NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 120/2024
[2026] NZSC 20

BETWEEN	BARRY JOHN BAILEY Appellant
AND	THE KING Respondent

Hearing:	16 July 2025
Court:	Glazebrook, Ellen France, Williams, Kós and Miller JJ
Counsel:	M J McKillop and D Steyn for Appellant M J Lillico and W J Harvey for Respondent
Judgment:	30 March 2026

JUDGMENT OF THE COURT

A The appeal is allowed.

B The application under s 147 of the Criminal Procedure Act 2011 is remitted to the District Court for rehearing.

REASONS

GLAZEBROOK, ELLEN FRANCE, WILLIAMS AND KÓS JJ
(Given by Kós J)

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Introduction

[1] This appeal raises a significant question of criminal jurisdiction. Must defendants found unfit to stand trial[1] continue to the next statutory step, that is, an involvement hearing?[2] Or may they instead apply for dismissal or stay in the ordinary way, on the basis a fair trial cannot be conducted due to delay, death of relevant witnesses or perhaps even because of the very circumstances causing their unfitness?

[2] A District Court Judge said Mr Bailey, despite being unfit to stand trial, could still apply for dismissal—and dismissed his charges.[3] The Court of Appeal said he could not: the legislation required him to proceed to an involvement hearing.[4]

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1 Under the Criminal Procedure (Mentally Impaired Persons) Act 2003 [CPMIP Act], s 8A(2).
2 Sections 8A(5) and 10(2). This step is intended to ensure that an unfit defendant who did not in fact commit the offence alleged has the charge dismissed and the unfitness finding quashed: s 13(2).
3 Under s 147 of the Criminal Procedure Act 2011 [CPA]: *R v Bailey* [2023] NZDC 18240 (Judge Savage) [DC judgment].
4 *R v Bailey* [2024] NZCA 552 (Katz, Cooke and Palmer JJ) [CA judgment].

Background

[3] Mr Bailey was once caretaker at a primary school. He is now 83 years old. The Crown alleges that, between 1982 and 1989, he sexually offended against three female pupils, all between six and nine years old at the time. He was interviewed in 1989 after one complainant made a police complaint, but the complaint was not taken any further. Another complainant stated that she first disclosed the offending when she was 13 or 14 years old, but there is no record of her complaint.

[4] In September 2020, Mr Bailey was interviewed about the alleged offending in general terms. He denied committing it. He identified a number of persons who had worked at the school with him who were now deceased or unable to give evidence due to mental impairment. His wife also provided a statement to police, but that document was mislaid.

[5] Mr Bailey was then charged with five counts of indecency with a girl under 12, one count of inducing an indecent act, one count of rape and one count of sexual violation by unlawful sexual connection. Pleas of not guilty were entered, and Mr Bailey elected trial by jury.

[6] In June 2021, counsel for Mr Bailey advised the Court he was in the process of obtaining a full health assessment of his client, which "may give rise to additional matters which require consideration by the Court". In October 2021, counsel applied for dismissal of the charge under s 147 of the Criminal Procedure Act 2011 (CPA) on the ground that the "time that has elapsed since the commission of the alleged offences … is such that it is not possible for the defendant to obtain a fair trial".

[7] In support of the dismissal application, counsel for Mr Bailey sought a report from a clinical psychologist with expertise in dementia to identify "whether any identified memory/cognitive impairments would likely materially less[e]n Mr Bailey's ability to recall details of events from the distant past". Because of the COVID-19 lockdowns, her report was not available until March 2022. It identified Mr Bailey was suffering from a degenerative condition affecting memory, likely to be caused by Alzheimer's disease. Both parties then sought a direction from the District Court that reports be obtained under s 38 of the Criminal Procedure (Mentally Impaired Persons)

Act 2003 (CPMIP Act) to ascertain whether Mr Bailey was fit to stand trial. A direction to that effect appears to have been made on 8 April 2022.

[8] In July 2022, two health assessors provided reports. The first health assessor considered Mr Bailey had a mild cognitive impairment, though not enough to diagnose dementia, and that he would be able to conduct a defence and instruct counsel with appropriate supports. The second assessor considered Mr Bailey had cognitive and memory impairments, likely related to dementia and describable as a "mental impairment", and in her view he was unfit to stand trial. It is not suggested Mr Bailey lacked the capacity to instruct his counsel to bring the s 147 application in October 2021, however.[5]

[9] After a consultant psychiatrist made a diagnosis of Alzheimer's-type dementia in September 2022 and Mr Bailey's physical and mental condition declined, both assessors considered he was unfit to stand trial, the first assessor providing an update in November 2022 and the second in April 2023.

[10] In April 2023, Judge Kellar found Mr Bailey suffered from a mental impairment and was unfit to stand trial.[6] He directed that the proceeding be adjourned until what was to have been the first day of the trial on 11 September 2023, with an involvement hearing to take place instead.

[11] After that ruling, but before the commencement of an involvement hearing, defence counsel renewed the October 2021 application for dismissal of the charges. In written submissions, the application was advanced on this basis:

> a. The events are said to have occurred some 30 to 40 years ago. Such significant delay carries 'presumptive prejudice', including a large number of witnesses who are no longer available because they have passed away or are incapable of giving evidence as a result of their advanced age.
>
> b. Two of the complainants are said to have made complaints closer to the time of the alleged offending. The police did not pursue any prosecution at the time of that reporting. As a result, important documents, including the police video interview of [complainant A] cannot be found (if it exists).

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5 See above at [6].

