CASE COMMENTARY

Fitness for Trial and the Self-represented Defendant

Berg v Director of Public Prosecutions (Qld) [2015] QCA 196

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Because the state has a specialised Mental Health Court, in which the presiding Supreme Court judge is assisted by two psychiatrists, and ‘fitness for trial’ had a statutory definition in the Mental Health Act 2000, the Queensland jurisdiction has developed an extensive jurisprudence in relation to determinations of ‘fitness for trial’.

In 2012, the Queensland Court of Appeal dismissed an appeal from a decision of the Mental Health Court that an appellant was fit for trial. After the Mental Health Court made a second determination in 2014, the appellant argued that since he was without legal representation and the statutory definition of ‘fitness for trial’ included a ‘fit to instruct counsel’ criterion, the previous assessments as to fitness for trial were irrelevant. In the subsequent decision in *Berg v Director of Public Prosecutions (Qld)* [2015] QCA 196, the Court of Appeal considered the statutory interpretation of the relevant provisions and the common law concepts of ‘fitness to plead’ and ‘fitness for trial’ particularly in the context of a self-represented defendant. The decision of the Queensland Court of Appeal decision effectively removes the safeguard that the accused should, in most circumstances, have legal representation in a criminal trial.

Key words: Fitness for trial; unrepresented defendant.

Introduction

Fitness to stand trial is a threshold issue for the participation of accused persons in their trials. It has been a complex and contested issue, both in relation to the criteria for unfitness and the consequences of a finding of unfitness. This case commentary analyses the decision of the Queensland Court of Appeal in *Berg v Director of Public Prosecutions* [2015] QCA 196 which reviewed the law in relation to persons who are without legal representation and about whose capacity to participate in the trial process there are serious doubts. It argues that the decision establishes a problematic precedent.

Fitness to Stand Trial in Historical Perspective

The following decisions constitute some of the jurisprudence that continues to be highly influential in Australian courts.

In *R v Dyson* (1831), the accused was a deaf-mute who was indicted for the murder of her illegitimate child. In his directions, Parke J told the jury (at [302]) that if they were satisfied that ‘the prisoner had not then, from the defects of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her not sane’. The jury was satisfied that Dyson could not understand

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the nature of the trial process and she was declared insane.

In *R v Pritchard* (1836) 7 Car & P 303, the accused, who was also deaf and dumb, was charged with the capital felony of bestiality. Pritchard did not plead to the indictment, and a jury found him mute 'by the visitation of God'. However, Pritchard was able to read and write, having been taught at the Deaf and Dumb Asylum in London. On reading the indictment, Pritchard clearly indicated by a sign that he was not guilty. Referring to the direction given in *R v Dyson*, Baron Alderson (at [304]) gave the often-quoted direction:

There are three points to be inquired into: First whether the prisoner is mute of malice or not; secondly whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial so as to make a proper defence – to know that he might challenge any of you to whom he may object – and to comprehend the details of the evidence which in a case of this nature must constitute a minute investigation.

Upon this issue, therefore, if you think that there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge, you ought to find that he is not of sane mind. It is not enough that he may have a general capacity of communicating on ordinary matters.

The jury found that Pritchard was not of sane mind by reason of mental deficiency and hence 'not capable of taking his trial'. Like Dyson, Pritchard was detained under the Criminal Lunatics Act 1800 (UK), even though he could read and write and was probably not insane, and indeed was likely not to have even been intellectually impaired. *Dyson* and *Pritchard* were decided early in the nineteenth century when the accused was frequently not represented by counsel. It is not surprising that in those early reported decisions, there are no references to the role of the accused's legal representative or the ability of the accused to instruct counsel.

In *Sinclair v The King* (1946) 73 CLR 316, the accused confessed to a friend to having committed a murder. He subsequently made a verbal confession to police and wrote and signed a confession. Within a week of being committed for trial, he was diagnosed with schizophrenia and certified 'insane' under the Lunacy Act 1889 (NSW). However, a jury subsequently found him fit for trial and, 10 months after the murder, he was convicted and sentenced to life imprisonment. On appeal to the High Court, it was contended that confessions must be shown to be the expression of a 'responsible and intelligent mind'. In the course of considering the admissibility of a confession, Dixon J referred to the test applied in *R v Pritchard* and later cases and cautioned (at [334]):

The matters to be considered are whether the form of insanity of the prisoner arraigned allows him to comprehend the details of the evidence. It does not seem to have been noticed by the text writers how high a degree of intelligence this test might demand if it were literally applied.

R v Presser [1958] VR 45 is the seminal Australian case on fitness to be tried. Referring to *R v Sinclair*, Smith J said (at [48]) that Dixon J in that earlier decision was not suggesting that the test:

should be applied in any extreme case, or in an over-literal sense. It needs, I think, to be applied in a reasonable and commonsense fashion. And the question, I consider, is whether the accused, because of mental defect, fails to come up to certain minimum standards which he needs to equal before he can be tried without unfairness or injustice to him.

In his direction to the jury, Smith J provided an authoritative list of criteria that an accused must satisfy:

He needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the

proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. *Where he has counsel* he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, *if any* (emphasis added).

It is not usually appreciated that the defendant in *R v Presser* was actually a 14-year-old boy who had an intellectual disability and that during his trial for the murder of his four-and-half-year-old friend, the jury heard medical evidence that Presser had a ‘mental age’ of a nine-year-old¹. On 12 September 1957, following the directions of Smith J, a jury found Presser fit to be tried. A subsequent jury deliberated for only 20 minutes before finding Presser guilty of manslaughter.

Legislative Framework in Queensland

The term ‘fit for trial’ was defined in the Mental Health Act 2000 (Qld) in Schedule 2:

[F]it for trial, for a person, means fit to plead at the person’s trial and to instruct counsel and endure the person’s trial, with serious adverse consequences to the person’s mental condition unlikely.

By s 267 of the Mental Health Act 2000 (Qld), on the hearing of a reference, the Mental Health Court must decide whether the person was of unsound mind or (if the offence is

murder) of diminished responsibility when the alleged offence was committed. Section 267 is subject to section 268.

s 268 Reasonable doubt person committed offence

- (1) The Mental Health Court must not make a decision under section 267(1) if the court is satisfied there is reasonable doubt the person committed the alleged offence (the *disputed offence*)
- (2) However, the court may make a decision under section 267(1) if the doubt the person committed the disputed offence exists only as a consequence of the person’s mental condition.

s 270 When Mental Health Court must decide fitness for trial

- (1) The Mental Health Court must decide whether the person is fit for trial if—
 - a. the court decides the person was not of unsound mind; or
 - b. under section 268 or 269, the court must not decide whether the person was of unsound mind when the alleged offence was committed.

By s 271, if the Mental Health Court decides the person is unfit for trial, the court must also decide whether the unfitness for trial is of a ‘permanent nature’.²

The Charges Against Berg

On 7 October 2005, the appellant, Vincent Berg, had been working as a non-training psychiatry registrar at the Townsville Hospital, a Queensland regional public hospital, when he was charged with one count of indecent treatment of a child under 16. Although the offence was alleged to have occurred between September and October 2000, the complaint to police was not made until 2005.

The offence was alleged to have occurred while the appellant falsely claimed to be a Russian-trained psychiatrist. The charge arose as a result of the 2003 Queensland Public Hospitals Commission which recommended that there be an inquiry into the

appellant's claims that he was an overseas-trained doctor. Investigations indicated that his degrees had not been awarded from the institutions he claimed to have attended and it was also alleged that he forged various documents. The allegedly forged documents included a certificate of good standing purportedly issued by the Medical Board of Queensland in 2001 stating that 'Dr Vincent Berg' was registered with the Board with conditions that he practice only in psychiatry with a licence for private practice.

On 7 October 2005, the appellant was granted bail with a reporting condition. A committal hearing was set down for 11 July 2006 but was adjourned to the end of July 2006.

First Reference to the Mental Health Court – November 2006

On 13 November 2006, the appellant's then solicitor filed a reference in the Mental Health Court in respect of the offence of the indecent treatment of a child.

On 7 November 2007, the matter was listed for hearing. The appellant did not attend the hearing, and the original reporting doctor was unable to attend. The matter was adjourned to the following year.

After an assessment on 6 February 2008, pursuant to a Court Examination Order, an independent psychiatrist, Dr Frank Varghese, reported that the appellant's presentation was consistent with a severe psychotic depression. However, on 11 February 2008, five days after the assessment, Queensland Police surveillance recorded the appellant walk out of his unit on the Gold Coast, body surf and swim before walking back to his unit. Later that day, the appellant was filmed interacting in a public library and shopping.

On 14 February 2008, the matter was again listed for hearing in the Mental Health Court. The appellant did not attend the hearing and the matter was adjourned to a date to be fixed for the defence to inform him of the proceedings and to allow him to represent himself.

Decision of the Mental Health Court – July 2008

On 12 June 2008, after the hearing date was adjourned a number of times, the reference was heard by the Mental Health Court. Defence lawyers were given leave to withdraw, and the matter was dealt with in the absence of the appellant. At the application of the respondent, the Director of Public Prosecutions, the Mental Health Court (unreported, Philippides J) struck out the reference.

On 25 July 2008, when the appellant's stay application was heard by the Mental Health Court, the appellant was again not present for the hearing and the stay was refused.

Decision of the Court of Appeal – October 2008

The applicant appealed to the Court of Appeal on the grounds that the Mental Health Court was not empowered to strike out references or should not have exercised its discretion to do so.

On 10 October 2008, the Court of Appeal (McMurdo P, Keane and Holmes JJA, unreported) dismissed the appeal from the decision of the Mental Health Court. The Court of Appeal found that by s 384 of the Mental Health Act, the Mental Health Court was empowered to control the manner in which its jurisdiction was exercised, and the powers of the Mental Health Court included a power to terminate a reference where it was unable to come to a substantive decision. Moreover, the Court of Appeal held that the Mental Health Court did not miscarry in its exercise of its discretion to terminate the appellant's reference.

Application to Vary Bail Conditions – May 2009

On 20 March 2009, the appellant applied to the Supreme Court to have the reporting condition on his bail removed on the grounds that it was not justified under the Bail Act

1980 and that the condition was having a negative impact on the appellant's chronic mental illness and physical health and placed a significant burden on the appellant's 'son' (Andreas Berg) who was his 'carer'. By affidavit, Andreas Berg made assertions about the appellant's medical condition and copies of prescriptions for medications for the appellant were produced. The appellant also argued that there had been no breaches of the bail order made on 7 October 2005, the charges were based on weak evidence and the appellant denied all accusations of any wrongdoing. The appellant claimed that the reporting condition was more onerous for the appellant than was necessary in regard to the public interest.

