ORDER PROHIBITING PUBLICATION OF CERTAIN EVIDENCE PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011: SEE [94].

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: DISTRICT COURT ORDERS PROHIBITING PUBLICATION OF CERTAIN EVIDENCE AND THE COMPLAINANT'S VICTIM IMPACT STATEMENT REMAIN IN FORCE: SEE [90].

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA400/2018
[2019] NZCA 261

BETWEEN	DAVID JOHN SCOTT Appellant
AND	THE QUEEN Respondent

Hearing:	9 April 2019
Court:	Clifford, Katz and Thomas JJ
Counsel:	B J Hunt and A S Olney for Appellant S K Barr for Respondent
Judgment:	26 June 2019 at 2.30 pm

JUDGMENT OF THE COURT

A The application to amend the grounds of appeal is granted.

B The application for leave to adduce fresh evidence on appeal is declined.

C The appeal against conviction and sentence is dismissed.

D Order prohibiting publication of the measurements made by Dr Krebs and Dr Studd referred to at [72].

REASONS OF THE COURT

(Given by Thomas J)

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Introduction

[1] David Scott was a Kapiti Coast District Councillor when, on 13 April 2017, he allegedly indecently assaulted a senior staff member by placing his hands on her hips and intentionally pressing his groin area against her. He was convicted following a jury trial and sentenced to a fine of $1,500.[1] Mr Scott now appeals his conviction and, should that fail, he appeals the refusal to grant him a discharge without conviction.

[2] On 29 November 2018, Mr Scott filed an application to amend the grounds of his appeal. That application is granted. The appeal against conviction is therefore

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1 *R v Scott* [2018] NZDC 12265.

now advanced on the ground that there were irregularities in the trial that caused it to miscarry, namely:

(a) the failure to call expert medical evidence; and

(b) the "fundamental error" of asking a Crown witness, Mr Scott's general practitioner, to measure Mr Scott's penis during an adjournment and then to give evidence about that.

[3] In support of the appeal, Mr Scott seeks leave to adduce fresh evidence from two medical experts.

Background

[4] On 13 April 2017, Mr Scott and the complainant were at a council meeting. The meeting broke for morning tea. The complainant was standing while talking to the Mayor. She said she felt Mr Scott stop momentarily behind her, place his hands on her hips and intentionally press his groin area into her backside. She described feeling a belly pushed firmly into her back, a belt buckle, and two legs moving around the top of her legs and bottom. She said she could feel something firm down Mr Scott's pants, which she later specified was a penis. She did not believe it was an erect penis.

[5] The Crown case was based principally on the complainant's evidence. The defence case as it developed at trial rested on two planks. First, that Mr Scott had circumcision surgery on 24 November 2016 and his groin was still tender on the day of the incident, meaning he would not have pressed his penis against the complainant due to the pain he still suffered. Secondly, that Mr Scott's penis was not the size described by the complainant and the four to five-inch object she felt was likely Mr Scott's wallet. During the cross-examination of Dr Cammack, Mr Scott's general practitioner, trial counsel asked him to measure Mr Scott's penis during an adjournment. Dr Cammack then gave evidence of that measurement to the jury. Mr Scott's wallet was also measured and its size was closer to the complainant's assessment of the size of the object she felt pressed into her.

The conviction appeal

[6] The context for Mr Scott's conviction appeal was that he had an arguable defence to the charge of indecent assault, namely, that he did not indecently assault the complainant and he could not have done so.

[7] Although Ms Hunt, appearing for Mr Scott, submitted Mr Scott's position at trial was that there was no contact between him and the complainant, in fact Mr Scott's position from the time of his police interview to when he gave evidence was that he could not recall whether there was contact or not. He did not deny there was any contact.

[8] It is therefore fair to describe the essential issue for the jury as being whether Mr Scott touched the complainant as he passed her in an act of deliberate indecency as the Crown alleged, or inadvertently as he moved or squeezed past her.

