CASE NOTE: COUNTER-INTUITIVE SEXUAL ABUSE EVIDENCE, EMOTIVE LANGUAGE AND INADVERTENTLY-ELICITED POTENTIALLY PREJUDICIAL EVIDENCE: *KOHAI V R* [2015] NZSC 36 AND *DH V R* [2015] NZSC 35.

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I. INTRODUCTION

The two Supreme Court appeals, *Kohai v R*[1] and *DH v R,*[2] focused primarily on various aspects of so-called 'counter-intuitive' expert sexual abuse evidence.[3] The overall objective of expert counter-intuitive sexual abuse evidence is to provide the fact-finder with a comprehensive conceptual framework in terms of which evidence of sexual abuse must be understood. This purpose was explained in the 1999 Law Commission report on the Reform of the Law of Evidence:[4]

> Part of that purpose is to correct erroneous beliefs that juries may otherwise hold intuitively. That is why such evidence is sometimes called "counter-intuitive evidence": it is offered to show that behaviour a jury might think is inconsistent with claims of sexual abuse is not or may not be so; that children who have been sexually abused have behaved in ways similar to that described of the complainant; and that therefore the complainant's behaviour neither proves nor disproves that he or she has been sexually abused. The purpose of such evidence is to restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance. This is similar to the use of expert evidence to dispel myths and misconceptions about the behaviour of battered women.

The aspects considered by the Court included admissibility, expert credentials, types of evidence, evaluation, sufficiency and the scope of evidence. In addition, in the *DH v R* case the court considered the effect on the jury of the use of emotive language by the court, and jury directions about good character evidence and memory. In *Kohai v R*, the Supreme Court also commented on the use of emotive language by the trial court prosecutor, and the correct approach to dealing with inadvertently-elicited potentially prejudicial evidence.

II. BACKGROUND

The appellant in *Kohai v R*, Mr Abraham Eparaima Kohai, an adult male in his thirties, was convicted in a jury trial on nine counts of committing sexual offences on three female complainants, who were from six to nine years' old at the time the offences were committed (from 2001 to 2003). On appeal to the Court of Appeal against these convictions, the two grounds of appeal were, first, trial counsel incompetence,[5] and second, the alleged excessive scope and inadmissibility of certain parts of the evidence of the expert witness, Dr Suzanne Blackwell, who testified on "counter-intuitive" sexual

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[1] *Kohai v R* [2015] NZSC 36; [2015] 1 NZLR 833.

[2] *DH v R* [2015] NZSC 35; [2015] 1 NZLR 625.

[3] For a comprehensive overview of this type of evidence, see Fred Seymour and others "Counterintuitive Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand" (2014) 21(4) Psychiatry, Psychology and Law 511.

[4] Law Commission *Evidence* (NZLC R55, 1999) at [C111].

[5] This ground appears not to have been pursued in the appeal.

abuse evidence at the trial. The Court of Appeal dismissed the appeal,[6] and the Supreme Court thereafter granted leave to appeal on the approved question whether the Court of Appeal had correctly dismissed the conviction appeal.[7]

The *Kohai* case was heard by the Supreme Court at the same time as another appeal on similar issues, *DH v R*. DH had been convicted in a jury trial[8] on 16 counts of sexually abusing his daughter over a period of five years, starting from 2002 when his daughter was 11 years old. On appeal to the Court of Appeal, the convictions were confirmed,[9] after which DH was granted leave to appeal to the Supreme Court.[10]

In *DH v R*, the admissibility of Dr Blackwell's 'counter-intuitive' sexual abuse expert evidence was not in issue. The appellant's main contention was that there had been a miscarriage of justice due to the excessive scope of Dr Blackwell's testimony, combined with an ancillary argument that she had addressed matters specific to the complainant's allegations, thereby potentially influencing the jury and prejudicing the appellant.[11]

In both the *Kohai* and *DH* cases, the appellants submitted that the Court of Appeal should have found that a miscarriage of justice in terms of s 385(1)(c) of the Crimes Act 1961 had occurred.