On 14 May 2009, the appellant was charged with a further 37 charges, including 1 count of procuring a sexual act by false pretence, 3 counts of grievous bodily harm, 2 counts of assault occasioning bodily harm, 1 count of obtaining financial advantage by deception as well as 28 counts relating to various offences of fraud, attempted fraud and uttering forged documents based on allegations that the appellant used sham qualifications to obtain employment as a psychiatrist. All of the offences were alleged to have occurred between June 1999 and June 2004. The charges of causing bodily harm arose from incidents at the Townsville Hospital when it was alleged that the appellant treated patients with a mental illness and changed their medication, causing them to suffer adverse events. On 15 May 2009, the appellant entered into an undertaking as to bail at the Southport Magistrates Court.

On 25 May 2009, the Supreme Court (unreported, A Lyons J) noted that there was no medical or psychiatric evidence to indicate that the reporting condition was having the impact on the appellant as alleged. The Court was not satisfied that the reporting condition was onerous and did not consider that it was in the public interest to remove the reporting requirement and dismissed the application.

Decision of the Court of Appeal – July 2009

On 27 July 2009, the Court of Appeal (Muir JA, Mullins and Philippides JJ) heard the appellant's appeal of the decision of the Supreme Court not to vary the bail conditions. The grounds of the appeal were as follows:

- the primary Judge erred in failing to scrutinise the material relating to the appellant's illness set out in the appellant son's affidavit filed on 19 May 2009
- the primary Judge had wrongly held the appellant responsible for the lack of medical evidence, when it was due to the refusal of the treating psychiatrist to comply with a subpoena to produce a report
- the primary Judge relied on the affidavit of a police officer without deciding the allegations of official misconduct and perjury made by the appellant against that police officer.

Mullins J (with whom Muir JA and Philippides JJ agreed) in *Berg v DPP (Qld)* [2009] QCA 213 cited the reasoning of the Court of Appeal in *Clumpoint v Director of Public Prosecutions (Qld)* [2005] QCA 43 at [18] and held that the issue raised was whether under section 11 (2A) of the Bail Act the reporting condition was more onerous than necessary having regard to the nature of the offences, the appellant's circumstances and the public interest.

The Court of Appeal held that in view of the appellant's primary argument that his mental condition was adversely affected by reporting to the police, medical evidence was required to support the argument. The Court of Appeal noted that the service of the subpoena on the psychiatrist Dr Wright did not oblige the psychiatrist to prepare a report about the appellant. The affidavits relied on by the appellant did not otherwise provide the necessary medical evidence.

The Court of Appeal held there was no error of law in the approach of the primary Judge and, in light of the lack of any additional medical evidence to support the application, the appeal must be dismissed.

Special Leave Application to the High Court – November 2009

On 12 November 2009, the applicant sought special leave of the High Court to appeal against the orders of the Court of Appeal made on 10 October 2008 dismissing the applicant's appeal against the decision of the Mental Health Court to strike out proceedings for want of prosecution.

The appellant argued that he was denied natural justice and that the Mental Health Court did not consider the potential impact of his alleged mental illness on his ability to properly instruct his legal advisers. In refusing the special leave application, the High Court (Hayne and Crennan JJ) in *Berg v Director of Public Prosecutions (Qld)* [2009] HCASL 222 held that the appellant's written submissions advanced no arguable ground for the grant of special leave and that any appeal would have insufficient prospects of success. The High Court also noted that the application was brought out of time. The High Court held that an order dispensing with the requirement to comply with the time limit should be refused for the reason that even if it were granted, it was inevitable that the application for special leave to appeal would be dismissed.

Second Reference to the Mental Health Court – April 2010

On 13 April 2010, a second reference was filed in the Mental Health Court including the initial charge of indecent treatment of a child under 16 as well as 37 further offences that the appellant was charged with in 2009. The reference noted that the matter of soundness of mind at the time of the alleged offences could not be considered by the Mental Health

Court since the appellant denied committing any of the offences.

On 12 July 2010, the new reference was mentioned before the Mental Health Court. On 11 November 2010, the matter was mentioned again in the Mental Health Court and the solicitors for the appellant were given leave to withdraw. On 2 December 2010, the hearing of the matter was adjourned, as the appellant's new legal representatives advised that they had only just been briefed and had not received all material. On 7 February 2011, the appellant's legal representatives were given leave to withdraw.

Decision of the Mental Health Court – September 2011

On 4 May 2011, the reference was listed for hearing in the Mental Health Court. On 13 May 2011, the matter was adjourned to 31 August 2011 to allow the appellant's son (who had appeared on his behalf) sufficient time to consider the written submissions from the Director of Public Prosecutions and to formulate submissions in response on behalf of the appellant. On 10 July 2011, the Mental Health Court received submissions in response on behalf of the appellant.

Three psychiatrists gave evidence before the Mental Health Court. Dr Jvozas (Joseph) Ziukelis had been treating the appellant for 16 months at the time of the hearing and had seen the appellant on nine occasions. The Mental Health Court also heard evidence from independent psychiatrists Dr Velimir Kovacevic and Dr Michael Beech who had assessed the appellant pursuant to a Court Examination Order. The Mental Health Court was assisted by two senior psychiatrists, Dr Joan Lawrence and Dr Elizabeth McVie.

Evidence of Dr Ziukelis

In a Queensland Government form completed on 12 October 2010, five months after Dr Ziukelis began treating the appellant, Dr Ziukelis recorded his diagnoses as 'chronic paranoid

schizophrenia, depression, possibly, secondary to schizophrenia, and agoraphobia'. In correspondence to the Registrar of the Mental Health Court dated 12 October 2010, Dr Ziukelis declined to provide a written report:

[A]s the treating doctor, it is preferable that my involvement with the patient be on a strictly clinical level.

Having said this I am nevertheless able to state the following without compromise to the clinical relationship. The diagnosis is that of chronic paranoid schizophrenia ... Currently the patient is considered to be fit for trial. There is a likelihood of decompensation during the trial process. This would require review of capacity at such time as pertinent symptoms become evident.

In subsequent correspondence to Legal Aid Queensland dated 27 October 2010, Dr Ziukelis referred to his previous opinion that the appellant was fit for trial and wrote:

Today I find that his new legal representatives ... are known with certainty by Mr Berg to be KGB Agents. The means of acquiring this knowledge is not revealed by Mr Berg. It is unlikely that he will now be candid with his counsel.

As the problem is due to symptoms of mental illness I consider he is no longer fit to attend Court on this basis as he cannot properly instruct counsel.

In his evidence, Dr Ziukelis emphasised that in his role as a treating doctor, he could offer only limited assistance to the Mental Health Court and he acknowledged that he had not spoken to the appellant in any detail about the charges. As was later noted by the Court of Appeal in *Berg v Director of Public Prosecutions (Qld)* [2012] QCA 91 (at [19]–[20]), the efficacy of Dr Ziukelis' treatment of the appellant was questionable. In his evidence, Dr Ziukelis could give surprisingly little information about the appellant's illness. The treatment he prescribed was the same as that which had been prescribed by someone

else, and Dr Ziukelis was not sure who had initiated the treatment. Although he thought that the appellant was not improving, he did not see any benefit in changing the medication. He could not say whether the appellant had been treated with other antipsychotic medication in the past, and he never questioned whether the appellant was taking the medication he prescribed. Dr Ziukelis also noted that the appellant always attended with Andreas Berg who was said to be the appellant's adopted son, and that Andreas Berg did most of the talking 'by far' at the consultations.

As to the appellant's ability to participate in a trial, although he conceded that the appellant could give instructions as to whether or not the charges against him were true or false and give reasons to support his contentions in that regard, Dr Ziukelis could not say for certain whether the appellant's decision about his plea would be affected by his delusional beliefs or whether, considering his impaired concentration and memory, the appellant could follow the course of proceedings. Because of the appellant's considerable distractibility and inattention, Dr Ziukelis could not say whether the appellant was capable of exercising his right of challenge. When asked whether the appellant could endure a trial without serious adverse consequences to his mental health, Dr Ziukelis said that the matter was not able to be predicted.

Evidence of Dr Kovacevic

Dr Kovacevic reported that he formed the opinion that the appellant failed to co-operate fully during the assessment and that although the appellant reported 'quite extensive psychopathology', he did not see many signs of this during the assessment. Dr Kovacevic explained that the results of psychological testing showed that the appellant was giving false answers in order to appear to be psychotic. Dr Kovacevic opined that the longitudinal history given by the appellant as to the course of his illness over many years was

unusual and more consistent with someone exaggerating symptoms.

Dr Kovacevic testified that he was influenced by a series of past hospitalisations during which no clear psychotic symptoms or signs were confirmed. Dr Kovacevic testified that he was also influenced by past claims the appellant had made to an earlier reporting psychiatrist, Dr Frank Varghese in 2008 and the Queensland Police surveillance recording. Dr Kovacevic testified that he found little basis for the delusions claimed by the appellant and that the reports of hallucinations lacked credibility. Dr Kovacevic was of the opinion that the appellant was fit for trial.

Evidence of Dr Beech

Dr Beech referred to psychological testing which showed 'an unsophisticated attempt to exaggerate and magnify his claimed level of dysfunction'. Dr Beech explained the inconsistencies in psychological testing and also described how animated, mobile and active the appellant appeared in the police surveillance video recorded in February 2008.

Dr Beech described the appellant's inconsistent presentation at interview and explained that the history of the appellant's illness, said to date from a first presentation when he was aged 17, was inconsistent with 'the natural progression' of recurrent major depression, schizophrenia or dementia and that the reported course of the illness was more consistent with 'someone with an adjustment disorder who had become depressed by his circumstances and who was now elaborating psychotic symptoms and evolving them to meet a purpose'. Dr Beech concluded that he could not say with 'any reasonable confidence' that the appellant suffered from a severe mental illness. Although he conceded that the appellant was depressed and thought it possible that his mood might be adversely affected by a trial, Dr Beech considered that the trial process would not seriously adversely affect his condition while he remained under the care of a psychiatrist.