[9] In Ms Hunt's submission, trial counsel made a fundamental error in not adducing expert medical evidence to support Mr Scott's contention that he was still suffering pain in his groin as a result of earlier circumcision surgery, making it most unlikely he would have used his body in the way alleged. Ms Hunt then said that, when the dimensions of Mr Scott's penis became an issue during the trial, the defence would have been well placed to respond with expert medical evidence. Ms Hunt was understandably reluctant to express it in these terms but the appeal was clearly based on counsel incompetence.

[10] The leading authority on appeals based on counsel incompetence is *R v Sungsuwan*, where the Supreme Court stated:[2]

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

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2 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [70] per Gault, Keith and Blanchard JJ.

[11] Accordingly, the correct approach is to determine whether there was any error or irregularity arising in trial counsel's representation of Mr Scott and, if so, whether there was a real risk that any of those errors or irregularities affected the outcome of his trial.[3] In order for the appeal to succeed, the alleged errors must have been such that, had they not occurred, there was a real possibility that a not guilty verdict might have been delivered.[4]

Fresh evidence

[12] Mr Scott has applied for leave to adduce fresh evidence being expert reports from Dr Jeremy Krebs, an endocrinologist/diabetologist, and Dr Rodney Studd, a urologist.[5]

[13] Ms Hunt accepted the evidence could not be described as fresh but stressed its cogency. In her submission, the reason the evidence was not before the jury was as a result of counsel error in failing to brief the evidence in advance.

[14] In *S (CA88/2014) v R*, this Court dealt with the production of fresh evidence on appeal in cases of trial counsel error.[6] It said that, in such a case, the Court will usually treat the evidence as fresh if persuaded that counsel error explains its absence from the record and if satisfied that it would have been led at trial but for counsel error.[7]

[15] The consideration of the appeal necessarily involves a consideration of the fresh evidence. The appeal is on the grounds the failure to call the evidence amounted to counsel incompetence. We therefore consider the fresh evidence as part of our assessment of the merits of the appeal.

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3 *Wang v R* [2016] NZCA 632 at [12].
4 *R v Sungsuwan*, above n 2, at [110] per Tipping J.
5 See Court of Appeal (Criminal) Rules 2001, r 12B.
6 *S (CA88/2014) v R* [2014] NZCA 583.
7 At [15]. See also *Loffley v R* [2013] NZCA 579 at [58].

Failure to call expert medical evidence

[16] We begin our assessment by reviewing what happened at the trial before considering the affidavits filed for the appeal from trial counsel and Mr Scott, and the fresh evidence.

Mr Scott's police interview

[17] In his video interview with the police, which was played to the jury, Mr Scott said the room where the alleged incident took place was full in excess of its capacity. He explained that he had injected himself with insulin, which meant he needed something to eat and drink. He therefore made for the table where food was laid out and said he "sort of squashed" to reach the table. He said he did not recall the actual incident but did say he pushed past the complainant. He said he would have been protective of his groin area, not only because of the injection he had just administered to his stomach, but also because of the circumcision surgery he had undergone four and a half months earlier. He said any contact with that area was extremely painful, and that two of the stitches from the surgery had not by that time dissolved and they were red and raw. He admitted that he had not discussed this with his doctor.

Evidence at trial

[18] The Crown referred Mr Scott to the written statement he had given the detective at the end of his police interview, wherein he said it was physically impossible for him to have done what the complainant claimed, as he had injected two shots of insulin just prior to the alleged incident. Mr Scott had seen Dr Cammack (or a nurse at his practice) nine times between 9 December 2016 and the date of the incident on 13 April 2017 for the purpose of monitoring his diabetes. Mr Scott was closely cross-examined by the Crown on the frequency of his GP appointments and his insulin regime. His doctor had prescribed insulin once a day but Mr Scott's evidence was that, because the quantity of insulin had been increased, he administered two injections. The regimen, however, was that the insulin was to be administered in the evening.

[19] The Crown then put it to Mr Scott that he was exaggerating the pain he suffered as a result of his circumcision. It was put to him that, had he been still experiencing the degree of discomfort he maintained, he would have raised it with his GP, particularly given the frequency of his doctor's visits for the purposes of his diabetes checks. The same general proposition was put to Mr Scott in relation to his claim that the insulin injections caused "massive bruising".