6 *R v Bailey* DC Christchurch CRI-2020-009-7701, 28 April 2023 (Minute of Judge Kellar) at [5].

c. Mr Bailey's advanced age, and mental frailty, with its impact on his ability to mount an effective defence.

d. Mr Bailey's lack of fitness is not in dispute. It has already been determined that he is unfit to stand trial as a result of the mental impairment that he is suffering from.

…

g. Given the nature of the allegations, and the fact that they were only put to Mr Bailey in a general sense in his police interview, in order to challenge the prosecution case Mr Bailey would be required to give evidence and provide counsel with specific instructions for the purpose of cross examination. Mr Bailey is no longer able to do that, and therefore, it must follow that he is unable to receive a fair hearing and the charges should be dismissed.

[12] Defence counsel relied particularly on a 2023 High Court decision, *R v Corkran*, where an application in the alternative—primarily for stay, but otherwise for a finding of unfitness to stand trial—was made on behalf of a 91-year-old former psychiatric nurse facing charges of cruelty to children between 45 and 49 years earlier, with stay ultimately granted.[7]

[13] The Crown resisted Mr Bailey's application on the basis the Court had no jurisdiction to dismiss the charges or stay the proceeding after the unfitness finding, but before the involvement hearing, because s 8A(5) (and s 10(2)) of the CPMIP Act say that the court "must" inquire into the defendant's involvement following a finding of unfitness to stand trial. (These provisions are set out below at [43].) The Crown also referred to the importance of giving the complainants their day in court.

District Court judgment

[14] Judge Savage heard and determined the application.[8] He recorded the parties' submissions,[9] including, for Mr Bailey, that he lacked capacity to participate in an involvement hearing and would be "severely hamstrung" in trying to respond to the Crown's case.[10] He noted that Mr Bailey had been asked questions that were general

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7 *R v Corkran* [2023] NZHC 1602.

8 DC judgment, above n 3.

9 We note that it is unclear from Judge Savage's reasons the extent to which he accepted the submissions.

10 At [13].

in nature and had not been given the opportunity to make specific comments about the allegations at a time when he evidently had capacity.[11]

[15] The Judge concluded:

> [16] My finding is that it is an improper use of the Court's processes to prolong a proceeding to "give the complainants their day in court". I exercise my jurisdiction under s 147 of the Criminal Procedure Act to dismiss the charge having taken into account subs (3) which allows me to pay heed to other evidence and information that is provided by the prosecutor or the defendant.
>
> [17] That other information is found in the medical reports prepared in relation to the defendant.
>
> [18] It is not in the interests of justice to prolong this proceeding, so I do not.

Court of Appeal judgment

[16] The Crown applied for leave to appeal to the Court of Appeal under s 296 of the CPA as to whether Judge Savage was incorrect in law to dismiss the charges. That Court granted leave and allowed the appeal.[12] It described the English approach in *R v M* as "compelling".[13] In that case, the Criminal Procedure (Insanity) Act 1964 (UK) (1964 UK Act) was held to preserve only a limited residual stay discretion:[14]

> … the defendant's disability, or matters related to it, cannot, in our judgment, in themselves found a successful abuse application. This would avoid the whole point of sections 4 and 4A … An abuse application, whenever made, must be founded on matters independent of the defendant's disability, such as oppressive behaviour of the Crown or agencies of the state, or circumstances or conduct which would deprive the defendant of a fair trial, eg destruction of vital records during a long period of delay or an earlier assurance that he would not be prosecuted.

[17] The Court of Appeal reached the same conclusion in relation to the CPMIP Act. It is specialised legislation, and s 8A(5) requires inquiry into involvement after an unfitness finding, including to ensure that the defendant is not

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11 At [11].
12 CA judgment, above n 4.
13 At [28] citing *R v M* [2001] EWCA Crim 2024, [2002] 1 WLR 824.
14 *R v M*, above n 13, at [37].

placed in secure care where they have not committed the alleged offence.[15] The CPMIP Act, "in effect, provides a code for addressing such issues": once the defendant is found unfit to stand trial, his mental impairment cannot be relied upon as a basis for stay under s 147 because "that would circumvent the processes mandated by the CPMIP Act".[16] The mandatory direction in the CPMIP Act could be reconciled with the dismissal and stay powers in the same way fashioned by the Court in *R v M*, namely, those powers could only be exercised when "founded on matters independent of the defendant's disability".[17]

[18] Jurisdiction aside, the Court of Appeal also considered there was an insufficient basis for dismissing the charges. To the extent Mr Bailey's dementia meant he could not have a "fair" involvement hearing, that would apply to "all or most defendants who are found unfit to stand trial".[18] That was the rationale for the separate processes established under the CPMIP Act, and an involvement hearing would not infringe s 25 of the New Zealand Bill of Rights Act 1990 (Bill of Rights), if that was applicable to such a hearing.[19]

Jurisdictional framework

[19] The jurisdictional framework applying in this case is a mixture of statute (the CPA and CPMIP Act) and common law (inherent power to control abuse of process). We start with dismissal and stay—which was the route initiated by counsel for Mr Bailey in October 2021—and then turn to the CPMIP Act in the context of unfitness to stand trial.

Dismissal and stay

[20] While the courts' inherent common law powers to stay proceedings for abuse have long been recognised, their exposition in the criminal jurisdiction did not receive any significant analysis until the decision of the House of Lords in *Connelly v Director*

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15 The word "committed" being that used by the then Minister of Justice, the Hon Phil Goff, in the third reading debate (though the Minister also referred to "physical responsibility for the offence"): (23 October 2003) 612 NZPD 9546. None of that is to be read as implying a full trial process.