On 27 September 2011, Mental Health Court in *Re Berg* [2011] QMHC, unreported, Ann Lyons J, MHC No 9 of 2010 concluded (at [91]–[92]):

It is clear that Vincent Berg is currently being treated by a psychiatrist and is receiving treatment and medication in particular. Dr Ziukelis considers that he is stable and has been so for some time. He is apparently depressed but Dr Ziukelis will monitor the situation during his trial.

Having considered the reports of Dr Ziukelis, Beech and Kovacevic as well as the advice of the assisting psychiatrists I am satisfied that on the balance of probabilities Mr Vincent Berg clearly understands the charges he faces and is currently able to give instructions and assert his defence. I am also satisfied that he will be able to endure a trial and that appropriate strategies will be put in place to cater for his reduced ability to concentrate and to monitor his mental health during such a trial.

The Mental Health Court held that the appellant was not of unsound mind and was fit for trial and ordered that proceedings continue according to law.

On 27 September 2011, an application for a stay had been made on behalf of the appellant when the decision was handed down, but after a misunderstanding of the stage which the committal proceedings had reached, the application was re-listed for further consideration. On 30 September 2011, the appellant's application for a stay of the orders of the Mental Health Court was refused.

Committal proceedings on the indecent treatment charge were arranged to commence on 28 October 2011. In an exchange of emails between the office of the Director of Public Prosecutions and the appellant's solicitor, dated 3 October and 13 October respectively, 10 witnesses were identified for cross-examination in the Southport Magistrates Court including 3 civilian witnesses who had been arranged to travel from Townsville to Southport for the committal hearing.

Decision of the Court of Appeal – October 2011

On 14 October 2011, the appellant filed a notice of appeal in respect of the Mental Health Court orders and an application for a stay of those orders.

In support of the stay application, the appellant filed an affidavit containing a mixture of submissions and some assertion and opinion. In correspondence to the Registrar dated 21 October 2011, to which he attached an outline of submissions, the appellant explained that he was unable to retain legal representation for the stay application:

I am incapable of representing myself in the Court due to an ongoing mental illness (schizophrenia accompanied by depression), and also spending sufficient time in a crowded courtroom due to agoraphobia in the form of unmotivated fear of crowded places.

The appellant applied for leave to have his application determined without any appearance by himself or another and to present his argument solely in writing. By a further correspondence to the Registrar dated 22 October 2011, the appellant provided a copy of a document appointing his “son”, Andreas Berg, as his attorney with an enduring power.

The Registrar advised the appellant that, although he could rely solely on his written outline of argument on the stay, at an oral hearing the parties would have the opportunity to put their case orally and address matters that might arise in the course of that hearing. The Registrar noted that the respondent Director of Public Prosecutions had briefed counsel to appear who would have an opportunity to put further oral arguments.

The appellant responded that, in addition to his mental illness as described in his earlier correspondence, his health had lately deteriorated, and he was ‘incapable of travelling to Brisbane’ and that his son, Andreas Berg, had a prior commitment and was also unable to appear on the appellant’s behalf. The appellant sought that the respondent be similarly

confined to written submissions. The Registrar responded that the respondent would not be so confined. The hearing proceeded on the written materials provided by the appellant and counsel appeared for the respondent to oppose the granting of a stay.

On the appeal, the appellant contended that although a committal proceeding was administrative, he should be able to be present, capable of following the hearing in a general sense, and instructing counsel if such a need arises, but without damage to his health. The appellant contended that proceedings against him should be forever stayed because he was unable to tolerate being present in the courtroom.

On 26 October 2011, the Court of Appeal (White JA) in *Berg v Director of Public Prosecutions* [2011] QCA 302 held that the appellant’s written submissions demonstrated that he could comply with each of the ‘minimum standards’ established in the decision in *Pressor*. The Court of Appeal noted that the magistrate had power to make whatever arrangements seem appropriate to excuse him from attendance if the magistrate was satisfied that the appellant’s interests were being adequately protected. Citing the observations of McHugh J in *Fuller & Cummings* (1994) 68 ALJR 611 (at 615), the Court of Appeal held that if any element of unfairness was alleged to have occurred at the committal stage, then a trial judge could adjourn or stay a trial until there was a proper committal or a *voir dire*.

The Court of Appeal observed that the Mental Health Court subjected the opinions of the psychiatrist to detailed scrutiny and analysis and closely considered the submissions made on behalf of the appellant including the submission that the Mental Health Court should accept the evidence of Dr Ziukelis over that of the other psychiatrists. The Court of Appeal found no obvious error in the approach of the Mental Health Court to the resolution of the conflicting evidence and refused the application for a stay:

I am not persuaded that Mr Berg has promising prospects on his appeal. The committal

proceedings may not even be completed before Mr Berg's appeal is determined. It is likely that the balance of the charges will be given a committal hearing before an indictment is presented on the indecent dealing charge. The administration of justice and the public interest demands that this matter, which is now quite old, continue to a conclusion as promptly as can be achieved.

Decision of the Court of Appeal – April 2012

On 14 October 2011, the appellant filed an appeal from the decision of the Mental Health Court on 27 September 2010 in which the appellant was found not of unsound mind at the time of the alleged offences, that the appellant was fit for trial and that proceedings against him were to continue according to law.

On 11 March 2012, the appellant wrote to the Registrar:

I have no counsel to represent me at the relevant Court of Appeal hearing.

My financial situation does not allow me to employ a private solicitor as I am a disability support pensioner (mental illness). It is unlikely that Legal Aid Queensland would fund legal representation in the Court of Appeal for this matter.

I am incapable of representing myself in the Court due to an ongoing mental illness (schizophrenia accompanied by depression), and also of spending sufficient time in a crowded courtroom due to agoraphobia in the form of unmotivated fear of crowded places.

Accordingly, pursuant to section 26 of the *Court of Appeal Practice Direction 2* of 2010, I am applying to the Court of Appeal for the leave 'to have a proceeding determined without that party appearing at an oral hearing' when 'a party may present argument solely in writing'.

The Court of Appeal responded to the appellant through the Registrar, in terms that the appeal would be heard in open Court and

that although the appellant should appear, if he simply wished to rely on his written submissions, he could do so. On 20 March 2012, Mr Andreas Berg, on behalf of the appellant, wrote to the Registrar:

Unfortunately, the Appellant is unable to attend the Court of Appeal hearing of his *Appeal* listed on the 22nd of March 2012 due to medical condition (flu with secondary throat infection – *Medical Certificate* by Dr Robin Alexander is attached).

The Appellant has no professional representative, and his son, carer approved by Centrelink and attorney with enduring power Andreas Berg is unable to appear on his behalf on the 22.03.2012.

Accordingly, the Appellant applies to the Court of Appeal to have relevant hearing de-listed and scheduled at a later date suitable for all of the parties.

The correspondence had attached a photocopied medical certificate from Gold Coast general practitioner Dr Robin Alexander: 'This is to certify that I have today examined Mr Vincent Berg ... In my opinion, he will be unfit to attend his court case on 22/3/12'.

The Court responded through the Registrar that the application for an adjournment has not been granted and that the Court may consider the request to appear by telephone to make oral submissions. The Court advised that the appellant must provide a medical certificate outlining details of the appellant's illness and when the appellant would be well enough to appear. The Court also advised that the appellant must take steps to have Dr Alexander available to give evidence by telephone at the hearing.

At 6 pm on 21 March 2012, the Registrar received a faxed letter from Mr Andreas Berg on behalf of the appellant:

[T]he Applicant has no authority and power 'to have Dr Alexandra (sic) available to give evidence by telephone tomorrow at 10.15 am'. Firstly, Dr Alexander is usually fully booked to see his patients, and such a

very short notice would be unacceptable. Secondly, in such a case, it is up to Dr Alexander to decide whether he wants to fulfil his patient's request or not. However, we submit that, if the Court of Appeal requires having evidence from Dr Alexander, it has all the authority and power to issue a subpoena.

Currently, Vincent Berg is suffering from common flu complicated by throat infection. His condition is presented by increased body temperature, headaches and joints' aches, running nose, light sensitive eye sight, sore throat and inadequate ability for voice conversation. Consequently, we submit that he must not be disturbed until his full recovery, which is expected in 7 to 10 days if condition does not develop any further complications (which are not uncommon in Vincent Berg's age).

Accordingly, we do confirm that Vincent Berg is incapable of appearing before the Court of Appeal on the 22nd of March 2012 either in person or by phone. We do confirm our application to have the relevant hearing adjourned until later date suitable for all parties.

The Registrar responded by email on behalf of the Court of Appeal requiring the appellant's appearance, if not in person, then by phone and furthermore that the appellant was required to phone the court room by 10:10 am. The Registrar also noted that, as previously advised, the Court required the appellant to arrange the doctor's appearance by phone so that the doctor could advise the court as to the appellant's medical condition. The Registrar requested acknowledgement of receipt of the email.

On 22 March 2012, the President of the Court of Appeal (Margaret McMurdo P) noted that there had not been an acknowledgement of receipt of the Registrar's email, and shortly before the hearing commenced, the Registry staff attempted unsuccessfully to contact the appellant on the telephone number he had provided.

The President noted that the appellant had been represented in the Supreme Court by his

son, Mr Andreas Berg, who was not a lawyer but was apparently a PhD student. The President also noted that the appellant himself also made submissions to the Mental Health Court and had filed a nine-page written outline of argument, a list of authorities and a four-page reply to the respondent's five-page written outline of argument.

In refusing the application for an adjournment, the President held (Chesterman JA and Dalton J agreeing) in *Berg v Director of Public Prosecutions (Queensland)* [2012] QCA 62:

The appellant has put in extensive written submissions and until the Court indicated that the matter should be heard in open Court and not on the written submissions was content to have his appeal determined on the written submissions. There is some evidence before the Court today that Mr Vincent Berg may not be well enough to appear before the Court today but a photocopied medical certificate in such general terms is far from compelling. The subsequent unsworn assertions from Mr Andreas Berg are not evidence. I can see no significant disadvantage at all to the appellant if the appeal proceeds today on his written submissions. Nothing has been placed before the Court to indicate what more needs to be said orally by the appellant who, in any case, could have appeared by telephone link or could have been represented by his son, Mr Andreas Berg, with leave of the Court. As I have stated, Mr Andreas Berg has appeared for Mr Vincent Berg in the past.

The compelling reason against granting the adjournment is the great age of the charges brought against Mr Vincent Berg which this appeal concerns. That is a weighty factor against the granting of the adjournment. The interests of justice, of those of the alleged victims of those charges, of the community and, indeed, of the appellant require that the charges be determined as soon as possible after this grave delay.