[20] Mr Scott was then referred to his email exchange with the complainant, which took place a few days after the incident. The complainant had emailed Mr Scott saying:

> Your behaviour last Thursday in holding my hips and pushing your genitals against my backside was obviously totally unacceptable.

[21] Mr Scott responded the following evening, offering his apologies, saying:

> Sincere apologies for any action of mine that may have upset you.

[22] It was put to Mr Scott in cross-examination that this was an acceptance on his part that something did happen.

[23] Mr Scott was again referred to the statement he took to his police interview. It was put to him there was nothing in the statement suggesting he might simply have bumped into the complainant by mistake. The Crown referred to two aspects of the statement:

> I did not intentionally push my genitals against her.
>
> I'm completely innocent of any intent.

The Crown used those statements to put it to Mr Scott that his focus was on his intent rather than saying there was no contact at all.

The summing-up

[24] The Judge's summing-up provided a good summary of the evidence and competing contentions.

[25] Before he discussed the evidence, the Judge reminded the jury of Mr Scott's version of events: that he did not recall seeing the complainant; did not recall passing her; in any event, did not intentionally push or press his penis or groin into her; and would not have done so because of the tenderness in his penis due to his circumcision and the tenderness in his stomach due to the insulin injection he administered moments before. The Judge gave the standard tripartite direction, so the jury was clear that, if what Mr Scott said left them feeling unsure and his version of events seemed a reasonable possibility, then the Crown would not have discharged the onus and they must find Mr Scott not guilty.

[26] The Judge discussed the complainant's evidence, including that there were not more than 12 people in the room at any time and there was no need for any contact between her and Mr Scott to occur. At least two other witnesses saw contact between Mr Scott and the complainant, and one described seeing Mr Scott's hands on the complainant's hips. The Mayor, who was engaged in conversation with the complainant at the time, described Mr Scott passing behind the complainant and momentarily stopping, at which point his conversation with the complainant abruptly stopped and she appeared to be in shock and then angry.

[27] The Judge outlined the Crown's closing address, which canvassed the arguments summarised above and submitted that Mr Scott's defence was implausible and inconsistent with other evidence.

[28] The Judge then summarised the defence case that there was no intentional assault and whatever happened was no more than the kind of common contact that occurs in a crowded room. He reminded the jury of the evidence about the circumcision surgery and Mr Scott's use of insulin. Two witnesses described seeing Mr Scott after the alleged incident, saying he looked as white as a sheet and unsteady on his feet, which the defence said was consistent with Mr Scott having administered insulin and needing food.

[29] The Judge repeated the defence submission that the jury could not ignore the evidence about the size of Mr Scott's penis, as the Crown had suggested, and that the complainant was not prepared to concede that what she felt might have been

a wallet, despite it having the same dimensions as those she had described of Mr Scott's penis. The other alternatives of a cellphone or insulin pen were equally plausible, in the defence submission.

Trial counsel affidavit

[30] Trial counsel, in his affidavit adduced for the appeal, explains that he took instructions from Mr Scott on his medical issues. Mr Scott had told him that "he had infection around the circumcision site and was experiencing pain and discomfort as a result at the time of the alleged incident". Trial counsel says Mr Scott attempted to illustrate the level of sensitivity by explaining, at first, that he had been wearing a cricket box at the time of the incident to protect his genital area. However, it became clear in discussions with trial counsel that he probably was not, in fact, wearing the box at the time.

[31] Trial counsel says he then told Mr Scott he was sceptical of Mr Scott's claims his penis was painful and infected, and had not healed at the time of the alleged incident. Trial counsel understood Mr Scott to accept there appeared to be no merit in pursuing this avenue.

Mr Scott's affidavit

[32] In his affidavit in support of the appeal, Mr Scott maintains expert evidence would have shown it was most unlikely he did what was alleged and that it was physically impossible for him to have had a firm or semi-erect penis of the dimensions described by the complainant. He believes medical experts would have offered an opinion that, because of the residual tenderness and discomfort in his groin area, he would have been protective of that area. He refers to photographs of the site of the surgery, which he had given to trial counsel, who did not produce them. Mr Scott considers Dr Cammack was not qualified to express his opinion about the likely recovery time from surgery and the impact of diabetes on that recovery time.