16 CA judgment, above n 4, at [31]–[32].

17 At [32] referring to *R v M*, above n 13.

18 CA judgment, above n 4, at [36].

19 At [39].

of Public Prosecutions in 1964.[20] Although expressed in partial dissent, we consider this passage by Elias CJ in *Wilson v R* accurately states the broad principles as they apply in the New Zealand context:[21]

> [119] Courts have inherent and implied powers to ensure that their processes are not abused. There is a duty to exercise such powers where fair trial cannot be provided. An unfair trial in itself is an abuse of process and holding an unfair trial would breach s 25(a) of the New Zealand Bill of Rights Act 1990 which provides that the right to a fair trial is a "minimum standard of criminal procedure".
>
> [120] A duty to prevent abuse of process arises also where there is no unfairness in the particular case but allowing the trial to proceed would be an affront to justice which would taint the criminal justice system. This jurisdiction exists in recognition of the fact that some values in the legal system transcend the significance of any particular case, as Lord Morris pointed out in respect of the rules of natural justice in *Ridge v Baldwin*.

[21] Where appropriate, the clear prospect of unfair trial or affront to justice may require the court to stay a proceeding.[22] While the District Court lacks inherent jurisdiction,[23] it does not lack inherent power to stay proceedings to prevent an abuse of process.[24]

[22] Delayed prosecution presents particular problems in criminal justice. There is no statute of limitations in criminal law; rather, s 25(b) of the Bill of Rights guarantees

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20 *Connelly v Director of Public Prosecutions* [1964] AC 1254 (HL). See in particular at 1355–1356 and 1361–1362, citing *The Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210 (HL) at 214–215 per the Earl of Selborne LC and 220–221 per Lord Blackburn.

21 *Wilson v R* [2015] NZSC 189, [2015] 1 NZLR 705 (footnotes omitted) citing *Ridge v Baldwin* [1964] AC 40 (HL) at 113–114.

22 Where, for example, it would be "impossible for the accused to receive a fair trial": *R v Thorp* [2013] NZCA 589 at [23] citing *R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837 at [13] per Lord Dyson SCJ. Otherwise, this duty may be met by giving the jury warnings or excluding evidence: Don Mathias "The Duty to Prevent an Abuse of Process by Staying Criminal Proceedings" in J Bruce Robertson (ed) *Essays on Criminal Law: A Tribute to Professor Gerald Orchard* (Thomson Brookers, Wellington, 2004) 133 at 135–136; and Sian Elias *Fairness in Criminal Justice: Golden Threads and Pragmatic Patches* (Cambridge University Press, Cambridge, 2018) at 62–63.

23 See District Court Act 2016, pt 4.

24 *Department of Social Welfare v Stewart* [1990] 1 NZLR 697 (HC) at 708; and *Watson v Clarke* [1990] 1 NZLR 715 (HC) at 720. See also *District Court at Christchurch v McDonald* [2021] NZCA 353, [2021] 3 NZLR 585 at [27]–[30].

the right to be tried "without undue delay".[25] That provision has tended to be given *post*-charge focus; thus where the delay is to the *bringing* of charges at all, common law stay—standing apart from the Bill of Rights—has been emphasised.[26]

[23] As a majority of this Court observed in *CT v R*, there is strong public interest in the courts enabling prosecutions for historical sexual abuse and no general limitation period for prosecutions for sexual offending:[27]

> The corollary of these two interconnected considerations is that prejudice of a kind which is commonplace in cases of historical sexual abuse does not warrant a stay. This is reconcilable with the fair trial guarantees in s 25 of the New Zealand Bill of Rights Act if, but only if, such prejudice is appropriately mitigated. Such mitigation is largely achieved by the general rules of criminal procedure (particularly as to the onus and standard of proof) and careful evaluation by the trier of fact of the evidence which is adduced. But it also usually requires the judge to take particular measures to reduce, as far as possible, the risk of delay-related prejudice.

The judgment went on to describe seven applicable principles, broadly consistent with comparable jurisprudence in England, Australia and Canada, including the absence of presumption of unreliability of evidence after a particular time has elapsed and a discrete standard of proof. This Court also itemised considerations weighing in the judicial evaluative process.[28] Ultimately, however:[29]

> A judge should grant a stay if persuaded that, despite the operation of the burden and standard of proof and the steps which a trial judge must take to mitigate the risk of prejudice, there cannot be a fair trial.

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25 The White Paper preceding the New Zealand Bill of Rights Act 1990 [Bill of Rights], Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at [10.131], drew upon the judgment of Somers J in *Re Arnold* [1977] 1 NZLR 327 (SC) at 334 citing Magna Carta 1297 (Eng) 25 Edw 1 c 29. That chapter states: "We will sell to no man, we will not deny or defer to any man either justice or right". Somers J also cited in that passage the Habeas Corpus Act 1679 (Eng) 31 Cha 2 c 2, s 6, which provided for the release of persons committed for treason or felony if not indicted at the latest in the second term assizes or sessions after committal. Sometimes statute did provide limitations in criminal law: for example, s 134 of the Crimes Act 1961 formerly required a prosecution for sexual conduct with a girl aged between 12 and 16 to be commenced within 12 months from the time the offence was committed—a limit repealed by the Crimes Amendment Act 2005, s 7.

26 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [23.3.6] and [23.3.18]–[23.3.19].

27 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [16] per Elias CJ, McGrath and William Young JJ.