For those reasons, I would refuse the adjournment and continue to hear the appeal today on the written submissions of the appellant.

The appellant's Notice of Appeal stated the grounds of the appeal from the decision of the Mental Health Court:

- the decision that the Appellant 'was not of unsound mind when the alleged offences were committed' should not have been made since s 268(1) of the Mental Health Act 2000 (Qld) prescribes that 'The Mental Health Court must not make a decision under section 267(1)(a) or (b) if the court is satisfied there is reasonable doubt the person committed the alleged offence (the *disputed offence*)'.
- the decision was made without application and consideration of s 268(2) of the Mental Health Act 2000 (Qld).
- the Mental Health Court erred when it reasoned that when Dr Ziukelis testified that the Appellant was unfit for trial, that Dr Ziukelis 'had no background information and very little, if any, collateral material'. The appellant argued that prior to giving his testimony in the Court, Dr Ziukelis was in possession of the same background information and collateral material as was available to the Mental Health Court, assisting psychiatrists and other psychiatric experts.

In his written submissions, the appellant advanced 19 points which were said to highlight factual errors of reasoning by the Mental Health Court.

On 13 April 2012, The Court of Appeal (McMurdo P and Chesterman JA and Dalton J) in *Berg v Director of Public Prosecutions (Qld)* [2012] QCA 91 gave separate reasons for judgment. Chesterman JA and Dalton J concurring as to the orders made and McMurdo P dissented in part.

Decision of McMurdo P

Agreeing with Dalton J's reasons for allowing this appeal, McMurdo P held (at

[1]), since the appellant contended that he did not commit the alleged offences, there was a reasonable doubt for the purpose of s 268 and they were disputed offences under s 268. As a result, the Mental Health Court could not make a decision about whether the appellant was of unsound mind, and the order of the Mental Health Court that the appellant was not of unsound mind must be set aside.

However, McMurdo P held (at [2]) that the appellant had not demonstrated any error in the Mental Health Court's reasons for finding him fit for trial.

Decision of Dalton J – Finding as to Soundness of Mind

Dalton J (with whom Chesterman JA agreed) held (at [9]) that the Mental Health Court ought not to have made a determination of soundness of mind in circumstances where the defendant denied committing the offences. Dalton J noted that although there was little organised material before the Mental Health Court as to the basis of the dispute, there are enough indications that the defendant asserted that at all material times, he was qualified as a psychiatrist and did not engage in the sexual offending with which he is charged. Dalton J held that in those circumstances there was sufficient doubt that the appellant committed the offences and that s 268(1) operated to prevent the Mental Health Court making a finding of soundness of mind. Dalton J held (at [9]) that to this limited extent, the appeal should succeed.

Decision of Dalton J – Fitness for Trial

Dalton J held (at [10]) that the fact that the Mental Health Court wrongly determined that the appellant was of unsound mind at the time of the alleged offences did not mean that its thorough and careful determination as to fitness for trial should be overturned. To the contrary, having regard to the provisions of s

270(1)(b), the Mental Health Court was obliged to determine whether the appellant was fit for trial. The fact that the Mental Health Court embarked on this exercise via s 270(1)(a) when it ought to have proceeded via s 270(1)(b) did not in any way affect the substance of what followed. Dalton J held that the Court of Appeal should proceed on the basis that the material before the Mental Health Court, and before the Court of Appeal, established a reasonable doubt that the appellant committed the offences with which he is charged, within the meaning of s 268(1).

Following the reasoning in *McDermott v The Director of Mental Health; ex parte A–G (Qld)* [2007] QCA 51, Dalton J proceeded on the basis that an appeal from a decision of the Mental Health Court was by way of rehearing. Dalton J noted (at [33]) that a number of paragraphs in the written submissions were all essentially complaints that the Mental Health Court preferred the evidence of Drs Kovacevic and Beech to that of Dr Ziukelis. Dalton J held that the Mental Health Court was well entitled to prefer Drs Kovacevic and Beech as the only independent experts who gave evidence at the hearing. As to the appellant's complaints that some of the material before the Mental Health Court, and relied upon by the independent psychiatrists, was somewhat dated, Dalton J noted that there was abundant evidence that Drs Ziukelis, Kovacevic and Beech had assessed the appellant very recently before the hearing and that in the context of a 58-year-old man complaining of an illness which, by the appellant's account, first manifested when he was 17, it was hardly surprising that historical material was also relevant.

Dalton J noted that there were aspects of Dr Ziukelis' evidence that were surprisingly vague, including his knowledge of the history of his patient's medication treatment and his lack of knowledge of the delusions suffered by his patient. Dalton J noted (at [33]) that the Mental Health Court was entitled to take account of the fact that as a treating doctor, Dr Ziukelis did not purport to present an

independent opinion but volunteered that his assistance to the Court was limited by the fact that he had not attempted to assess the veracity of his patient in a forensic setting, but to treat him, and had not made any formal or disciplined assessment as to his fitness for trial. Dalton J held that the Mental Health Court was also entitled to take into account, as one of the assisting psychiatrists, Dr Lawrence, pointed out, that Dr Ziukelis' evidence actually fell short of unequivocally stating that the appellant was presently unfit for trial.

The appellant complained about the conclusion of the Mental Health Court that the appellant was able to understand the charges he faced, particularly having regard to Dr Beech's evidence. Dr Beech gave evidence that, although he did not go through all 37 charges with the appellant, he went through the ones he thought were indicative of the nature of the charges, or the most important ones, and he formed the view that the appellant understood the charges and that the appellant was able to defend them because he was able to give Dr Beech an account of how he would dispute the charges. Dalton J held that the statements in the reasons given by the Mental Health Court were all soundly based on the evidence before that Court.

In relation to statements of the Mental Health Court to the effect that there was objective support for the opinions of Drs Kovacevic and Beech that the appellant was not unfit for trial and that his delusional beliefs about his lawyers would not prevent him from giving instructions, Dalton J held that the reasoning of the Mental Health Court was soundly based on the evidence of the two independent psychiatrists and supported by the views of the assisting psychiatrist in circumstances where the contrary views expressed by the appellant's treating psychiatrist were tentative.

In relation to the Mental Health Court's recording of the submissions made on behalf of the Crown, Dalton J held that there was nothing unorthodox in recording those submissions, and indeed acting consistently with

them. In relation to the appellant's challenge to the independence of one of the assisting psychiatrists, Dalton J noted that no challenge was raised at the hearing and it was too late to raise that matter on appeal. Dalton J held that in any event, there was nothing more to the challenge than vague assertion put forward by the appellant in submissions, not by evidence.

Dalton J concluded (at [34]) that there was an abundance of evidence before the Mental Health Court upon which it could reach the conclusion that the appellant was fit for trial. The only dissenting voice amongst the psychiatrists was that of Dr Ziukelis. Not only did Dr Ziukelis himself qualify his ability to assist the Mental Health Court, he did not unequivocally state that the appellant was unfit for trial.

Whilst observing the limitations that existed by reason of the Court of Appeal having proceeded wholly on the record, Dalton J noted (at [35]) the advantage the Mental Health Court had in seeing and hearing the psychiatrists who gave evidence and the assistance of the two assisting psychiatrists. Dalton J held that there was nothing to indicate that this advantage was misused in any way.

In relation to the appellant taking issue with the observation of the Mental Health Court that the appellant's dealing with his criminal charges was to date, consistent with his being able to maintain his innocence and assert his rights, Dalton J held (at [36]) that the Mental Health Court was well entitled to take account of the consistent and vigorous defence of his rights mounted by the appellant in the proceedings to date. Dalton J also remarked upon (at [36]) the appellant's 'substantial, detailed, well organised and coherent written submissions' received by the Court of Appeal.

As to the appellant's complaint that the Mental Health Court acted on the basis that there was no evidence that the proceedings had unduly affected the appellant's mental state, Dalton J found (at [37]) that there was

no such evidence before the Mental Health Court and that the Mental Health Court was entitled to act on that basis. Dalton J held that for the appellant to assert otherwise mistook the onus of proof. Dalton J held that the appellant could not introduce evidence to the contrary on appeal by way of a sentence or two in written submissions.

Dalton J held (at [40]) that the order declaring that the appellant was not of unsound mind at the time of the alleged offences should be set aside and that otherwise the appeal was dismissed.

Second Decision of the Mental Health Court – October 2014

On 18 March 2013, three years after he filed his last reference and a year after the last decision of the Court of Appeal, the appellant filed a further reference in the Mental Health Court.

In April 2014, Mental Health Court (Dalton J) heard the appellant's reference.

On 11 October 2014, in *Re Berg* [2014] QMHC 5, Dalton J (at [10]) summarised the change in the appellant's circumstances:

- the appellant was now without legal representation and that previous assessments as to fitness for trial were therefore irrelevant to his current circumstances.
- the appellant ought to be assessed as unfit for trial because the 2011 reference in the Mental Health Court proceeded on the basis of an assumption that he would be represented by lawyers at any trial.

Dalton J noted (at [20]) that the only new medical evidence about unfitness before the Mental Health Court on the reference was in letters from Dr Ziukelis:

In terms of what substance there is in the letters from Dr Ziukelis, he simply reiterates the view he expressed (more tentatively)

before Lyons J. It is based upon his accepting what Mr Berg (or perhaps Andreas Berg) tells him. There is no indication that he tries to assess the veracity of this, as an independent expert must, much less any reason for his assessing and accepting it. He considers no collateral information and does not begin to deal with the reports and evidence of Drs Beech and Kovacevic. His view continues to be that the reports from Mr Berg (perhaps through Andreas Berg) amount to psychosis with paranoia and persecutory delusions. His views as to that were rejected by Justice Lyons on advice from the psychiatrists assisting her. The psychiatrists assisting me also advise that there is no evidence of psychosis. There is simply no proper basis to act on the basis of the assertions in Dr Ziukelis's letters.

One of the two assisting psychiatrists advised the Mental Health Court:

The clinical opinions presented to this court by Dr Ziukelis are simply that; his clinical opinions. There is no evidence that he has applied an appropriate level of forensic rigour in his consideration of the issues. While it is not uncommon for a clinician to advocate for his patient, in a case such as this where there is historical evidence of exaggeration, malingering and multiple allegations of deliberate fraud, one would expect a greater degree of caution from the clinician and the opinions that he expresses to a court. It appears to me that Dr Ziukelis has continued to act on a false presumption throughout in an individual where there is not a lot of evidence that he can be considered to be a reliable historian. I would advise your Honour that she accept the previous advice of the two independent forensic assessments that were undertaken by Doctors Beech and Kovacevic, and that this man is fit for trial, that any depression he has suffered was of a mild and transient nature and that the claims in relation to a persistent psychotic illness are not supported by objective evidence.