III. The Supreme Court's Approach To Expert Counter-Intuitive Sexual Abuse Evidence

Dr Suzanne Blackwell testified as an expert witness on the nature and purpose of counter-intuitive expert sexual abuse evidence in both trials. In both appeals,[12] the Supreme Court accepted the justification for counter-intuitive expert sexual abuse evidence. Applying s 25(1) of the Evidence Act 2006, the court in *Kohai* specifically stated that counter-intuitive evidence of this nature would only be admissible if, "... the fact-finder was likely to obtain 'substantial help' from it in understanding other evidence or ascertaining a fact in issue." The court further held that the expert evidence had to be "... relevant to a live issue in the case ...". [13]

This holding in the Supreme Court *Kohai* case was preceded by its summary in the *DH* case of the approach to counter-intuitive evidence applied in two Court of Appeal cases,[14] which reads as follows:[15]

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[6] *Kohai v R* [2014] NZCA 83.
[7] *Kohai v R* [2014] NZCA 91.
[8] In a second trial, following a first trial in which the jury had been unable to agree. Dr Suzanne Blackwell testified as an expert witness on counter-intuitive sexual abuse evidence in the second trial.
[9] *DH v R* [2013] NZCA 670.
[10] *DH v R* [2014] NZSC 50.
[11] *DH v R* [2015] NZSC 35 at [28].
[12] *Kohai v R,* above n 1, at [20]; *DH v R*, above n 2, at [135].
[13] *Kohai v R,* above n 1, at [20].
[14] *M v R* [2011] NZCA 191, confirmed by the Supreme Court in *M v R* [2011] NZSC 134; *OY v Complaints Hearing Committee* [2013] NZCA 107.
[15] *DH v R* [2015] NZSC 35 at [30] (footnotes omitted).

> (a) In many cases involving allegations of sexual abuse, the jury's verdict will depend critically on their assessment of the complainant's credibility. In such cases, there is a risk that unjustified behaviour assumptions may influence the jury's assessment, and expert evidence as to those assumptions may be admissible. The evidence should be directed at correcting erroneous beliefs the jury might otherwise hold about the likely conduct of a victim of sexual abuse. The objective is to allow the jury to consider the complainant's credibility on a neutral basis.
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> (b) The evidence should not be linked to the circumstances of the complainant in the case in which the evidence is being given. This is an important limitation, designed to ensure that the evidence is not used in a diagnostic or predictive way. The witness should make it clear that the witness is not commenting on the facts of the particular case.
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> (c) The evidence must be relevant to a live issue in the case. Evidence about features in other cases of sexual abuse that are not raised in the particular case will not be relevant or substantially helpful in terms of s 25 of the Evidence Act. Having said that, it must be acknowledged that when the expert's brief of evidence is being prepared before a trial, it may not be apparent which matters involving counter-intuitive reasoning will arise in the trial.[16]
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> (d) The witness should make it clear that the evidence draws on generic research in cases of sexual abuse and says nothing about the case in which evidence is being given. The witness should also make it clear to the fact finder that the purpose of the evidence is limited to neutralizing misconceptions which may be held by the fact finder.
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> (e) Where counter-intuitive evidence is admitted in a jury trial, the judge must instruct the jury of the purpose of the evidence and that it says nothing about the credibility of the particular complainant. The judge must caution the jury against improper use of the evidence, such as reasoning that the fact that the complainant behaved in one of the ways described by the expert witness (for example, delayed complaining) is itself indicative of the complainant's credibility or that sexual abuse occurred.

It appears that some of the difficulties that arose in the assessment of counter-intuitive evidence in both the *Kohai* and *DH* cases[17] can be traced back to the contents of paragraph (c) in the summary above, which acknowledges that when the expert's brief of evidence is being prepared before a trial, it may not be apparent which matters involving counter-intuitive reasoning will arise in the trial.[18]

In the *Kohai* and *DH* cases this situation resulted, in a number of instances, for the court to address defence arguments alleging that the expert counter-intuitive evidence given at the trial was directly or impliedly diagnostically used to support the complainants' versions, thereby resulting in consequent prejudice to the appellants.[19]

It therefore appears that it is good practice for the expert's brief to have a relatively wide scope. This is to ensure that not only all issues that the expert considers to be

[16] In terms of s 23 of the Criminal Disclosure Act 2008, the defendant may deliver an expert witness brief in response to the prosecution's expert witness brief at least 10 working days before the commencement of the trial. Should this route be followed, it does provide scope for the narrowing of the number of "live" issues for trial, by the seeking of pre-trial rulings if necessary. However, as stated in paragraph (c), there may be matters involving counter-intuitive reasoning that were not foreseen and were therefore not included in the experts' briefs, or the defence may choose to leave the point at large in order not the have to disclose their defence.