28 At [32].

29 At [32(c)].

[24] The inherent, common-law stay power is supplemented (but not superseded) by statutory dismissal powers, principally s 147 of the CPA. That section provides:[30]

> **147 Dismissal of charge**
>
> (1) The court may dismiss a charge at any time before or during the trial, but before the defendant is found guilty or not guilty, or enters a plea of guilty.
>
> (2) The court may dismiss the charge on its own motion or on the application of the prosecutor or the defendant.
>
> (3) A decision to dismiss a charge may be made on the basis of any formal statements, any oral evidence taken in accordance with an order made under section 92, and any other evidence and information that is provided by the prosecutor or the defendant.
>
> (4) Without limiting subsection (1), the court may dismiss a charge if—
>
> (a) the prosecutor has not offered evidence at trial; or
>
> (b) in relation to a charge for which the trial procedure is the Judge-alone procedure, the court is satisfied that there is no case to answer; or
>
> (c) in relation to a charge to be tried, or being tried, by a jury, the Judge is satisfied that, as a matter of law, a properly directed jury could not reasonably convict the defendant.
>
> (5) A decision to dismiss a charge must be given in open court.
>
> (6) If a charge is dismissed under this section the defendant is deemed to be acquitted on that charge.
>
> (7) Nothing in this section affects the power of the court to convict and discharge any person.

[25] By s 147(6) a defendant is deemed to be acquitted on charges dismissed under s 147.[31] If a defendant is thereafter prosecuted for any offence arising from the same facts, they have available to them the plea of prior acquittal under s 47 of the CPA.[32] By contrast, a stay entered under the inherent, common-law power is not deemed an acquittal.[33]

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30 This is reproduced as enacted and in force at the time the charges were dismissed. The heading has since been amended to include the word "generally" at the end: Security Information in Proceedings (Repeals and Amendments) Act 2022, s 27.

31 Subject to the Crown's right to appeal, with leave, on a question of law under s 296: see s 296(3)(b). See also ss 303 and 309.

32 Mathew Downs (ed) *Adams on Criminal Law – Criminal Procedure* (looseleaf ed, Thomson Reuters) at [CPA47.03].

33 *Henderson v Attorney-General* [2024] NZCA 9, [2024] 2 NZLR 399 at [39].

[26] The question of which of stay or dismissal is appropriate is primarily a question of whether the effect peculiar to dismissal, i.e., acquittal, is justified.[34] Acquittal may not be justifiable in cases where it cannot be said that the charges should never have been brought.[35]

Unfitness to stand trial

[27] This Court recently considered the historical background to the defence of insanity in *Cook v R*.[36] The present appeal requires consideration of a related but distinct matter: the fitness of the defendant to stand trial regardless of the defence intended to be offered.

[28] Unfitness in this context is about more than just the ability to plead to a charge; it is fundamentally about the impact of mental impairment on a defendant's ability to conduct a defence or to instruct counsel to do so. That, in turn, also concerns his or her capacity to understand the nature, purpose or consequences of the proceeding and to communicate with counsel.[37]

[29] Until 1969, however, no clear distinction was drawn between unfitness and insanity in this country.[38] The common-law approach had been established in 1836 in the English case of *R v Pritchard*.[39] Pritchard, who was intellectually disabled, was instead found insane and therefore unable to be tried. He was then detained at His Majesty's pleasure under the Criminal Lunatics Act 1800 (UK).[40]

[30] A procedural modification was attempted in 1953 in *R v Roberts*.[41] There, the Judge said that where the defence did not propose to challenge that the prosecution

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34 See generally *R v Aitken* HC Rotorua CRI-2008-070-6480, 13 June 2011.
35 See for example *R v B* HC Wellington CRI-2003-091-2902, 17 November 2003.
36 *Cook v R* [2025] NZSC 44, [2025] 1 NZLR 75 at [38]–[41].
37 CPMIP Act, s 4(1) definition of "unfit to stand trial".
38 The history of the evolution of the common law regarding fitness to stand trial and its reform by statute is traced by Professor Brookbanks in Warren Brookbanks *Competencies of Trial: Fitness to Plead in New Zealand* (LexisNexis, Wellington, 2011) at 13 and following. Until 1969, a jury would consider whether a person upon arraignment was "insane so that he [could not] plead to the indictment": Mental Health Act 1911, s 32. See further below at [34].
39 *R v Pritchard* (1836) 7 Car & P 303, 173 ER 135 (Assizes).
40 Criminal Lunatics Act 1800 (UK) 39 & 40 Geo 3 c 94, s 2. As we noted in *Cook v R*, above n 36, at [38], that Act was enacted to provide a lawful pathway for detention where insanity was established.
41 *R v Roberts* [1954] 2 QB 329 (QB).

had a prima facie case, and had no evidence which might induce a jury to reject the evidence for the prosecution, the convenient course was to let the issue of fitness to plead be tried at once—but added that a defence challenge to evidential sufficiency might still be taken and the prosecution's case heard first.[42]

[31] On that basis, Roberts was acquitted outright on account of insufficient evidence, while his fitness remained reserved.[43] But *Roberts* was an outlier; the accepted view remained that a finding as to fitness had to be made upon arraignment, because unfit defendants should not be tried at all.[44]

[32] Statutory reform was made by the 1964 UK Act. It provided that the question of fitness must in general be determined as soon as it arises,[45] but s 4(2) permitted the court to postpone the question of fitness for trial "if having regard to the nature of the supposed disability the court are of opinion that it is expedient so to do and in the interests of the accused", until any time up to the opening of the case for the defence. The purpose of this postponement procedure was said to be to enable the accused "to avoid this much dreaded order"—i.e., that the defendant be detained at Her Majesty's pleasure—"where the defence was in a position to demolish the prosecution case by cross-examination or upon some point of law before the time came for the defence to be opened".[46] However, postponement was not mandatory. Some defendants were still detained without any inquiry into whether they committed the offence.[47]

[33] In 1991, therefore, an amendment to the 1964 UK Act was made, introducing s 4A, the provision at issue in *R v M*, the case upon which the Court of Appeal placed

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42 At 335.