Fresh evidence

[33] We will briefly summarise the proposed fresh evidence.

Dr Krebs

[34] Dr Krebs begins his report by setting out his understanding that the conviction essentially depends on the probability that Mr Scott had a penile erection at the time and what the complainant felt was an erect or semi-erect penis pushed against her body.

[35] Dr Krebs notes Mr Scott's 15-year history of type 2 diabetes. He refers to Mr Scott's self-report that he has no sex drive and cannot get an erection.

[36] Dr Krebs discusses Mr Scott's November 2016 circumcision surgery, undertaken because of a persistent phimosis and the development of two small lesions of unknown significance on the foreskin. He says Mr Scott described a slow and delayed recovery. Dr Krebs confirms recovery from surgery can be delayed in people with type 2 diabetes. Mr Scott's June 2017 photographs showed some ongoing inflammation but Dr Krebs was unable to confirm an infection. Dr Krebs could not identify the two sutures Mr Scott maintained were still present at the time of the incident.

[37] Dr Krebs says it was possible Mr Scott would have been suffering ongoing discomfort at the time of the incident and, in that case, would avoid contact between his genitals and anything else. Mr Scott informed him that he had been wearing a cricket box as protection because of ongoing discomfort but was not wearing one on the day of the incident.

[38] Dr Krebs considers it highly improbable Mr Scott would have had an erection.

[39] Dr Krebs also measured Mr Scott's penis. We discuss this issue in the next section of the judgment.

Dr Studd

[40] Dr Studd describes the circumcision surgery as uncomplicated. An examination on 29 November 2018 showed it had healed well although there was some mild discomfort.

[41] Dr Studd confirms it is usual following circumcision for the wound and the glans penis to be tender and sensitive due to inflammation, which he says usually settles over six weeks. He refers to Mr Scott's self-report that the area remained very sensitive for several months. From what he was told, Dr Studd does not consider there was a wound infection, noting Mr Scott did not require antibiotics, and he considers the redness more likely post-surgical inflammation, which was part of the healing process. He agrees wound healing can be slower in diabetics and that Mr Scott has suffered from diabetes for at least 15 years.

[42] Dr Studd describes the dimensions of Mr Scott's penis given at trial as similar to the measurements he himself took. He says it was very unlikely, given Mr Scott's long history of diabetes, that he would be able to generate a firm erection.

Submissions

[43] Drawing on this Court's recent comment that expert scientific evidence can have a powerful effect on a jury,[8] Ms Hunt submitted that the expert medical evidence would have had a powerful impact on the jury in this case. She said, had evidence been properly briefed in advance of trial, then the defence would have been in a position to respond to the challenges to Mr Scott's version of events, as well as having expert evidence in support of his case that he was still in pain and would not have done as the complainant alleged.

[44] Ms Hunt gave the example of Mr Scott's evidence of concern that he had signs of cancer on his penis. At trial, it was put to Mr Scott that he had received no diagnosis of cancer on his penis. In Ms Hunt's submission, the way in which Mr Scott dealt with cross-examination on this topic showed he was under stress and he did not explain his condition clearly. In her submission, expert evidence should have been called to support what he said, which would have supported his credibility generally.

[45] In Mr Barr's submission, at its highest this aspect of the appeal must be viewed as a failure of trial counsel to comply with Mr Scott's instructions and present the case in accordance with Mr Scott's narrative of events.

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8 *Lundy v R* [2018] NZCA 410 at [197].

[46] Mr Barr submitted it was clear that, prior to trial, Mr Scott discussed these matters with trial counsel who was sceptical, and when trial counsel advised Mr Scott of that, he appeared to understand. In Mr Barr's submission, these are the very issues about which trial counsel is obliged to advise a client. Trial counsel was one of the most senior defence counsel in Wellington and was well placed to assess the weaknesses of Mr Scott's account and advise him accordingly, he said. At best, said Mr Barr, Mr Scott in hindsight wishes he had run his defence differently.