[17] *Kohai v R,* above n 1, at [19] to [41]; *DH v R,* above n 2, at [28]-[103].

[18] See the discussion in *DH v R,* above n 2, at [110].

[19] For example, see the discussion and findings on "delay in sexual abuse disclosure" in *DH v R,* above n 2, at [42]-[49].

relevant are covered in the brief of evidence, but that issues that the expert thinks the prosecution, defence or court *may* consider relevant are also covered.

This broad approach may result in the inclusion of counter-intuitive expert evidence on some topics that may prove to be only tangentially relevant to the "live" issues in a particular case. This is to be expected, as the expert's role is to provide an overall framework in terms of which evidence of sexual abuse should be understood, and not every item of relevant research used to inform the framework will necessarily be applicable in every case.

However, the evidence included in its ambit should be limited to evidence that is clearly counter-intuitive, and not be expanded to include evidence which is logically inferable - for example, the obvious inference that a young child has been sexually abused due to she or he having contracted a sexually-transmitted disease.[20]

As emphasized above, the purpose of the expert's brief is to provide a general assessment of the current state of knowledge relating to sexual abuse evidence (i.e. a general conceptual framework), in order to ensure that fact finders assess the evidence led at trial unburdened by unjustified assumptions and prejudices.[21] This evidence is not intended to be minutely dissected on an issue-by-issue basis for admissibility and weight - it merely provides an overall basis for understanding sexual abuse evidence.[22]

IV. The Legal Basis For Admitting Expert Counter-Intuitive Evidence

It is trite law that for expert evidence to be admissible in criminal trials, the evidence concerned must be both relevant, as required by s 7 of the Evidence Act 2006, and comply with the "substantial help" test in s 25(1) of this Act. Section 7(3) of the Evidence Act 2006 reads:

> Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

The "anything that is of consequence" requirement is, *in casu,* narrowly confined to one issue: the need to disabuse the fact finder of unjustified assumptions and prejudices when assessing sexual abuse evidence. Having established the relevance of the counter-intuitive evidence, the next question is whether the expert evidence proffered satisfies the "substantial help" test in s 25 of the Evidence Act 2006. Section 25(1) reads:

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[20] See, for example, the discussion on the evidence of children with gonorrhoea (*Kohai v R,* above n 1, at [34], and the issue of continued contact with the abuser (*Kohai v R,* above n 1, at [41]).

[21] Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012), makes the valid point that excessive jury deference to the expert's opinion must be guarded against (at 299). This argument was made in *DH v R* (above, n 2), at [99].

[22] Of course, given the nature of the evidence and the preparation of the brief of evidence, all obviously relevant live issues will inevitably be incorporated in the expert's brief, and led at trial. (See *DH v R,* above n 2, at [21]-[26]). See also, in general, Fred Seymour and others "Counterintuitive Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand", above n 3. See also *Tomo v R* [2015] NZCA 392.

> An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding, or in ascertaining any fact that is of consequence in the determination of the proceeding.

The evidence given by Dr Blackwell, the expert in *Kohai* and *DH,* thus had the narrowly confined purpose of offering, "substantial help … in understanding other evidence in the proceeding, …' namely, substantial help in understanding the nature and risk of unjustified behaviour assumptions that may influence the fact-finder's assessment of sexual abuse evidence.[23]

The Supreme Court in *Kohai* endorsed this approach by quoting with approval the trial judge's jury directions on dealing with counter-intuitive expert evidence. The trial court directed the jury that this evidence was general evidence designed to assist the jury, and that it said, "… nothing about this case directly." The trial court emphasized that the purpose of the expert's evidence was solely to educate the jury on various misconceptions as to how children react when they have been abused.[24]

It is submitted, therefore, that the correct approach (as inferred from the Supreme Court's approach in the *Kohai* and *DH* cases) to the admissibility and scope of counter-intuitive evidence, is whether the expert evidence concerned provides an accurate and non-prejudicial overall conceptual framework in terms of which the sexual abuse evidence to be led at trial can be properly understood.[25] This is to ensure that the jury considers the evidence led at trial on a neutral basis (as set out in of the Supreme Court's summary of the correct approach to counter-intuitive evidence –see paragraph (a) above).