43 Nigel Walker *Crime and Insanity in England* (Edinburgh University Press, Edinburgh, 1968) vol 1 at 230.

44 *R v Benyon* [1957] 2 QB 111 (Assizes) at 116. See also *R v Webb* [1969] 2 QB 278 (CA) at 282.

45 Section 4(3).

46 *Webb*, above n 44, at 282.

47 See Ronnie Mackay "The Development of Unfitness to Plead in English Law" in Ronnie Mackay and Warren Brookbanks (eds) *Fitness to Plead: International and Comparative Perspectives* (Oxford University Press, Oxford, 2018) 11 at 15–16. During the second reading of the Bill that would become the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 [1991 UK Act], the House of Commons spent some time discussing the case of Valerie Hodgson who, having been found unfit under the Criminal Procedure (Insanity) Act 1964 [1964 UK Act] was detained "not for committing an act, but for being unfit to plead". In fact, Ms Hodgson was innocent; but there was no procedure to test the evidence that would have shown she did not commit the murder. This was described as an "anachronism" of the then-present law: (1 March 1991) 186 GBPD HC 1270; and see *R v M*, above n 13, at [34].

particular reliance in this case.[48] It provides that where a defendant is found to be under a disability constituting a bar to standing trial, a jury "shall" decide whether the defendant "did the act or made the omission charged against him as the offence".[49] If that is the case, the jury "shall" find the defendant did the act or made the omission charged and the court "shall" make disposition orders.[50] Otherwise, the jury "shall" acquit.[51]

New Zealand's reforms

[34] With that background, we turn to the New Zealand legislation. Aspects of this subject were recently considered by this Court in *T (SC 95/2024) v Te Whatu Ora Health New Zealand*.[52] In 1969, Parliament introduced pt 5A of the Criminal Justice Act 1954 (CJA 1954).[53] It mirrored the 1964 UK Act. The court would direct a finding that the defendant was "under disability" if so satisfied,[54] and it could postpone the consideration of the question "if in its opinion it is to the advantage of the person charged to do so".[55] Persons found under disability were presumptively required to be detained in a hospital as a special patient.[56] That was then substantially carried through to pt 7 of the Criminal Justice Act 1985 (CJA 1985). Neither enactment required that the court inquire into whether the defendant had committed the acts forming the basis of the alleged offending.

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48 *R v M*, above n 13. See above at [16]–[17].

49 Section 4A(1)–(2). The 1991 UK Act also carried through the postponement procedure, now contained in s 4(2)–(3) of the 1964 UK Act. But it seems postponement has fallen into desuetude, at least following the introduction of the so-called "trial of facts": see Brookbanks, above n 38, at [2.6.1]; and compare Downs, above n 32, at [CM8.01].

50 Sections 4A(3) and 5.

51 Section 4A(4).

52 *T (SC 95/2024) v Te Whatu Ora Health New Zealand* [2025] NZSC 119, [2025] 1 NZLR 590 at [16]–[20]. That case concerned s 23 of the CPMIP Act, concerning detention after an involvement hearing and before disposition is determined.

53 Criminal Justice Amendment Act 1969, s 2.

54 Criminal Justice Act 1954 [CJA 1954], s 39C(1)–(2). "Under disability" meant "mentally disordered to such an extent as to be unable to plead, or unable to conduct a defence or instruct a solicitor for that purpose, or unable to comprehend the course of proceedings": s 39A(1) definition of "under disability".

55 Section 39C(4). Postponement could be "until any time up to the opening of the case for the defence".

56 Section 39G(1). A different order—that the person be detained in a hospital as a committed patient or immediately released—could be made if "it would be safe in the interests of the public", and if also the person was subject to an unexpired term of imprisonment or detention, the court did not have to make any order: s 39G(2).

[35] It appears the absence of any such requirement formed part of the impetus to replace pt 7 of the CJA 1985. The Law Commission noted in its 1994 report *Community Safety: Mental Health and Criminal Justice Issues*:[57]

> For a number of reasons, Part VII of the Criminal Justice Act 1985, which regulates much of the relationship between the criminal justice and mental health systems, should be reviewed, particularly with reference to "under disability" issues. One option, relating to the consequences of finding a defendant to be under disability, includes provision for a special hearing to determine the defendant's innocence of or factual responsibility for the alleged crime, and for the consequences of the latter determination …

[36] The Criminal Justice Amendment Bill (No 7) 1999 (CJA Bill 1999) was introduced to the House on 5 October 1999.[58] Throughout the Bill's four-year journey through the House, the involvement inquiry was described as a procedural safeguard for the benefit of those accused of committing the act or omission forming the basis of an offence—in particular, in relation to the restrictiveness of the orders that would (or could) flow from a finding of unfitness.[59] As the then Minister of Justice, the Hon Phil Goff, observed in the third reading debate, the involvement inquiry was intended to address "the risk under the current law that a person can be found unfit to stand trial and placed into secure care, even though that person has not committed the alleged offence".[60]

CPMIP Act

[37] In due course these provisions were enacted as part of the CPMIP Act. It is important to note at the outset that, so far as the Act is concerned with unfitness to stand trial, that unfitness has to be based on "mental impairment".[61] Where inability to participate in a fair trial is attributable instead to other causes, that lies beyond the scope of the Act. In such a case, stay under the Court's inherent jurisdiction remains the most likely pre-emptive response to an inability to ensure fair trial.