Our assessment

[47] On the question of fresh evidence on appeal, the Privy Council has said:[9]

> [103] A substantial miscarriage of justice will actually occur if fresh, admissible and apparently credible evidence is admitted which the jury convicting a defendant had no opportunity to consider but which might have led it, acting reasonably, to reach a different verdict if it had had the opportunity to consider it. … That result will occur where a defendant is convicted and further post-trial evidence raises a reasonable doubt whether [they] would or should have been convicted had that evidence been before the jury.

[48] Dr Krebs' report was predicated on what he had been told to the effect that the conviction essentially depended on the probability that Mr Scott had a penile erection at the time. As discussed, that was not what the complainant alleged — quite the contrary. Both experts' reports were based on Mr Scott's self-reporting. While they accepted his report that he was still suffering pain at the time of the incident, they did not support Mr Scott's self-diagnosis of having an infection and could not locate the two sutures he maintained were still present.

[49] In our assessment, the fundamental issue of Mr Scott's credibility was undermined by his own evidence and the expert evidence would not have altered that. Mr Scott's assertion of being in extreme pain was a matter for jury assessment. If anything, the expert evidence would have undermined some of Mr Scott's contentions and further exposed the inconsistencies and implausibility of his account. For example, Mr Scott told both experts the pain was such that he wore a cricket box to protect his genital area yet he was not in fact wearing one on the day in question.

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9 *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71.

[50] In our view, trial counsel's assessment of the position was exactly right. Mr Scott has not challenged trial counsel's evidence that he discussed his opinion of the difficulties with this aspect of Mr Scott's version of events with Mr Scott, who accepted it.

[51] We do not share Ms Hunt's concerns about whether or not Mr Scott had a cancerous growth on his penis. In his police interview, Mr Scott explained he had to undergo circumcision surgery because of such a growth. He said he had previously had skin cancer removed from his face and was concerned the lesions on his penis were also cancerous. It was not entirely clear whether or not the lesions were cancerous, Mr Scott saying he had not been informed of any test results. The prosecution did not contend that the circumcision surgery did not occur or was not required. The medical reason for his surgery was therefore irrelevant. It was clear from Mr Scott's evidence that he had a genuine concern and, in fact, surgery was required. Expert medical evidence would have added little to his explanation.

[52] The issue of erectile dysfunction was not a live issue because the complainant was clear that she was not alleging Mr Scott had an erection at the relevant time. Although Mr Scott says there should have been expert evidence on this, trial counsel explained he had not pursued the issue because it was not part of the complainant's allegations. That decision was undoubtedly correct.

[53] We are not satisfied that, had the fresh evidence been called, a jury acting reasonably might have reached a different verdict. For these reasons, we do not consider trial counsel made a fundamental error in not calling expert medical evidence and therefore we will not treat the evidence as fresh.

Evidence as to measurement

[54] In Ms Hunt's submission, trial counsel erred in requesting Dr Cammack, Mr Scott's general practitioner who was called by the Crown to give evidence, to measure Mr Scott's penis during an adjournment during Dr Cammack's cross-examination.

How the evidence arose

[55] The dimensions of what the complainant said she felt pressed against her was first raised in her cross-examination as follows:

> Q. Now how do you know that what you felt behind you was a penis?
>
> A. Because it was in the area in terms of a man's anatomy where a penis would hang. It was about the length and the girth and it felt slightly solid.
>
> Q. So you could tell all of those things about this object, its girth, its length, where it was positioned and all that sort of thing, could you?
>
> A. Well it just felt like one so I couldn't be precise and say how long and, et cetera, but …
>
> Q. But you were able to say to the police that you didn't think it was an erect penis, for instance?
>
> A. Exactly, yes.
>
> Q. So what you felt was something that had a certain firmness about it, is that right?
>
> A. (no audible answer).
>
> Q. So could you have felt rather than a penis, something that was otherwise in the pocket of this man, like for instance a cellphone?
>
> A. No, it was definitely not a cellphone.
>
> Q. Could it have been the edge of a wallet?
>
> A. No.
>
> Q. Why not?
>
> A. Because of the length and the roundness and the shape.
>
> Q. So you're saying that what you could feel was longer than a standard-sized wallet?
>
> A. Yes.
>
> Q. So how long do you think this object was, in terms of inches or centimetres, whatever you're familiar with?
>
> A. I don't know, I guess the bit that was pressing into me was four or five inches. Um …
>
> Q. Could it have been — are you familiar with an insulin kit?
>
> A. No. Sorry, no.