Dalton J noted (at [42]) that the question of fitness might arise with respect to unrepresented defendants:

An assessment of fitness will no doubt take into account, if it is known, whether the

accused person has legal representation, and it may be that in some cases that may make a difference to the assessment of whether the accused person has the minimum comprehension necessary, and separately, whether the accused person can endure the trial.

In relation to the statutory construction of the definition of 'fit for trial' in the Mental Health Act, Dalton J stated (at [43]–[44]):

It will be recalled that the term 'fit for trial' is defined in the dictionary schedule to the Act as, 'fit to plead at the person's trial and to instruct counsel and endure the person's trial, with serious adverse consequences to the person's mental condition unlikely'. I think it is unfortunate that the parliamentary draftsman sought to define this term in the [Act] and further, that the definition was drafted, apparently in ignorance of the position at common law. If the words of the definition 'fit to plead at the person's trial' refer only to the act of entering a plea when called upon, it can be seen that the statutory definition omits much of the common law test – challenging jurors, understanding the nature of proceedings, etc. The alternative is to interpret those words in accordance with the old common law understanding that fitness to plead and fitness to stand trial are the same thing. That produces the circular definition that the term fit for trial is defined as meaning fit for trial, but does have the advantage that regard can be had to all the elements to the common law test.

Acutely though, on the facts here, there is still the difficulty that the definition of fit for trial specifically refers to the person being 'fit to ... instruct counsel'. If that part of the definition were read literally then this Court could never take into account that an accused person the subject of a reference was legally unrepresented: fitness would have to be determined on the basis that they were represented, even though that was a false basis. The absurdity of that literal approach is so clear that I would not adopt it. I would prefer to interpret the words 'fit to plead at the person's trial' as meaning fit for trial in the common law sense according to the authorities I have outlined and regard the words 'fit to ... instruct counsel' as

surplusage. That is, I interpret the statutory test as one which allows the Mental Health Court to take into account, where it is the case, that an accused person the subject of a reference has no legal representation in determining whether or not that person is fit for trial.

In finding that the appellant was fit for trial, Dalton J concluded (at [47]):

Mr Berg continues to assert his position strenuously through Mr Andreas Berg. He signs and adopts written submissions by Mr Andreas Berg, and on his instructions Mr Andreas Berg presents arguments which have been consistently presented to this Court, and on appeal from it, over nearly eight years. I find he has the requisite comprehension necessary in terms of the *Presser* minimum requirements. I do not accept that there is any evidence that he suffers from any mental illness which interferes with this comprehension or which would prevent him enduring a trial. No doubt accommodation can be made for him in representing himself at any proceeding. As the matter of *Ogawa* shows, difficult behaviour by a self-represented accused is no reason why criminal proceedings should not continue.

Decision of the Court Of Appeal – November 2014

On 7 November 2014, an application for a stay of the decision of the Mental Health Court was refused by the Supreme Court on the basis that the applicant's prospects of success in having the Mental Health Court's finding set aside were not good. In *Berg v Director of Public Prosecutions (Qld)* [2014] QCA 281, Muir JA held (at [4]):

The problem the applicant faces in the prosecution of his appeal is that it is not so much the construction issue or issues identified by the applicant in his submissions, but the factual findings made by the Mental Health Court. Those findings are consistent with those made in earlier proceedings as to the applicant's general fitness for trial. It is plain from the findings that no matter how the construction point is decided, the

prospects that the applicant would have of setting aside the findings and of obtaining a rehearing are not high. The balance of convenience is also against the applicant. There is a strong public interest in having criminal charges, particularly serious criminal charges, dealt with expeditiously. The subject charges are already embarrassingly old. The quality of the evidence in relation to some of the offences, in particular, is likely to continue to deteriorate.

If a stay is not granted, a committal hearing may be held before the appeal is heard. However the respondent is likely to suffer no significant disadvantage if that transpired. Having regard to the past history of these matters, the applicant is likely to have difficulty in securing or maintaining legal representation. Mr Andreas Berg, who represents him this morning has gained considerable forensic experience. My perusal of the material indicates that he is able to focus clearly on and identify relevant issues. He also has the ability to mount effective arguments.

I should add that there is no evidence before me that participation in a committal hearing is likely to have any adverse health consequences for the applicant. If it does appear after the committal that my assessment of the possibility of detriment to the applicant is wrong, then there will be an opportunity for that to be addressed by a Court.

Decision of the Court of Appeal – April 2015

The appellant appealed the decision of Muir JA not to grant the stay. On 17 April 2015, before the Court of Appeal, the appellant argued through Mr Andreas Berg that matters had changed since the hearing before Muir JA because a committal hearing has been set down for May 4, and the appellant's request to have the charges dealt with one by one had not been met. The appellant also asserted that the High Court decision in *Hunter and New England Local Health v McKenna* [2014] HCA 44 had improved his prospects of success on appeal because the decision supported the appellant's argument that the trial judge

erred in having regard to the common law in construing the Mental Health Act.

In dismissing the appeal in *Berg v Director of Public Prosecutions (Qld)* [2015] QCA 59, Holmes JA held (at [2]):

I am unable to accept that submission. In [McKenna's] case, the court concluded that to impose a duty of care in negligence in respect of the release of a mentally ill patient would be inconsistent with obligations imposed on a hospital by the *Mental Health Act*. It has no relevance to whether the common law can inform statutory construction. And in any case, to the extent that the *Mental Health Court* judge had regard to the common law in construing the statutory definition, by doing so, she arrived at a more expansive view of what 'fit to plead' meant than the words taken literally would indicate, which could only have been to the applicant's advantage.

I understand that there are other arguments made by the applicant about her Honour's construction, but so far as her application of the common law is concerned, as I have indicated, I do not think that *McKenna* assists his case and I do not consider that the result was any more limited a construction of the definition than would otherwise have been the case.

The fact that the applicant's committal is not to be conducted charge by charge adds nothing new. At no stage has there been any suggestion that it would be, and neither the original finding of fitness nor Muir JA's decision in any way turned on the conception that it would be.

The applicant's submissions in dealing with the balance of convenience largely attempt to re-argue the fitness finding, relying on the 2013 psychiatric evidence from Dr Ziukelis which was specifically rejected by the Mental Health Court. There was also an argument made in written submissions that the applicant lacks the expertise necessary to argue questions of admissibility of foreign evidence. Here, Mr Berg Junior argues that there are difficulties in the applicant appearing unrepresented, of the kind discussed by the High Court in *Dietrich*. All of that can be accepted, but it has no particular bearing

on questions of fitness under the *Mental Health Act*.

The reasons given by Muir JA for refusing a stay remain valid. The applicant's prospects of success on appeal are poor. The age of the charges is a very powerful consideration. He is undoubtedly disadvantaged as an unrepresented person facing committal, but in that regard he is in no different position from any others simply on that score, and the only professional evidence of unfitness is that which was specifically found unacceptable by the court below.

Decision of the Court of Appeal – October 2015

On 20 July 2015, the appeal from the decision of the Mental Health Court (Dalton J) in *Re Berg* [2014] QMHC 5 was heard by the Court of Appeal.

On 16 October 2015, the Court of Appeal in *Berg v Director of Public Prosecutions (Qld)* [2015] QCA 196 dismissed the appeal. Flanagan J (with whom Fraser and Morrison JJA agreed) noted (at [9]) that the primary change in circumstances relied on by the appellant since the previous reference was that the appellant's legal aid had been withdrawn. Flanagan J observed that although there was no funding in place for the appellant's matters currently before the Southport Magistrates Court for committal proceedings, if the appellant was committed for trial in the District Court, he would be at liberty to re-apply for legal aid.

Flanagan J found (at [10]) that the appeal raised three issues:

- statutory construction concerning whether a person who may be self-represented can ever be 'fit for trial' as that term is defined in the schedule to the Mental Health Act
- whether Dalton J erred in relying on evidence from the previous Mental Health Court reference in determining the appellant's current fitness for trial

- whether the determination of Dalton J that the appellant was fit for trial was infected with apparent and/or actual bias;
- apparent bias from the fact that Dalton J was one of the judges who constituted the Court of Appeal in relation to the first reference
- actual bias in relation to how the proceedings before Dalton J were conducted.

The appellant also argued that Dalton J erred in construing the definition of ‘fit for trial’ and submitted that the Mental Health Act necessarily implied, by virtue of the phrase ‘fitness to instruct counsel’, that a defendant is represented. The appellant argued that the Mental Health Act mandated representation by counsel and fitness to instruct such counsel as the ‘minimum criteria’ to participate in court proceedings. Consequently, the appellant sought orders that:

- the appellant was ‘conditionally fit for trial, being unfit only in the absence of professional representation’
- such an unfitness was of ‘permanent nature’ and
- the Court of Appeal should put all of the appellant’s charges on permanent stay, as the Court had no power to order a professional representation for the appellant and there was a substantial delay in reaching potential trial(s) from the date of charges.

Flanagan J also noted (at [16]–[18]) that:

- the appellant submitted that the situation whereby a defendant was unrepresented was not addressed by the Mental Health Act and therefore the Act foresaw that trial participation must occur via a properly instructed counsel
- the appellant was also critical of the trial judge’s incorporation of the

common law into the definition of ‘fit for trial’, specifically in the first criteria, ‘fit to plead’

- the appellant submitted that Dalton J ignored both the second and third criteria of the definition of ‘fit for trial’ in the Act, namely fitness to instruct counsel and the ability to ‘endure the person’s trial, without serious adverse consequences to the person’s mental condition’.

Statutory Construction

Flanagan J held (at [19]) that it may be accepted that the definition of ‘fit for trial’ identified three individual criteria:

- (a) fit to plead
- (b) fit to instruct counsel and
- (c) fit to endure the person’s trial.

Flanagan J held that the phrase ‘with serious adverse consequences to the person’s mental condition unlikely’ might only be referable to the third criterion of ‘fit to endure’, or, alternatively, the phrase might be referable to all three criteria. Flanagan J held that the positioning of a comma after the term ‘endure the person’s trial’ would suggest that the phrase ‘with serious adverse consequences to the person’s mental condition unlikely’ was applicable to all three criteria both individually and collectively.