The identification of disputed "live" issues relating to counter-intuitive evidence (following the tentative pre-trial issue identification in the expert's brief of evidence) is effectively determined by the defence's choices on how to counter the expert counter-intuitive evidence led, presented or admitted at trial.[26] This may be done through the defence calling its own experts on counter-intuitive evidence, or cross-

[23] See, in general, Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers, Wellington, 2014), 105 – 115; *RA v R* [2010] NZCA 57, (2010) 25 CRNZ 138 at [28].
[24] *Kohai v R,* above n 1, at [26] and [27].
[25] Scott Optican *Evidence* [2015] 3 NZ L Rev 473, referring to various sources, suggests that much of so-called 'counter-intuitive' evidence is already general knowledge, and the time may come when courts refuse to admit this type of evidence as 'substantially helpful.'(at 499). However, as previously noted, certain kinds of evidence currently given under the counter-intuitive evidence label are clearly *not* counter intuitive: for example, the inference of sexual abuse where victims contract sexually transmitted diseases.
[26] For example, see *Kohai v R*, above n 2, at [31]-[33], where the Supreme Court found that Dr Blackwell's evidence why abused children may not disclose sexual abuse to significant adults was 'substantially helpful,' and therefore admissible, despite the same evidence having been found to be inadmissible in prior the Court of Appeal case.

examining the expert witnesses called by the Crown.[27] In addition, the court itself may question the expert on issues it considers pertinent.[28]

V. Methods Of Presentation Of Expert Counter-Intuitive Evidence

In *Kohai*[29] and *DH*[30] the Supreme Court supported the general approach that counter-intuitive evidence be given as briefly and clearly as possible.[31] However, although brevity and clarity are desirable, the applicable legal principle is set out in *DH v R*:[32]

> We do not think it is appropriate to be prescriptive about how erroneous beliefs or assumptions are best to be countered in criminal trials. Judicial directions, s 9 statements and expert evidence are all possibilities. We do, however, consider that a cautious approach needs to be taken to the ambit of expert evidence given at trials of this kind to ensure that such evidence is confined to what would be substantially helpful, there is focus on live issues and that the evidence is not unduly lengthy or repetitive and is expressed in terms that address assumptions and intuitive beliefs that may be held by jurors and may arise in the context of the trial.

In articulating the above legal test, the Supreme Court clearly indicates that there is no "one size fits all" solution, and that the appropriate method of presentation chosen will largely be determined by the aspects of the expert counter-intuitive evidence the defence decides to dispute.[33] In the context of the current cases, the five aspects of Dr Blackwell's expert evidence that may be disputed are, first, her qualifications as an expert; second, the factual basis on which her proposed evidence rests; third, the scope, ambit and relevance of the issues identified by her; fourth, the sources and supporting material she relies upon, and fifth, the validity of the conclusions and opinions drawn by her, based on the facts, issues and source materials.[34]

The Supreme Court in *DH v R*,[35] suggests the following general approach for the presentation counter-intuitive expert evidence (bullet-points inserted):

- We consider that, in cases where evidence of this nature is to be adduced, the trial judge and counsel should address any potential issues before trial, with a view to ensuring that the evidence is given as briefly and clearly as possible. This could be a matter that is routinely addressed at call-overs.

- For example, there could be a discussion about whether the expert's credentials will be challenged. If not, a short formulation of the expert's credentials could be agreed.