> Q. So the only thing you felt that you can tell us about is a stomach, a belt buckle, and an object that was about four or five inches long, am I being fair in that summary?
>
> A. Yes, and about an inch or an inch and a half in diameter and round and not hard, but firm. And two legs.

[56] It is clear that the complainant could not be precise about the length of what she felt and "guess[ed]" it was four or five inches.

[57] In his unchallenged affidavit, trial counsel says that, when the complainant gave evidence about the dimensions of what was pressed into her, it occurred to him to ask Dr Cammack to measure Mr Scott's penis and to give evidence as to that. He says he was aware, from having seen a photograph of Mr Scott's penis, that it did not match the description given by the complainant. He considered it might advance the defence case if there were some evidence confirming the dimensions of Mr Scott's penis. He says he met with Mr Scott in the cells that morning before court and discussed his plan with him. He says they both thought it was a good idea at the time.

[58] Trial counsel told Mr Scott he would ask the Court to make a suppression order regarding the measurements of his penis. He says Mr Scott told him he did not care. Trial counsel applied for the order and the Court made it.

[59] Dr Cammack duly gave evidence as to the length of Mr Scott's penis. Detective Constable O'Donnell was the next Crown witness. Trial counsel handed him Mr Scott's wallet and asked him to use the same ruler to measure its dimensions. The detective said the length of the wallet was greater than the length of Mr Scott's penis as previously reported by Dr Cammack.

[60] In his video interview with the police, Mr Scott had said that, as he pushed past the complainant, she may possibly have felt something that was in his pockets but nothing to do with his genitalia. And later on:

> A. No, no. And my groin wouldn't possibly have touched her. Physically my stomach sticks out more than my genitals and with all the stuff in my pockets, I have phones and keys, bunch of keys, wallet all in those low pockets down there (*indicates*).

[61] Mr Scott again referred to the contents of his pocket when he gave evidence.

[62] In closing, the Crown prosecutor referred to the limitations in the complainant's estimate of size, given she described it as a guess; said the object the complainant felt could not have been Mr Scott's wallet because of where Mr Scott said he kept it; and in any event it mattered not whether the complainant felt Mr Scott's penis or wallet — the act complained of still amounted to an indecent assault.

[63] Trial counsel submitted to the jury that it was not a coincidence that the dimensions described by the complainant were inconsistent with the known length of Mr Scott's penis but consistent with the known measurement of his wallet.

Mr Scott's affidavit

[64] Mr Scott agrees he was in the cells when trial counsel discussed this strategy with him. He said he felt unwell and was stressed about the trial and had very little time to consider the proposition. He says he agreed to the tactic but did not really understand the consequences. Mr Scott believes the tactic misfired and diverted the jury from his defence.

Submissions

[65] In Ms Hunt's submission, it was when this evidence was introduced that things went wrong. She described it as a trial tactic that misfired, saying it was degrading to Mr Scott and resulted in a frenzy of media attention. Ms Hunt accepted the Judge properly directed the jury to disregard any media reports there might have been. She submitted, however, that the way in which the media dealt with this issue demonstrates how the jury would have reacted. As Ms Hunt acknowledged, that submission was speculation.

[66] Ms Hunt then contended that, while trial counsel might have been taken by surprise by the complainant's answer as to the penis dimensions, he could have applied for an adjournment in order to obtain expert evidence (which should have been available in any event).

[67] In Mr Barr's submission, the measurement evidence was an appropriate tactic decided on by experienced trial counsel and agreed to by Mr Scott. Indeed, in the

context of the complainant's answers in cross-examination, it was appropriate that evidence of the measurement was adduced.