Flanagan J also noted (at [20]) that the appellant submitted that the Act clearly listed three equally indispensable criteria in the definition of ‘fit for trial’ and that incapacity in any one of them was reflective of unfitness. Flanagan J held that this submission may be accepted, contrary to the respondent’s submission that fitness to instruct counsel was not relevant where a defendant is self-represented. Flanagan J cited the reasoning of Connolly J in *R v House*: ‘a finding of unfitness for trial cannot be properly be [sic] made without the statutory criteria being addressed

and a positive conclusion reached in relation to each of them’.

Referring to the decisions in *Sherritt Gordon Mines Ltd v Federal Commissioner of Taxation* [1977] VR 342, 353 and *Douglas v Tickner* (1994) 49 FCR 507, 514, Flanagan J emphasised (at [21]) that Parliament had mandated that each criterion must be met through its use of the word ‘means’. The legislature’s use of the word ‘means’ was a well-established drafting principle and is used where the definition is intended to be exhaustive. Further, Flanagan J held that the use of the word ‘and’ required that each criterion be considered conjunctively. An inability to meet one criterion equated to an inability to be ‘fit for trial’. Flanagan J noted that at common law, the concept of ‘fit to plead’ incorporated the concept of ‘fit to instruct counsel’.

Flanagan J noted (at [22]) that although on its face it may appear as though the definition of ‘fit for trial’ sought to exclude any other factors deemed relevant by the common law in determining a person’s fitness for trial, further analysis of the components of the definition was required. Flanagan J emphasised that the individual components were not defined in the Act. The phrase ‘serious adverse consequences’ and ‘mental condition’ were also undefined terms. Whilst the phrases ‘fit to endure the trial’ and ‘with serious adverse consequences to the person’s mental condition unlikely’ were capable of interpretation based on their ordinary meaning, the phrases ‘fit to plead’ and ‘fit to instruct counsel’ did not hold an ordinary meaning but were terms which had their origin in the common law. Flanagan J held that in such circumstances, it was permissible in construing these terms to have reference to the common law. In a decision concerning the Tasmanian Criminal Code in *Boughey v The Queen* (1986) 161 CLR 10, Brennan J observed (at [30]):

It is erroneous to approach the Code with the presumption that it was intended to do

no more than restate the existing law ... but when the Code employs words and phrases that are conventionally used to express a general common law principle, it is permissible to interpret the statutory language in the light of decisions expounding the common law’ (citations omitted).

Flanagan J held (at [23]) that in light of the purpose of the Mental Health Act, ‘fit to plead’ meant more than the ability to communicate, in some form, the words guilty or not guilty in response to an arraignment. Flanagan J held that it would necessarily require, at the very least, an inquiry into a defendant’s understanding and comprehension of any charge. Further, given that it was a well-established common law phrase, it was necessary to determine whether parliament intended the common law definition to be incorporated within the statutory definition.

Flanagan J accepted (at [24]) the trial judge’s observation that it would be an absurdity if ‘fit to instruct counsel’ was read literally in the sense that a defendant must always have counsel present to be fit for trial. This absurdity was most obviously demonstrated where a defendant withdraws instruction from his or her legal representatives with the intention to be deemed unfit for trial, perhaps permanently, and to effect the proceedings being discontinued or permanently stayed. Such an absurdity would also arise if a defendant failed to comply, either intentionally or otherwise, with reasonably imposed conditions of legal aid. Flanagan J held that the definition of ‘fit for trial’ which means in part ‘fit to instruct counsel’ was a definition of general application which must be capable of applying to numerous and varying circumstances.

Flanagan J held (at [25]) that to determine whether a person has the capacity to instruct counsel does not require counsel to be present. Flanagan J held that the relevant assessment was of the person’s capacity or ability to instruct counsel and that the full definition of ‘fit for trial’ by reference to a person’s fitness to endure the person’s trial, with serious

adverse consequences to the person's mental condition unlikely, permitted the Mental Health Court to determine fitness for trial even where a person was self-represented.

Citing the Acts Interpretation Act 1954 (Qld) s 14A(1) and the decisions in *Mills v Meeking* (1990) 169 CLR 214; *Saraswati v The Queen* (1991) 172 CLR 1, Flanagan J held (at [26]–[27]) that the construction of the definition and its application to a person who was self-represented was also consistent with the purpose of the Mental Health Act as stated in ss 4 and 5 which includes balancing the rights and freedoms of defendants (including the right to a fair trial) with the rights and freedoms of others and the protection of the community.

Flanagan J held (at [27]) that an interpretation that protects a defendant's right to a fair trial and permits a determination of a defendant's fitness to stand trial where they are self-represented strikes the appropriate balance.

Legislative History of the Definition of 'Fit for Trial'

Flanagan J held (at [28]) that the correctness of the construction of the definition of 'fit for trial' by reference to the common law was also supported by a brief examination of the legislative history of the definition of 'fit for trial'.

The definition of 'fit for trial' was first introduced into the Mental Health Act 1974 by the Mental Health Act, Criminal Code and Health Amendment Act 1984 (Qld). During the second reading speech (Queensland *Parliamentary Debates*, Legislative Assembly, 22 March 1983, 3636), the then minister Brian Austin for health, stated:

Fitness to be tried is not to be equated with fitness to plead. Fitness to be tried [in the 1984 Act] involves an assessment of all the mental and emotional capacities of the individual at the relevant time. If he lacks any of the required capacities, he should not be tried.

When the Bill was reintroduced the following year, the then minister Brian Austin

for health stated (Queensland, *Parliamentary Debates*, Legislative Assembly, 29 August 1984, 350):

The new concept of 'fit for trial' is not to be equated with the term 'fit to plead'. In commenting on this definition, Mr Justice Kirby, who made a significant submission on the Bill, has wondered why it has been decided to include this definition in mental health legislation and why it has not been thought preferable to leave it to the Criminal Code and the common law.

The reason is quite simple. Although fitness to plead may well be a concept of the Criminal Code and common law, the concept of fitness for trial is not. It is very necessary that mental health legislation is specific in this matter.

Flanagan J held (at [34]) that the then minister Brian Austin for health wrongly stated that there was no common law concept of fitness for trial. Flanagan J held that the common law concepts of 'fitness to plead' and 'fitness for trial' continue to be used interchangeably (albeit incorrectly) and that the common law concept included an assessment of a defendant's mental and emotional capacities at the time his or her fitness to plead or be tried is called into question. Flanagan J observed that the then minister for health construed fitness to plead in a technical and narrow sense, namely the ability to communicate a plea of guilty or not guilty to a charge with, perhaps, the required understanding of the charges being brought against him or her.

After an extensive process of consultation beginning in 1993 and the production of a Green Paper in 1994, the Mental Health Act 2000 replaced the Mental Health Act 1974. The definition of 'fit for trial' was not a newly enacted definition in the Mental Health Act 2000. It was identical to the definition of 'fit for trial' contained in the 1974 Act. The Explanatory Memorandum, in explaining the definition of fitness for trial for the present Act, made clear reference to the common law:

A person will be unfit for trial if the person is unable to understand what it means to plead guilty or not guilty, or understand what he or she is charged with. Also, the person will be unfit for trial if they are not able to understand the general nature of court proceedings, or if they are unable to tell their lawyer or the court their version of events or comment to their lawyer about the evidence. The person will also be unfit for trial if, in attending the trial, they are likely to experience a serious deterioration in their mental condition.

Flanagan J held (at [29]) that the use of the word ‘or’ in which a defendant must have the ability to tell their version to their lawyer or the court also suggested that the requirement to instruct counsel could not literally require a defendant to be represented in order to be fit for trial.

On 14 March 2000, during the second reading speech (Queensland, *Parliamentary Debates*, Legislative Assembly, 14 March 2000, 349), the then Minister for Health, stated:

Unsoundness of mind and fitness for trial should not be confused. As these two legal concepts are central to the determinations made, it is important to understand the difference between the two concepts.

Fitness for trial ... is considered when a person is not of unsound mind in relation to the offence but is unable to understand the nature of the proceedings, to understand the meaning of a plea of guilty or not guilty or to instruct counsel. It also means a person may be unable to endure his or her trial without serious deterioration of their mental state. For a person with a mental illness this is usually a transient condition, although at times an illness can be so severe that the person’s unfitness for trial is prolonged.

Flanagan J held (at [31]) that both the explanatory memorandum and the second reading speech suggested that the terms ‘fit to plead’ and ‘fit to instruct counsel’ were intended to be far more expansive than their literal meanings.

Fitness to Plead

Flanagan J noted (at [35]) that whilst the appellant was correct in his submission that an Act of Parliament prevails to the extent of any clear contradiction to the common law, the definition of ‘fit for trial’ in respect of the criteria of fitness to plead was intended to reflect and incorporate the common law and there was therefore no contradiction.

Flanagan J noted (at [36]) that although Dalton J stated in *Re Berg* [2014] QMHC 5 (at [38] and [43]) that ‘[a]t common law fitness to plead and fitness to stand trial were regarded as the same thing’, that was historically not the case. Flanagan J observed that although the terms are now used interchangeably, perhaps erroneously so, the terms relate to the timing of the question for fitness and the procedures that ensue dependent on that timing. Fitness to plead was a preliminary threshold test that included the requirement to understand the nature of the charge(s) so as to be able to plead, to communicate his or her plea and understand generally the nature of the proceeding that was about to be commenced. Fitness to be tried focused on a defendant’s understanding and following of the trial so as to be able to make a proper defence. Flanagan J emphasised that, in both cases, a defendant’s comprehension of the proceeding was of importance for a fair trial. As the law developed, the focus appeared to be whether a defendant was fit to plead *and* to stand his or her trial and, as a consequence, the two concepts merged. Flanagan J noted that it appeared ultimately that fitness to plead, as it developed, incorporated all aspects of fitness for trial.

Citing the decision in *R v Presser* [1958] VR 45, Flanagan J highlighted (at [37]) the final passage: ‘[The accused] must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, *if any*’.

Noting that the appellant relied upon a submission that the criteria in the decision in

Presser were posited on the assumption that there was representation, Flanagan J emphasised (at [38]) that this was incorrect as the emphasis in the passage demonstrated and that Smith J did not require a defendant to be represented so as to be fit for trial. Rather, Smith J contemplated that ‘questions of fitness might well arise with respect to self-represented people’.