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57 Te Aka Matua o te Ture | Law Commission *Community Safety: Mental Health and Criminal Justice Issues* (NZLC R30, 1994) [Community Safety Report] at [18].

58 (5 October 1999) 580 NZPD 19517.

59 Criminal Justice Amendment Bill (No 7) 1999 (328-1) [CJA Bill 1999] (explanatory note) at iii; (5 October 1999) 580 NZPD 19704 and 19707; and (21 October 2003) 612 NZPD 9512 and 9546.

60 (21 October 2003) 612 NZPD 9546. The Minister of Justice at the time of the Bill's introduction was the Hon Tony Ryall.

61 Section 4(1) definition of "unfit to stand trial", para (a).

[38] Before a court could make any finding as to the defendant's fitness to stand trial under the CPMIP Act as enacted, it first had to find and record that the defendant was involved in the alleged offending in the sense that "the defendant caused the act or omission that forms the basis of the offence with which the defendant is charged" on the balance of probabilities.[62] This requirement met a stated objective of the Act in s 3(b), namely that in the absence of such circumstances, no fitness inquiry took place. If not satisfied the defendant was involved, the court had to discharge the defendant.[63] Otherwise, the court had to determine whether the defendant was unfit under s 14.[64] If the defendant was unfit to be tried, the court had to order inquiries to be made as to "the most suitable method of dealing with the person" and make orders from a wider range of options in ss 23–25.

[39] The CPMIP Act also ended the presumption, referred to above at [34], that a person unfit to stand trial must be detained as a special patient.[65] Instead, that order, or one requiring detention as a special care recipient, was required to be made if the court was "satisfied that the making of the order is necessary in the interests of the public or any person or class of person who may be affected by the court's decision".[66] Otherwise, the court had to make a less restrictive order.[67] We itemise the available orders below at [44].

[40] The order of the three stages of the CPMIP Act process—involvement, fitness, then disposition—did not match the approach in comparable jurisdictions, which tended to inquire into fitness to stand trial *first*.[68] In those jurisdictions, the involvement inquiry was "an alternative to a trial", "conducted in circumstances where it [had] been established that the accused person [was] not fit to stand trial".[69] It seems the reverse order was adopted in New Zealand "to reduce the risk of subjecting

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62 Sections 9 and 13(1) as enacted.

63 Section 13(2) as enacted. Such a discharge did not amount to an acquittal: s 13(3) as enacted.

64 Section 13(4) as enacted.

65 See CJA Bill 1999 (explanatory note) at ii–iii. Contrast the Criminal Justice Act 1985 [CJA 1985], s 115(1).

66 Section 24(1)(c); and see s 25(1). The Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, governing the latter kind of order, was enacted alongside the CPMIP Act.

67 CPMIP Act, s 25(1).

68 See for example the 1964 UK Act; and the Mental Health (Criminal Procedure) Act 1990 (NSW), as it was then known.

69 *R v Te Moni* [2009] NZCA 560 at [69]–[70].

innocent defendants to the criminal justice process unnecessarily".[70] The Law Commission's 1994 report suggested the involvement hearing occur *after* the unfitness finding, referring to the then-recent development in the United Kingdom.[71] Curiously, the explanatory note to the CJA Bill 1999 actually described the involvement inquiry as a safeguard "for persons *found* to be unfit to stand trial"—despite the fact it preceded any such finding.[72]

[41] The original procedure proved unsatisfactory. An involvement hearing might not meet the accused's needs if they were in fact unfit to stand trial.[73] If the accused were found fit for trial, witnesses may have had to give evidence twice: once at the involvement hearing and again at the trial.[74] The defence could (improperly) trigger the fitness procedure in order to test the prosecution's evidence at an early stage in the prosecution.[75] The process was also generally wasteful, duplicative and untimely.[76]

[42] In 2018, Parliament amended the CPMIP Act—swapping the order of the involvement and unfitness inquiries.[77] Introducing the Bill that effected that change, the then Minister of Justice, the Hon Amy Adams, noted the swap was being made "so that victims and other witnesses will not have to attend and give evidence twice".[78]

[43] Section 8A(5)—inserted in 2018, and now the provision at the centre of this appeal—says:[79]

> If the court records a finding under subsection (2) that the defendant is unfit to stand trial, the court *must* inquire into the defendant's involvement in the offence under section 10, 11, or 12, as the case requires.

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70 Ministry of Justice | Te Tāhū o te Ture *Regulatory Impact Statement – Order of inquiries to determine fitness to stand trial under the Criminal Procedure (Mentally Impaired Persons) Act 2003* (May 2016) [Regulatory Impact Statement] at [7].

71 Community Safety Report, above n 57, at [20(4)], [151]–[157] and [174(3)].

72 CJA Bill 1999 (explanatory note) at iii (emphasis added). Yet, if the prosecutor's case could not survive the involvement hearing, no unfitness inquiry would or could take place because the court had to discharge the defendant: see cl 16 (proposing s 111D(2) of the CJA 1985).

73 *Te Moni*, above n 69, at [96]; and Regulatory Impact Statement, above n 70, at [13].

74 *Te Moni*, above n 69, at [96]. The Court specifically referred to complainants in sexual cases. See also Regulatory Impact Statement, above n 70, at [9].

75 Regulatory Impact Statement, above n 70, at [12].

76 At [10] and [11]. See also Brookbanks, above n 38, at [12.4].

77 Courts Matters Act 2018, pt 4 subpt 6.

78 (15 August 2017) 724 NZPD 20165. See also Courts Matters Bill 2017 (285-1) (explanatory note) at 4.