Our assessment

[68] In *Hall v R*, the Court of Appeal drew a distinction between trial counsel error on fundamental matters, which would almost inevitably result in an unfair trial and so a miscarriage, and trial counsel errors on matters less fundamental, which would not always result in a miscarriage.[10] The Court noted:[11]

> … it is helpful to identify the three fundamental decisions on which trial counsel's failure to follow specific instructions will generally give rise to a miscarriage. The fundamental decisions are those relating to *plea, electing whether to give evidence and to advance a defence based on the accused person's version of events*.

[69] Where errors in making less fundamental trial decisions are alleged, a miscarriage of justice will only occur if the decision was not one a competent lawyer would have made and if what actually happened may have affected the outcome.[12] It is not a matter of whether counsel could have reached a different decision or conducted the trial in a different way.[13]

[70] We acknowledge Ms Hunt's submission that the media coverage of this aspect of the evidence would have caused Mr Scott some embarrassment. We cannot see, however, that this would have been any different were the evidence to have come from the two experts. The measurement was carried out by Dr Cammack, Mr Scott's general practitioner. Trial counsel acted appropriately by obtaining suppression orders to minimise the impact of publicity and the Judge appropriately directed the jury to disregard any media coverage.

[71] We have some difficulty with Ms Hunt's claim that the evidence of measurement shattered the appellant's credibility. There is nothing to suggest the measurement was contrary to any evidence given by Mr Scott. It could not, therefore, have adversely affected the jury's assessment of his credibility.

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10 *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [61]–[65].
11 At [65] (emphasis added).
12 *Hall v R*, above n 10, at [77].
13 *S (CA88/2014) v R*, above 6, at [16], citing *R v Sungsuwan*, above n 2, at [66].

[72] In our view it was a legitimate trial strategy to adduce the measurement evidence in circumstances where the complainant's description was known to be different from the dimensions of Mr Scott's penis. We also note that, had the two experts given evidence on this issue, the defence position would have been worse. Dr Krebs measured Mr Scott's penis and gave a figure which was very close to Dr Cammack's measurement. Dr Studd measured Mr Scott's penis and gave a figure considerably closer to the complainant's estimate. Dr Studd also discussed possible explanations for the different measurements, which would have only served to blur what was otherwise a clear differentiation on which the defence was able to rely at trial.

[73] Given Mr Scott's defence, issues regarding his anatomy were always going to be squarely before the jury. While we can accept that the media might have shown a somewhat prurient interest in the case, in our assessment this was inevitable in the circumstances.

[74] Finally, in circumstances where Mr Scott had to accept he may have accidentally come into contact with the complainant as he moved past her, the measurement evidence and its close correspondence with the dimensions of Mr Scott's wallet can only have assisted Mr Scott's defence. It enabled the defence to offer a plausible explanation for what had happened and why the complainant might have made the allegations.

[75] For these reasons, we do not consider trial counsel made an error in calling the measurement evidence, much less a fundamental one.

Discharge without conviction appeal

[76] We now turn to Mr Scott's appeal against the refusal to discharge him without conviction.

[77] Mr Scott appeals on the basis that the Judge erred in his assessment of whether the consequences of a conviction would be out of all proportion to the gravity of the offending. He submits the gravity of his offending was low and the consequences for him for travel and employment are out of all proportion to his offending.

[78] If a person who is charged with an offence is found or pleads guilty, the court "may discharge the offender without conviction, unless by any enactment applicable to the offence the court is required to impose a minimum sentence".[14] However:[15]

> The court must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

[79] A court considering whether to discharge a defendant without conviction should follow a three-step process:[16]

> (a) identification of the gravity of the particular offence, taking into account all aggravating and mitigating factors of the offending and the offender;
>
> (b) identification of the direct and indirect consequences of conviction; and
>
> (c) a determination of whether those consequences are "out of all proportion" to the gravity of the offence.