Flanagan J also cited (at [39]) the High Court decision in the case of *Kesavarajah* (1994) 181 CLR 23 in which Mason CJ, Toohey and Gaudron JJ stated (at [245]):

In *Reg. v. Presser*, Smith J. elaborated the minimum standards with which an accused must comply before he or she can be tried without unfairness or injustice. Those standards, which are based on the well-known explanation given by Alderson B to the jury in *R. v. Pritchard*, require the ability (1) to understand the nature of the charge; (2) to plead to the charge and to exercise the right of challenge; (3) to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged; (4) to follow the course of the proceedings; (5) to understand the substantial effect of any evidence that may be given in support of the prosecution; and (6) to make a defence or answer the charge’.

In *Eastman v The Queen* (2000) 203 CLR 1, the defendant had dismissed his legal representatives on a number of occasions and conducted his own defence for lengthy periods. The issue of fitness to plead and be tried was considered by the High Court in the context of the test contained in the Mental Health (Treatment and Care) Act 1994 (ACT) s 68 (3). Whilst Gleeson CJ stated that the ‘ultimate test to be applied is the statutory test’ (the test was termed ‘fit to plead’ and had nine elements that wholly reflected the test in *Presser*), he cited with approval (at [25]–[27]) the principles from *R v Berry* 66 Cr App R 156 and *R v Taylor* 77 CCC (3d) 551 and noted they were consistent with the statutory test.

In *R v Berry*, Geoffrey Lane LJ noted (at [158]):

It may very well be that the jury may come to the conclusion that the defendant is highly abnormal, but a high degree of abnormality does not mean that the man is incapable of following a trial or giving evidence or instructing counsel and so on.

In *R v Taylor*, the Ontario Court of Appeal recorded (at [564]–[565]) the following propositions:

- (a) The fact that an accused person suffers from a delusion does not, of itself, render him or her unfit to stand trial, even if that delusion relates to the subject matter of the trial.
- (b) The fact that a person suffers from a mental disorder which may cause him or her to conduct a defence in a manner which the court considers to be contrary to his or her best interests does not, of itself, lead to the conclusion that the person is unfit to stand trial.
- (c) The fact that an accused person’s mental disorder may produce behaviour which will disrupt the orderly flow of a trial does not render that person unfit to stand trial.
- (d) The fact that a person’s mental disorder prevents him or her from having an amicable, trusting relationship with counsel does not mean that the person is unfit to stand trial.

Flanagan J noted (at [44]) that these principles were consistent with the definition contained within the Mental Health Act, given that the Act reflected the common law, which was also cited with apparent approval by Beazley JA in *Wills v The Queen* [2007] NSWCCA 160 (at [76]–[77]). Flanagan J also agreed with the remarks of Mason P, Wood CJ at CL and Sully J in *R v Rivkin* (2004) 59 NSWLR 284, (at [298]) which were approved by (at [61], [64]) by Beazley JA (at [61], [64])

in *Wills*, whereby the *Presser* requirements were held to be the ‘minimum requirements for a fair trial’ and that it was irrelevant if suitable medication or medical treatment might have enabled a defendant to understand and follow the proceedings ‘better’, or if the defendant possessed greater intelligence or acuity of the mind. Flanagan J emphasised that as the NSW Court of appeal held in *R v Rivkin* (at [301]), the *Presser* test does not contemplate or assume a defendant can perform at trial according to his or her maximum potential.

Flanagan J noted (at [45]) that Gaudron J in *Eastman* quoted (at [58]) *Presser* with approval as representing the concept of ‘fit to plead’ and did not make any reference to the ACT statutory test. Similarly, Hayne J quoted (at [298]) *Kesavarajah* (which in turn quoted *Presser*) as constituting the common law test of fitness to plead and stand trial. Hayne J then noted (at [299]–[300]) that questions of ‘fitness to plead’ were regulated by the Mental Health (Treatment and Care) Act 1994 (ACT) and that it was unnecessary to decide whether s 68(3) of the Act applied to both questions of fitness to plead and questions of fitness to be tried (that is, whether the section could operate after a defendant had entered a plea and the trial had commenced).

In relation to the appellant’s submission that the trial judge did not take the common law factors into account, Flanagan J held (at [45]) that the trial judge expressly stated that she found the appellant met the *Presser* minimum requirements (as endorsed in *Eastman* and *Kasavarajah*).

Fitness to Instruct Counsel

Flanagan J cited (at [47]) the decision in *Re T* (2000) 109 A Crim R 559 in which Chesterman J had to consider the identical definition in the context of the Mental Health Act 1974. After referring to the reasoning in *R v Pritchard*, *R v Podola* [1960] 1 QB 325 and *Ngatayi v The Queen* (1980) 147 CLR 1, Chesterman J concluded that the accused was fit for trial

even though he had delusions that there was an organised conspiracy against him which might cause him to give an unbalanced account to his lawyers. Chesterman J observed (at [21]–[22]):

The authorities show a consistency of approach. An accused is fit for trial if he is able to answer the charge brought by the prosecution. To do so he must understand that he is on trial, and what that means, and he must understand the evidence led in support of the charge so that he can put forward whatever answer he has to it.

The authorities also suggest that the test is not a demanding one. If an accused realises, in general terms, what it is to be put on trial and can make sense of the evidence against him he can take a sufficient part in proceedings for the trial to proceed.

Chesterman J (at [31]) was not satisfied that the defendant’s paranoia and distrust of counsel made him unfit to instruct counsel:

[The reporting psychiatrist’s] concern was that the [defendant] would not give a balanced account of the facts to his lawyers. It is not, I think, necessary that an accused give such an account. It is enough, on the authorities, that he understands the evidence against him.

Flanagan J emphasised (at [49]) as critical the determination in *Re T* that it was not necessary that the defendant give an account to his legal representatives but, rather, that it was enough that the defendant *personally* understand the evidence so as to answer the charge. Flanagan J also cited (at [50]) the decision in *R v House* [1986] 2 Qd R 415, in which Connolly J (at [422]) also considered the definition of ‘fit for trial’ in the 1974 Act:

Capacity to instruct counsel involves understanding the evidence which is led so as to be able to inform counsel whether it is true or not and whether there are other facts which qualify or explain the evidence adduced. It does not involve understanding

the law especially if, as in this case, he had the benefit of counsel.

To similar effect in *R v M* [2002] QCA 464, the Chief Justice (at [13]) considered the meaning of ‘fit to ... instruct counsel’ in the same definition of ‘fit for trial’ in the Act:

Fitness for trial, in relation to the capacity to instruct counsel, posits a reasonable grasp of the evidence given, capacity to indicate a response, ability to apprise counsel of the accused’s own position in relation to the facts, and capacity to understand counsel’s advice and make decisions in relation to the course of the proceedings. It does not extend to close comprehension of the forensic dynamics of the courtroom, whether as to the factual or legal contest. For a person represented by counsel, fitness for trial of course assumes that counsel will represent the client on the basis of the client’s instructions. That the giving of such instructions may take longer because of intellectual deficit is a feature with which courts should and do bear.

Flanagan J noted (at [52]) that there were two relevant aspects to the observation made by the Chief Justice (at [4]–[6]):

- the reference to the common law in construing the relevant definition.
- the use of the words ‘for a person represented by counsel’ (and likewise Connolly J’s words ‘if ... he had the benefit of counsel’).

Flanagan J held that the Chief Justice must be taken to accommodate a determination of capacity to instruct counsel where the defendant is self-represented. Citing the decision in *Re Walton* [1992] 2 Qd R 551, Flanagan J noted (at [53]) that if a defendant is represented by counsel, it may be easier for a defendant to meet the minimum requirements of *Presser*. As noted by Gibbs, Mason and Wilson JJ in *Ngatayi v The Queen* (1980) 147 CLR 1 (at [9]), it was relevant that a defendant is defended by counsel and that with the assistance of counsel, a defendant was usually

able to make a proper defence so as to be fit to plead and be tried. However, Flanagan J emphasised that does not mean that in all cases where a defendant is self-represented, they are unable to make a proper defence.

Permanent Stay of Charges

In relation to the appellant’s reference to the principle in *Dietrich v The Queen* (1992) 177 CLR 292, that as long as he remains legally unrepresented, his charges should be permanently stayed, Flanagan J held (at [56]) that the *Dietrich* principle did not apply to committals and, when properly construed, the definition of ‘fit for trial’ permits a person’s fitness to be assessed including that person’s fitness to instruct counsel even where the person is self-represented.

In relation to the appellant’s submission that Dalton J erred in relying on evidence from the previous reference to the Mental Health Court, Flanagan J noted (at [57]) that because of the change in circumstances since the previous reference, which included the absence of legal representation and the opinions expressed by Dr Ziukelis in his letters, the appellant submitted that the evidence of the previous reference was ‘entirely’ based on the assumption that legal counsel was present.

Flanagan J held (at [58]) that the appellant has failed to establish this alleged error, since the evidence from the previous reference remained relevant to the present reference and the change in circumstances did not detract from the relevance of this evidence.

Apparent Bias

Flanagan J noted (at [64]) that the appellant’s allegation of apparent bias arose from the fact that Dalton J sat on the appellant’s appeal in respect of the previous reference which was decided by the Mental Health court in 2014. The appellant submitted that, having sat on the appeal, Dalton J should have recused herself from hearing the present reference. The

appellant further submitted that by failing to recuse herself, Dalton J viewed 'the present reference from the standpoint of the previous one'.

Flanagan J held (at [65]) that this submission should be rejected. Flanagan J noted having sat as a member of the Court of Appeal in respect of the previous reference, Dalton J had, early in the proceedings, but after having granted Mr Andreas Berg leave to appear for the appellant, stated that she was familiar with the previous reference having sat on the appeal. Having heard this statement, the appellant made no application for Dalton J to recuse herself. Flanagan J emphasised that since the appellant was not represented by counsel, this failure to take objection might not necessarily amount to a waiver. Flanagan J cited the observations by Brennan, Deane and Gaudron JJ in *Vakautu v Kelly* (1989) 167 CLR 568 (at [572]):

Where such comments which are likely to convey to a reasonable and intelligent lay observer an impression of bias have been made, a party who has legal representation is not entitled to stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground that, by reason of those earlier comments, there has been a failure to observe the requirement of the appearance of impartial judgment. By standing by, such a party has waived the right subsequently to object. The reason why that is so is obvious. In such a case, if clear objection had been taken to the comments at the time when they were made or the judge had been asked to refrain from further hearing the matter, the judge may have been able to correct the wrong impression of bias which had been given or alternatively may have refrained from further hearing.