79 Emphasis added. See also CPMIP Act, s 3(b) as amended by s 121 of the Courts Matters Act.

The Act repeats the emphasised word, "must", in ss 10(2), 11(2) and 12(2). The section applying in this case, s 10, says:[80]

> **10 Inquiry before trial into defendant's involvement in the offence**
>
> (1) This section applies if, before trial, the defendant is found unfit to stand trial.
>
> (2) The court *must* decide whether the court is satisfied, on the balance of probabilities, that the evidence against the defendant is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence with which the defendant is charged.
>
> (3) For the purposes of subsection (2), the court may consider—
>
> (a) any formal statements that have been filed under section 85 of the Criminal Procedure Act 2011:
>
> (b) any oral evidence that has been taken in accordance with an order made under section 92 of the Criminal Procedure Act 2011:
>
> (c) any other evidence that is submitted by the prosecutor or defendant.

[44] Importantly, the effect of s 13(2)(a) of the Act is that if the defendant is found not to have caused the act or omission forming the basis of the offence charged, that charge must be dismissed under s 147 of the CPA. And as we know, the effect of that dismissal is deemed acquittal.[81] Moreover, the finding of unfitness to stand trial is deemed to be quashed.[82] If, however, the defendant is found both unfit and to have caused the relevant act or omission, the court must deal with the defendant under pt 2 subpt 3.[83] Shorn of inessentials, the potential outcomes of that disposition process are six:

> (a) an order for detention as a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHCAT Act) (if and only if necessary in the interests of the public or a person or class of persons);[84]

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80 Emphasis added.
81 See above at [25].
82 CPMIP Act, s 13(2)(b).
83 Section 13(4). Subpart 3 is headed "Detention, treatment, and care of persons found unfit to stand trial or acquitted on account of insanity".
84 Section 24(1)(c) and (2)(a).

(b) an order for detention as a special care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR Act) (again, if and only if necessary in the interests of the public or a person or class of persons);[85]

(c) an order for compulsory treatment under the MHCAT Act (only if satisfied the defendant is "mentally disordered");[86]

(d) an order for compulsory care as a care recipient under the IDCCR Act (only if satisfied the defendant has an intellectual disability and the remaining procedural requirements of s 25(3) have been met);[87]

(e) no order—where the person is liable to be detained (in any case) under a sentence of imprisonment;[88] or

(f) an order for "the immediate release of the defendant"—in which case of course they are at liberty, but neither convicted nor acquitted.[89]

Further, in any of (c) to (f) above, the court may also make an order staying the proceeding and precluding further prosecution.[90]

Bill of Rights

[45] We set out for further reference later those provisions of the Bill of Rights potentially relevant to this appeal:[91]

> **19 Freedom from discrimination**
>
> (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
>
> (2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination

85 Section 24(1)(c) and (2)(b).
86 Sections 25(1)(a), (2) and 26(1).
87 Sections 25(1)(b), (3) and 26(2).
88 Section 25(1)(c).
89 Section 25(1)(d).
90 Section 27.
91 As to the applicability of s 25, see *Ruka v R* [2011] NZCA 404, (2011) 25 CRNZ 768 at [54] and following.

that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

…

25 Minimum standards of criminal procedure

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(a) the right to a fair and public hearing by an independent and impartial court:

(b) the right to be tried without undue delay:

…

(e) the right to be present at the trial and to present a defence:

(f) the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:

…

[46] We note also the right to the observance of natural justice protected by s 27(1). As noted above, we address these provisions later in this judgment.

Case law

[47] The precise issue arising in this appeal has not previously been confronted directly by appellate courts in this jurisdiction.[92] However, a number of High Court decisions have had to address stay applications where a defendant has presented with a complex pathology combining physical and mental impairments. The three we discuss stayed proceedings *before* a determination of unfitness to stand trial. In only one of those cases, *Corkran*, did the prosecution oppose stay.[93]

[48] In *R v B*, Wild J granted a permanent stay in a case where an elderly couple had made a mutual euthanasia/suicide pact, but the effective actor, the husband, had not been successful in taking his own life after taking that of his wife.[94] He was 90 years old and terminally ill with prostate cancer. He also presented with developing

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92 As noted above a similar question arose in the United Kingdom, in *R v M*, above n 13. See above at [16]–[17].

93 *Corkran*, above n 7. See above at [12].

94 *R v B*, above n 35.

dementia and hypersomnia (excessive sleepiness), and medical opinion was his cognitive deficits meant he would not be capable of giving evidence or responding to cross-examination. Not only was he incapable of instructing counsel, but he would be "incapable physically of withstanding the rigours of a High Court trial".[95] The decision pre-dated the application of the CPMIP Act, but notably there was no suggestion made that the case should be resolved instead under pt 7 of the CJA 1985.[96]

[49] *R v Codd*, a decision of Simon France J, did postdate commencement of the CPMIP Act, which conceivably applied on the facts of that case.[97] As in *R v B*, the defendant had a complex mixture of conditions, some mental and some physical, which represented an obstacle to a fair trial. The case involved alleged historic sexual offending, in one instance dating back 40 years. Mr Codd was 80 years old and presented with post-traumatic stress disorder (from wartime), Parkinson's disease and vascular dysfunction—the latter two of which affected his cognitive functioning, including memory. While Mr Codd was capable of pleading, his capacity to instruct counsel and to follow and participate in the trial was greatly affected. There was no prospect of improvement; only of continued deterioration.