[80] If the sentencing Judge erred in failing to grant a discharge without conviction, then a miscarriage of justice will have occurred and the conviction must be overturned.[17]

Gravity of the offending

[81] The Judge found that the offending was moderately serious. While the act itself was considered to be at the lower end of the scale, the Judge noted the context of it taking place in a workplace where there was a power imbalance and breach of trust.[18]

[82] Ms Hunt criticised this as an incorrect assessment, saying his offending was at the low end of that range. That approach focuses on the act in isolation. The workplace, power imbalance and breach of trust were all important aggravating factors that needed to be considered. The Judge recognised that Mr Scott had no prior

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14 Sentencing Act 2002, s 106(1).
15 Section 107.
16 *Prasad v R* [2018] NZCA 537 at [11].
17 Criminal Procedure Act 2011, s 232(2).
18 *R v Scott*, above n 1, at [10].

convictions and was heavily involved in other community organisations.[19] There could be no credit for remorse. The Judge was correct that, although the act in isolation was at the lower on the scale, its context rendered it more serious.

Consequences of a conviction

[83] Ms Hunt criticised the Judge's reference to *R v Smyth*, which cautions against offending being hidden from authorities,[20] and distinguished it on the basis that Mr Scott's conviction will disqualify him from being a local body councillor.

[84] In our assessment, the Judge followed the correct approach. After referring to *Smyth*, he went on to consider the consequences of the conviction for Mr Scott as a local body councillor and made an assessment of the application for a discharge without conviction on that basis.

[85] The Judge found it was inevitable that, on conviction, Mr Scott would lose his position as a local body councillor as his office would be vacated.[21] He said that elected officials should not be immune from the consequences of criminal offending due to their elected status.[22] Furthermore, Mr Scott would be able to run again in the resulting by-election.

[86] The Judge considered there was otherwise no evidence to establish that Mr Scott could not continue his community work and involvement with community groups such as Rotary. He said this was a decision that would be made by those organisations, which spoke very highly of Mr Scott. The Judge noted the uncertainty as to whether Mr Scott would be able to continue as a Justice of the Peace but acknowledged there was a real risk this would come to an end.

[87] The Judge's assessments were undoubtedly correct. Mr Scott would inevitably lose his seat as a local body councillor and there was a real risk he would be unable to continue as a Justice of the Peace. There was no real evidence of the anticipated

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19 At [9].
20 *R v Smyth* [2017] NZCA 530 at [22].
21 Local Government Act 2002, sch 7, cl 1(1)(b).
22 *R v Scott*, above n 1, at [17].

problems in relation to business activities, finance, travel, community work or Rotary work.

[88] In Ms Hunt's submission, the fact Mr Scott had not pleaded guilty did not disbar him from a discharge without conviction. The wording of s 106 makes this clear. That does not, however, mean it is an irrelevant consideration. We tend to agree with Mr Barr that a not guilty plea is a matter most appropriately weighed up at the discretionary assessment stage. In saying that, we do not need to comment further on this aspect, given the Judge correctly followed the procedure and came to what was clearly the correct result.

[89] In our view, the Judge did not err in finding the consequences of a conviction for Mr Scott were not out of all proportion to the gravity of the offending. While this may have been an isolated incident, we do not accept it lacked seriousness in light of its context. The offending was moderately serious. The consequences of a conviction (the prospect of losing positions associated with good moral character) are ordinary and to be expected for offending of this nature. Overall, those consequences are not out of all proportion to the gravity of the offending.

Suppression

[90] At the hearing we ordered that the new evidence should be suppressed pending the outcome of the appeal. This was to preserve Mr Scott's fair trial rights should the appeal be allowed and a retrial occur. The effect of our dismissing Mr Scott's appeal means that the interim suppression order comes to an end. The suppression orders made in the District Court, as to the measurements made by Dr Cammack and the complainant's victim impact statement, remain in force. The Crown has not sought to discharge those orders. On that basis, we have not referred in this judgment to the details of the measurement evidence proffered on behalf of Mr Scott in this appeal, and those details are now permanently suppressed.

Result

[91] The application to amend the grounds of appeal is granted.

[92] The application for leave to adduce fresh evidence on appeal is declined.

[93] The appeal against conviction and sentence is dismissed.

[94] Consistent with the order made in the District Court, we make an order prohibiting publication of the measurements made by Dr Krebs and Dr Studd referred to above at [72].

Solicitors:
Crown Law Office, Wellington for Respondent