Flanagan J noted (at [66]) that this passage suggested that waiver will not necessarily arise where a party is not legally represented. Flanagan J noted however that it remained the case that the appellant, knowing that Dalton J had sat on the appeal from the previous reference, did not request Dalton J to recuse herself. Flanagan J held (at [67])

that the mere fact that Dalton J sat as a member of the Court of Appeal in respect of the previous reference was not in itself sufficient to give rise to a reasonable apprehension that Dalton J might not bring an impartial and unprejudiced mind to the present reference. As observed by French CJ in *British American Tobacco v Laurie*:

Particular applications of the general principle enunciated in *Ebner* will be required for the different classes of case in which an apprehension of bias is said to arise and different sets of circumstances within those classes. A gratuitous observation, adverse to a party, made in the course of proceedings or in extra-curial speech is one thing. A finding properly made by a judge in the course of an interlocutory ruling or in earlier proceedings is another. The latter is the area of concern in this appeal. It is an area in which courts should be astute not to defer to that kind of apprehension that is engendered by the anticipation of an adverse outcome, rather than a legitimate concern about partiality. By way of example, the fact that a judge who has made a finding of fact adverse to a party on particular evidence is likely to make the same finding on the same evidence, is not of itself indicative of bias. It could be indicative of consistency subject to the judge having an open mind when it came to argument about the effect of the evidence.

Flanagan J emphasised (at [68]) that it was important to note what was decided by the Court of Appeal in respect of the appeal from the previous reference. The appellant's appeal was allowed in respect of the Mental Health Court's finding that the appellant was not of unsound mind at the time of the alleged offences. The Court of Appeal found that there was sufficient material before the Mental Health Court to show that there was reasonable doubt as to whether the appellant committed the offences with which he was charged. In those circumstances, s 268(1) of the Act operated to prevent the Mental Health Court making a finding of soundness of mind. The appellant was therefore partially successful before the Court of Appeal.

Flanagan J concluded (at [71]) that no fair-minded lay observer would reasonably apprehend that Dalton J might not bring an impartial and unprejudiced mind to the resolution of the present reference on the basis that she sat on the appeal from the earlier reference. Flanagan J noted that Dalton J was therefore correct in observing at [48]:

Since the hearing of this matter I have been made aware that Mr Berg has, through Andreas Berg, complained about me to the Chief Justice. I do not know whether I am fully apprised of the detail of that complaint, and it is not appropriate for me to address it here. However, I do know that part of the complaint is that I ought not have heard this matter because I sat on the appeal from Justice Lyons' 2011 decision. Mr Berg knew this at the hearing and did not object. Furthermore, I do not consider it is any valid basis to object, and would not have disqualified myself had he raised it at the hearing. There was nothing in my earlier involvement in the matter which prevented, or could reasonably be perceived to prevent, my bringing independent judgment to bear on the new circumstances which Mr Berg relied upon to ask for a determination different to the one which Justice Lyons made in 2011.

Actual Bias

The appellant submitted that Dalton J conducted the proceedings in a 'biased, interrupting and influencing manner' and that there were three aspects to the allegation of actual bias:

- actual bias was demonstrated from how Dalton J conducted the proceedings
- by announcing her opinion regarding the medical evidence before consulting with the two assisting psychiatrists, Dalton J influenced the opinions of the assisting psychiatrists
- actual bias was demonstrated by the treatment and criticism by Dalton J of the evidence of Dr Ziukelis

As to the first of these matters, Flanagan J noted (at [73]) that an examination of the

transcript of proceedings did not demonstrate any bias. The primary submission of the Director of Public Prosecutions was that because a committal was an administrative rather than a judicial proceeding, it was inappropriate to apply the *Presser* criteria to determine whether or not the appellant was fit to participate in a committal. Dalton J rejected this submission, observing (at [32]):

It seems to me that the important principles which underlie the rule that an accused person must be fit for trial also mean that an accused person ought to be fit at the time of the committal. If the accused person is not able to understand the evidence at a committal and not of sufficient understanding to put relevant questions in cross-examination and make a decision as to whether or not a rebuttal case ought to be led, it cannot be said that the accused person is able to take advantage of the committal. While the committal process may be more benign for the accused than a trial, someone who is not fit might prejudice their interest by making decisions, for example, to plead if called upon, or otherwise make admissions against interest during the course of proceedings which could be greatly to that person's disadvantage.

Flanagan held (at [74]) that although the Director of Public Prosecutions had not sought to challenge this aspect of Dalton J's judgment and the issue did not arise for determination on this appeal, the finding was, however, favourable to the appellant and was relevant in considering any allegation of actual bias in the conduct of the proceedings.

As to the allegation that Dalton J showed actual bias by 'interrupting', Flanagan held (at [75]) that an examination of the transcript of proceedings revealed that Dalton J did intervene when Mr Andreas Berg sought to ask questions of a Legal Aid solicitor, the answers to which would have revealed privileged communications. Flanagan J emphasised that Dalton J was correct to intervene and that such intervention was for the purpose of protecting the appellant's privileged communications with Legal Aid. Flanagan J also

noted (at [76]) that Dalton J correctly interrupted Mr Andreas Berg when he persisted in a submission that the Mental Health Court should direct Legal Aid as to how the appellant should be represented.

As to the general conduct of the proceedings, Flanagan J further noted (at [77]) that Dalton J gave leave to Mr Andreas Berg to appear on behalf of the appellant and granted the appellant's request to be provided with a transcript of proceedings and also ensured that relevant evidence as to the status of any grant of legal aid to the appellant was presented. Flanagan J concluded that there was therefore no substance in the appellant's submission in respect of actual bias.

Flanagan J also held (at [78]) that there was simply no evidence that either of the assisting psychiatrists was in any way influenced by Dalton J in providing their advice. Flanagan J held that any suggestion to the contrary was to impugn the independence of the assisting psychiatrists without justification.

Finally, Flanagan J held (at [80]) that Dalton J's careful analysis of the letters from Dr Ziukelis supported the conclusion that there was no proper basis to act on the assertions in Dr Ziukelis' letters. The mere fact that Dalton J preferred the previous opinions of Drs Kovacevic and Beech over the opinions contained in the letters of Dr Ziukelis did not support an allegation of actual bias.

Special Leave Application to the High Court – April 2016

On 13 April 2016, the High Court (Bell and Gageler JJ) in *Berg v Director of Public Prosecutions (Qld)* [2016] HCASL 64 refused an application for special leave to appeal the decision of Court of Appeal in *Berg v Director of Public Prosecutions (Qld)* [2015] QCA 196.

Discussion

As Dalton J noted (at [5]) in *Berg v Director of Public Prosecutions (Qld)* [2012] QCA 91, Vincent Berg's matters had 'an

extraordinarily long history of delay'. The multitude of decisions, including seven decisions of the Court of Appeal, which chronicle Mr Berg's persistent efforts to avoid trial for a multitude of offences, some of which were alleged to have been committed over 15 years previously, are testament to the forbearance of the Queensland courts.

However, the most recent decision of the Queensland Court of Appeal in *Berg v Director of Public Prosecutions (Qld)* [2015] QCA 196 has interpreted the common law stipulations for 'fitness for trial' less onerously than might have previously been assumed. The decision, which effectively removes the safeguard that the accused should, in most circumstances, have legal representation in a criminal trial, may well prejudice those who are disadvantaged by an intellectual or cognitive disability or by mental illness and are thereby unable to participate meaningfully in their trial.

Arguably the most enlightened mental health legislation in the world, the Mental Health Act 2000 (Qld) featured a number of innovative provisions aimed at diverting mentally ill offenders out of custody and into treatment.³ In the case of a person with a mental illness or cognitive impairment who was charged with a serious offence, the person, the person's legal representative or the Director of Mental Health could make a reference for the charge or charges to be heard in the Mental Health Court.⁴ The Mental Health Court is constituted by a Supreme Court justice assisted by two psychiatrists⁵ and operates on an inquisitorial model. The Mental Health Court is not bound by the rules of evidence, no party bears the onus of proof of any matter and matters must be decided on the balance of probabilities.

A reference to the Mental Health Court required a supporting expert report in which the questions of soundness of mind and / or fitness for trial were addressed by the reporting psychiatrist.⁶ Where a person was already subject to involuntary treatment for a mental illness, the Mental Health Act 2000 (Qld)

stipulated that an expert report must be produced to address the question of whether the person was of sound of mind at the time of the offence or offences and also to confirm that the person was currently fit to enter a plea, instruct his or her solicitor and participate meaningfully at trial.

On 5 March 2017, the Mental Health Act 2016 (Qld) commenced. Unlike the legislation it replaced, the Mental Health Act MHA 2016 (Qld) has no statutory definition of 'fitness for trial.' Also, by the Mental Health Act 2016 (Qld), where a person is already subject to a treatment authority for their mental illness or has an intellectual disability, the person may elect not to request or obtain an expert report and the chief psychiatrist may exercise a discretion not to direct that a report be produced to consider the question of 'soundness of mind' or 'fitness for trial.'

Following the commencement of the new Mental Health Act 2016 (Qld), it can be predicted that some persons with mental illness or an intellectual disability who are charged with serious offences, particularly those lacking insight into their mental illness or intellectual disability, may not seek legal advice and may not avail of the option of referring their charges to the Mental Health Court. It is

also likely that a proportion of persons with a mental illness or intellectual disability may elect not to be represented at trial or to plead to the offences and subsequently be convicted when previously, pursuant to provisions of the Mental Health Act 2000 (Qld), those persons may have been found of 'unsound of mind' and / or 'unfit for trial' and acquitted by the Mental Health Court.

Note

1. Kasinathan J, Le J, Barker A and Sharp G. 'Presser – the forgotten story' (2016) 24 *Australasian Psychiatry* 478.
2. Scott R, 'Fitness for trial in Queensland' (2007) 14 *Psychiatry, Psychology and Law* 327.
3. Scott R, 'Forensic Provisions of the *Mental Health Act 2000* (Qld)' (2007) 14 *Psychiatry, Psychology and Law* 272.
4. Scott R 'Court-ordered Treatment for Serious Offenders with Mental Illness' (2008) 16 *Journal of Law and Medicine* 405.
5. Scott R, 'The Function of the Assisting Psychiatrists in the Queensland Mental Health Court' (2009) 16 *Psychiatry, Psychology and Law* 7.
6. Scott R, 'Expert Evidence in the Queensland Mental Health Court' (2009) 16 *Psychiatry, Psychology and Law* S13.