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[27] The identification of "live" issues in both the *Kohai* and *DH* cases were often the subject of dispute-see, for example, *DH v R,* above n 6, at [47] and [65], and *Kohai v R,* above n 1, at [31]-[41].
[28] Section 100 of the Evidence Act 2006.
[29] *Kohai v R,* above n 1, at [18].
[30] *DH v R,* above n 2, at [103].
[31] See Optican's summary of the two courts' discussion on this issue in Scott Optican *Evidence* [2015] 3 NZ L Rev 473 at 498-499.
[32] *DH v R,* above n 2, at [110]. And see the discussion on various presentation options at [111]-[117].
[33] The expert evidence may be disputed in numerous ways: challenging expert credentials; admissibility of issues and proposed evidence; accuracy and sufficiency of the facts relied upon; reliability and applicability of sources and materials referred to; and the logical validity of conclusions drawn and opinions given by the expert witness.
[34] See *DH v R*, above n 2, [21]-[41].
[35] *DH v R*, above n 2, at [103].

- If no cross-examination is anticipated, it may be that there could be agreement that the expert will read a brief, which could omit references to academic commentaries.

- There could also be a discussion about alternative methods of dealing with intuitive assumptions (a topic to which we now turn).

- Of course, none of this is intended to restrict the options of defence counsel to challenge such evidence and/or the expertise of the witness.

- We envisage that the practice of providing a brief of evidence setting out the expert's qualifications and giving references to all sources (as Dr Blackwell did in this case) would continue. That ensures defence counsel is provided with full information so he or she can cross-examine the witness and/or brief potential witnesses for the defence.

VI. The Supreme Court's Comments On The Use Of Emotive Language

In *DH* the Supreme Court considered the evidential effect of the use of the word "grooming"[36] by expert witness Dr Blackwell, and the use by the trial judge of the words "criminals" and "dirty laundry" when giving jury directions. In *Kohai* the court considered the allegedly emotive language used by the prosecutor in referring to the appellant's "taste for young girls." In none of the above instances was it held that a miscarriage of justice had occurred.

In *DH*, after considering the use of the terms "grooming" and "normalisation of abuse" by the expert witness, the Supreme Court concluded that the term "grooming" was linked to the term "normalisation," as the expert evidence was directed at explaining how the abused child is conditioned over time (i.e. "groomed") to see the sexual abuse as "normal." The court points out that whilst "normalisation" is a relatively unfamiliar term, the use of the term "grooming" in this context should be avoided.[37] The essence of the objection to the expert's use of this word is that it is a term in everyday use with negative connotations, and may result in unwarranted prejudicial inferences by the jury (it also being a specific heading in the Crimes Act 1961,[38] as pointed out by counsel for the appellant).[39]

With regard to the use of the words in the *DH* case of "criminal"[40] and "dirty laundry"[41] by the trial judge in giving jury directions, the Supreme Court agreed with the Court of Appeal that it would have been preferable for the trial judge not to have used these words.[42] The message is that trial judges have to be very careful with their choices of words when giving jury directions, as even seemingly innocuous words or statements have the potential to influence the jury.

[36] At [56]-[61].
[37] At [63].
[38] Crimes Act 1961, s 131B.
[39] At [57].
[40] *DH v R*, above n 2. at [118]-[120].
[41] At [129]-[133].
[42] At [120] and [133].

The reference in *Kohai* by the prosecutor to the appellant's alleged "taste for young girls" is more problematic.[43] In her closing address, the prosecutor said:

> The first thing is that you know about the accused's taste in girls. At the time he offended against [S2] and [S1] he was publicly in a relationship with a girl who was teenager, 15 or 16 years old [Ms AP]. You have heard he was well over double in his age [*sic*]. In fact he was a day older than her [Ms AP's] mother. It is a matter entirely for you but you may conclude that much younger girls is what he had a taste for.

