COMMENT:

                Section 35(1)(b) of the *Criminal Justice and Public Order Act* 1994 precludes the drawing of adverse inferences from a defendant’s failure to testify where “it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence.” If the defendant is unable to testify due to a mental condition, he will usually be unfit to plead in any event (*R. v M (John)* [2003] EWCA 3452, unreported, 14 November 2003, CA). Here there was no suggestion of any intellectual impairment, so the question of fitness to plead had not arisen. *Welland* is therefore a useful example of a case in which the appellant was (probably) “fit to plead” but “unfit to testify” (see A Owusu-Bempah and N Wortley, “Unfit to Plead or Unfit to Testify?” 80 J.C.L. 391).

                In deciding whether it is “undesirable” for a defendant to give evidence, the courts have typically focussed on whether the defendant’s health would be adversely affected (*R. v Friend*, CLW/97/22/22,[1997] 1 W.L.R. 1433, CA)*.* In *R. v Friend*,the Court of Appeal commented that this “might include a risk of an epileptic attack” (at 1442).

                In the present case, events in court pointed to a risk of seizures. The appellant was therefore “vulnerable”, within the terms of paragraph 3D in *Criminal Practice Direction I (General matters)* (*Criminal Practice Directions 2015*, CLW/15/35/2, [2015] EWCA Crim 1567, unreported, 29 September 2015, Lord Thomas CJ). In accordance with paragraph 3D.2, the court was required to take “every reasonable step” to facilitate his participation, including “enabling [him] to give [his] best evidence”. The Court of Appeal held that the trial judge ought to have adjourned the trial for enquiries as to whether any steps could be taken to enable the appellant to give evidence (although the proposition that a medical report could be obtained in “a day or so”, so that the trial could continue with the same jury, is perhaps unduly optimistic). Requiring the trial “to proceed without intermission” was a “clear error”:

                “… A decision to proceed in circumstances where such a defendant is understood not to be in a fit state     to give evidence should be taken, if at all, only after the most full and careful consideration” (at [18]).

                The trial judge’s decision to refuse an adjournment for medical evidence to be obtained placed defence counsel in an invidious position. It had been the appellant’s “firm intention” to give evidence but counsel “had … taken the decision himself that it would be irresponsible” to call his client (at [11]), thereby prioritising his client’s clinical best interests over his legal best interests. While this *may* be a legitimate approach where a client has been found unfit to plead (*R. v Norman (Practice Note)*, CLW/08/33/02, [2008] EWCA Crim 1810, [2009] 1 Cr.App.R. 13, CA; *R. v B* [2012] EWCA Crim 1799, unreported, 19 June 2012, CA) it is problematic to say the least where a defendant has decision-making capacity.

                Even if doctors had been unable to identify any measures that would enable the appellant to give evidence, the defence would at least have been in a position to properly consider alternative options. One possibility would be a hearsay application to admit a written statement on the ground that the appellant was “unfit to be a witness because of his bodily or mental condition” (s.116(2)(b) of the *Criminal Justice Act* 2003 (CLW/03/45/40)). In *Hamberger*, CLW/17/21/2, [2017] 4 W.L.R. 77, [2017] EWCA Crim 273, the Court of Appeal could “see no reason why in such circumstances, upon proper application being made, a judge would not be entitled to admit the defence statement and/or the proof of evidence as hearsay evidence pursuant to section 116(2)(b)…” (at [45]), presumably coupled with a direction that the jury should not draw adverse inferences from the failure to testify.

                A final point to note is that, where adverse inferences are prohibited due to a defendant’s physical or mental condition, a cursory direction that the jury should not hold the defendant’s silence against him will not be sufficient. Here the judge should have “spelt out the consequences” of being unable to give evidence. He should also have considered whether the prosecution had raised any points that the defendant had not dealt with in his police interview and had therefore been unable to address (at [22]). There have been so few cases in which section 35(1)(b) decisions have been resolved in the defendant’s favour, that this is welcome guidance.