He submitted there was no evidential foundation for a defence of transference. If it were to be raised, then a timely application for leave under s 44 should have been made and there ought to have been expert evidence to support a defence of this nature. The issue should never have been before the jury, whether or not trial counsel had instructions to raise it.

[214] Mr Bogiatto accepted he had overlooked the need to apply under s 44 and that the defence was not in a position to call evidence to support such a defence. However, he pointed to the existence of the CYF records of the dysfunctional relationships within the complainants' family and E's acknowledgement of serious violence towards her by one of her former partners.

[215] The Crown accepted it was at least unwise for Mr Bogiatto to have opened on the transference theory before the Court had determined an application under s 44. However, the Crown submitted there was no risk of a miscarriage of justice resulting from the issue being raised at the outset of the case. The transference theory was not inconsistent with the defence case that the acts alleged did not occur and did not undermine the defence position. The Crown also noted the progress made by Mr Bogiatto in the cross-examination of E and her somewhat equivocal answers in cross-examination about whether two of her previous partners were "kiddie fiddlers".

[216] We accept the Crown's submission that there was no risk of a miscarriage of justice arising from this issue being raised. It was mentioned at the outset of the trial but not pursued after the Judge's ruling on the third day. Although Mr Bogiatto was not permitted to continue with this line, the seed had been sown in the jury's mind and we do not view the matter as harming Mr H's defence. Indeed, given the acknowledgements made by E, it was an issue that could have led the jury to entertain doubts about the credibility or reliability of the complainants' evidence.

[217] This ground of appeal also fails.

Conclusion – *H (CA322/2014)*

[218] Mr H's appeal against conviction is dismissed.

[219] Finally, we note that Mr H has permanent name suppression.

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Appendix

Table 1

The first table shows the numbers of conviction appeals over the period from 2009-2014 which raise issues relating to trial counsel conduct and the outcome of those appeals.

Statistics for 2009–2014 concerning trial counsel conduct issues

	A	B	C	D	E
Year	**Total no. of criminal appeals**	**No. of appeals against conviction**	**No. of appeals raising trial counsel conduct**	**C as % of B**	**No. of appeals raising trial counsel conduct which succeeded on that ground**
2009	513	220	35	16%	4
2010	557	219	37	17%	2
2011	532	208	50	24%	7
2012	555	235	47	20%	5
2013	508	220	41	19%	6
2014	429	201	43	21%	1
Total 09–14	3094	1303	253	19%	25

Over each of these years, there were a number of abandonments where trial counsel conduct was raised: six in 2009; three in 2010; 20 in 2011; nine in 2012; seven in 2013; and 11 in 2014. If those abandonments are included there were successful appeals on the ground of trial counsel conduct in 11%, 5%, 14%, 11%, 15% and 2% respectively of those appeals against conviction over the years in question.

Table 2

Outcome of appeals raising trial counsel conduct

	A	B	C
Year	**Number of appeals raising trial counsel conduct that were disposed**	**Number of appeals raising trial counsel conduct which succeeded on that ground**	**Percentage of successful appeals: B as a % of A**
2009	29	4	14%
2010	34	2	6%

2011	30	7	23%
2012	38	5	13%
2013	34	6	18%
2014	32	1	3%
Total 09–14	197	25	13%

Table 3

Successful appeals raising trial counsel conduct, conviction appeals, and conviction and sentence appeals

Year	**Appeals raising trial counsel conduct**	**Conviction appeals**	**Conviction and sentence appeals**
2009	14%	19%	30%
2010	6%	25%	27%
2011	23%	15%	31%
2012	13%	20%	29%
2013	18%	26%	35%
2014	3%	26%	19%
Total 09–14	13%	22%	29%