Later, in wrapping up her closing argument, the prosecutor repeats this phrase, linking it to other evidence in a way in a way that creates the superficial impression that it has been independently verified:

> So that's four matters that perhaps might lay a foundation for your deliberations. Firstly, you have heard he has had a taste for young girls; secondly, you have heard ... .[44]

The Supreme Court agreed with the counsel for the Crown's concession that the trial prosecutor was wrong to use the "taste for young girls" phrase, and to refer to the appellant's relationship with Ms AP in this regard. The court said these remarks were, "unjustified and inflammatory," and that the consensual relationship between the appellant and Ms AP (who was 15 or 16 years old at the time) had no relevance to the sexual abuse allegations.[45]

The Supreme Court recognized that the words used went beyond the mere use of emotive language, and was effectively an attempt by the trial prosecutor to imply that Ms AP's age and relationship with the appellant increased the likelihood that that the appellant had a general propensity to target young girls. The Court held, however, the trial did not miscarry as a result of the prosecutor's use of these words, especially as the trial judge had cautioned the jury, in general terms, not to be influenced by prejudice, or by sympathy for the complainants.[46]

Referring to *R v Stewart (Eric)*,[47] the Supreme Court reiterated the duty of prosecutors in this context: [48]

> ... prosecuting counsel is entitled to be firm – even forceful - in what is after all an adversary process. But a prosecutor must present the Crown case in a way that is dispassionate and analytical and may not make intemperate, inflammatory or emotive remarks about an accused.

This warning should perhaps be amplified to caution prosecutors not to attempt to create or entrench jury prejudices against accused persons by using emotive labels to suggest negative character traits that may be erroneously diagnostically linked to the issues the jury has to decide.

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[43] At [42]-[44].
[44] At [42].
[45] At [44].
[46] At [50]. The counsel for the appellant argued that the judge's jury caution should have been couched in more specific language, addressing this attempted diagnostic link directly.
[47] *R v Stewart (Eric)* [2009] NZSC 53; [2009] 3 NZLR 425.
[48] At [51].

In such cases, it would also be appropriate for trial judges to direct the jury to guard against the *specific* potential prejudice of such emotive language- in this case, the fallacious inference that because the appellant, in his thirties, is in a relationship with a 15 or 16 year old girl ("a young girl"), he has a "taste" for young girls, and is therefore likely to have sexually abused the three complainants (who are even younger girls).

The final issue that will be considered, arising from *Kohai's* case, is the Supreme Court's approach to inadvertently-elicited potentially prejudicial evidence.[49]

VII. Inadvertently-Elicited Potentially Prejudicial Evidence

In *Kohai v R*, the counsel for the appellant pointed out that one of the trial Crown witnesses had referred to the appellant "coming up on charges" and possibly having been in prison.[50] He argued that this evidence was irrelevant and prejudicial to the appellant.[51] According to counsel for the appellant, this information "popped out"[52] while the witness concerned was giving evidence, leading to the suggestion that it was inadvertently elicited by the prosecutor.[53] At trial the judge ignored this testimony in instructing the jury, and it was also not raised by defence counsel at any stage.

The Supreme Court held that the correct approach by the trial judge, in dealing with potentially prejudicial evidence mentioned in passing by a witness, is to make an assessment of the degree of potential prejudice the evidence concerned is likely to cause.[54] If the likelihood of potential prejudice is low, the judge may choose to merely ignore it. The alternative is to instruct the jury to ignore it, if the likelihood is that the jury could be influenced by the evidence to the detriment of the accused.[55] In this case, the Supreme Court found that the testimony concerned was "fleeting and non-specific and would have had little or no impact."[56] The court held that ignoring this evidence had been "the sensible course."[57] The Supreme Court therefore effectively found that, in the circumstances, the inadvertent admission of this testimony did not justify a finding that a miscarriage of justice could have occurred.[58]

The correct approach by an appeal court in assessing the likelihood of a miscarriage of justice having occurred at trial through the inadvertent disclosure of potentially prejudicial evidence is set out in *Edmonds v R*.[59] In *Edmonds,* the Court endorsed a

[49] *Kohai v R,* above n 1, at [47]-[49].
[50] A more detailed extract of the trial evidence is not referred to in the judgment.
[51] At [43].
[52] It is not uncommon for the term "popped out" to be used in court judgments when describing testimony assessed to have been inadvertently given.
[53] At [48].
[54] The applicable legal test is elaborated in *Thompson v R* [2006] 2 NZSC 3, [2006] 2 NZLR 577 at [16].
[55] Although the Supreme Court pointed out that this may itself be prejudicial, as it would draw attention to the evidence, thereby possibly giving it unwarranted prominence in the minds of jurors: *Kohai v R*, above, n 1, at [49].
[56] At [49].
[57] At [49].
[58] At [49] and [52].
[59] *Edmonds v R* [2015] NZCA 152. See also Scott Optican *Evidence*, above n 31, at 486 to 488.

contextual approach, whereby the nature and manner of the of the inadvertent disclosure is considered; whether the evidence was elicited as part as a natural response to a question; to what extent the defence case hinges on the credibility of witnesses, and measures taken after the evidence is given. The Court stated that the absence of jury directions in such cases "is not determinative," and that the Court will regard as "significant" the fact that an experienced trial judge chose not to intervene or see a need to direct the jury on the evidence concerned.[60]

While the Supreme Court's legal approach on this issue in *Kohai* is consistent with the legal methodology to assess the prejudicial effect of inadvertently admitted evidence set out in the *Edmonds* case, the Court's assessment of the applicable facts relating to the disclosure of the inadvertently elicited evidence in *Kohai* requires comment.

The actual trial transcript extract is not referred to in the judgment, but it is clear that the evidence of the witness concerned contained two items of information potentially prejudicial to the appellant. These items are that the appellant was "coming up on charges" and that he had possibly been in prison.[61] With reference to these two items of evidence, the Court concluded that, "... all concerned seem to have ignored it,"[62] and that that this evidence was somehow "lost in the noise of the trial."[63]

Whether this testimony "popped out" or was perceived to have been "mentioned in passing,"[64] the evidence was nevertheless given, and in the absence of evidence to the contrary, must be assumed to have been heard by some or all the members of the jury. While the defence counsel, prosecutor and trial judge may well have ignored the evidence that "popped out" as having been inadvertent, this conclusion cannot be attributed to the members of the jury, as their reactions to this evidence are not reflected on the court record. Any perceived danger that a judicial direction instructing jurors to ignore this potentially prejudicial evidence would unduly emphasise it must surely be outweighed by the even greater probability that the jury would consider itself entitled (and arguably even obliged) to take the inadvertently-elicited evidence into account in deciding the guilt or lack of guilt of the accused. Thus, from the jury's perspective, the lack of any challenges to the admissibility of this evidence by defence counsel,[65] and the later lack of directions from the judge on its content and admissibility, would most likely result in the jury treating this evidence like any other evidence before it.

In the circumstances of this case, it is therefore submitted that a more detailed contextual approach[66] by the appeal court to the inadvertently admitted evidence concerned should have been followed. It is submitted that a preferable approach would have been as follows:

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[60] At [24].
[61] At [43] and [48].
[62] At [48].
[63] At [49].
[64] At [48] and [49].
[65] This may be one indication why defence counsel competence initially appeared to be a ground of appeal- see n 5 above.
[66] As required by *Edmonds v R*, above n 60.

> (1) There is nothing on record to indicate that the jury did not actually *hear* the evidence concerned (the reference to "lost in the noise of the trial"). It must therefore be assumed that this evidence was heard by some or all the members of the jury.
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> (2) In the absence of a defence challenge during the trial, or any jury instruction by the trial judge to this effect, it must be assumed that the jury considered the evidence admissible.
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> (3) There is nothing on record to indicate that the jury understood the evidence concerned to be of such little potential weight that it needed not to have been considered at all. Therefore, it must be assumed that the evidence was discussed, evaluated and considered by the members of the jury in the same way as all the other evidence given at trial.
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> (4) Given the assumptions in (1) to (3) above, the inadvertently-elicited evidence must then be considered, in the context of the witness's assessed credibility and other supporting or contradictory evidence, to determine whether any reliance on this evidence by the jury prejudiced the accused to the extent that a miscarriage of justice could have occurred.[67]

In *Kohai*, on the available information, the Supreme Court's conclusion that the inadvertently-elicited evidence concerned did not result in a miscarriage of justice appears to be correct. However, it is submitted that the basis on which the inadvertently-elicited evidence is assessed to determine whether a miscarriage of justice occurred should be set out in more detail, as suggested above.

[67] See *Thompson v R* above n 54, at [16].