[50] The Crown did not oppose stay. While the Judge had concerns about the potential application of the CPMIP Act, he was satisfied the circumstances "were appropriate" for stay instead.[98] He explained his rationale thus:

> [15] Concerning the inherent jurisdiction, the principles have been often stated and need no repetition in the circumstances of this case. The two incidents here date back approximately 40 and 28 years respectively. Both allegations are of specific instances rather than a course of conduct. Memory is plainly relevant to any defence, as is the ability to communicate to counsel about the whole context existing at the time – family arrangements, living arrangements, lifestyle patterns, work arrangements and opportunities for contact, to name but a few. Accused persons often testify in these sorts of trial. Codd's health is a specific prejudice arising from the delay. It manifests itself in a way that is directly relevant to his capacity to conduct a defence to an extent where it would in my view not be possible to have a fair trial. Accordingly, I would impose a stay under the inherent jurisdiction, independent of the statutory stay of proceedings that may be available under the Criminal Procedure (Mentally Impaired Persons) Act.

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95 At [10].

96 See above at [34].

97 *R v Codd* [2006] 3 NZLR 562 (HC). At that time the 2018 amendment swapping the order of the involvement and unfitness hearings had not occurred: see above at [41]–[42].

98 At [14].

[51] Finally, in *Corkran*, which we referred to above at [12], Isac J was faced with a similar combination of physical and mental causes of incapacity.[99] As noted, the application made was for stay, failing which it would then have been for a finding of unfitness. Mr Corkran was charged with cruelty to children, relating to his former employment as a psychiatric nurse at Lake Alice Hospital. He was now 91 years old, and the alleged offending was said to have occurred 45–49 years earlier. He was terminally ill, with prostate cancer, probably with only months left to live.[100] Treatment required use of opioid painkillers, which were only partially effective. He had poor hearing and vision, experienced headaches when reading and spent most of the day sleeping. His physical condition led his general practitioner to assess that he was "not medically fit to attend the court hearing given his frailty related to the cancer".[101] In addition, he was diagnosed by two psychiatrists as mentally impaired in terms of s 38 of the CPMIP Act, with a mild neurocognitive disorder consistent with his age and a major depressive disorder further affecting his cognitive functioning. The psychiatrists could not say definitively that these particular impairments rendered him unfit to stand trial, but had "real concerns" as to his mental and physical ability to cope.

[52] For Isac J, the clear answer lay in the fact that the combination of physical and mental impairments robbed Mr Corkran of the ability to give evidence—which he would likely need to do to defend the charges. The Judge said:[102]

> … I do not consider a fair trial can take place if Mr Corkran is incapable of giving evidence in his own defence. My assessment is that effective participation in this case would require that he be able to do so.

Nor was Mr Corkran capable of giving effective in-trial instructions, and trial management measures could not fix that.[103] Finally, delay too had impaired his ability to have a fair trial, with over 50 potential witnesses no longer available and Mr Corkran's ability to recall and relay information from the time of the alleged

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99 *Corkran*, above n 7. The 2018 legislative amendment applied in this case, unlike *Codd*, above n 97.

100 Mr Corkran died aged 93 less than two years after the High Court hearing: Jimmy Ellingham "Former Lake Alice nurse charged over ill-treatment of children dies aged 93" (23 June 2025) RNZ <www.rnz.co.nz>.

101 *Corkran*, above n 7, at [31].

102 At [39].

103 At [40]–[41].

offending diminished.[104] Stay was necessary, and without prospect of improvement, the stay would be permanent.

[53] What may at least be gleaned from these cases is a practice in the High Court of granting stay in cases where the prejudice to fair trial lies on a broader plain than just the mental impairment that might otherwise result in a finding of unfitness to stand trial under the CPMIP Act.

Submissions

Mr Bailey

[54] For Mr Bailey, Mr McKillop submitted that the Court of Appeal's approach was unduly narrow and prescriptive. It removed a trial judge's discretionary power to dismiss charges under s 147 "where no useful purpose would be achieved by following through the CPMIP Act procedure". That, he submitted, would often be the case where a mental impairment is permanent and unchangeable and it is evident that the disposition options available under ss 24–25 of the CPMIP Act would not respond to the defendant's needs. That was, he submitted, the case with Mr Bailey. It was open for the Judge to find that the interests of justice were not served by the criminal proceedings continuing in relation to him.

[55] Mr McKillop submitted that dismissal or stay is available in cases where elderly defendants become unfit to stand trial due to a permanent condition, preventing a fair trial from taking place. If no restrictive compulsory order is conceivable in such a case, there will be no need to make use of the CPMIP Act process. That was the course taken in *R v B*, *Codd* and *Corkran*, which we have just traversed.[105]

[56] On the other hand, Mr McKillop accepted that a s 147 dismissal would not normally be appropriate "solely to address the unfairness resulting from a defendant's inability to actively participate in an involvement hearing due to their mental disorder". He accepted that avoiding an involvement hearing on the same unfairness basis on which a defendant cannot stand trial would eviscerate the purposes of the

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104 At [42].

105 *R v B*, above n 35; *R v Codd*, above n 97; and *R v Corkran*, above n 7.

CPMIP Act and could prevent public safety concerns from being met in circumstances where a person cannot be held criminally liable. In such cases, he accepted, the interests of justice would normally require the CPMIP Act process to continue so that enduring public safety risks can be addressed in circumstances where criminal culpability (and punishment) are not possible. However, s 147 continues to apply. It is therefore not mandatory to complete the CPMIP Act procedure in every case—particularly where tolerably clear at an early stage that none of the more restrictive orders under ss 24–25 of that Act would be necessary or appropriate. Mr McKillop submitted that Parliament introduced the involvement inquiry as a means of protecting the factually innocent from such orders. He emphasised in oral argument that the District Court Judge's decision was based principally on the acceptance that the full CPMIP Act process would serve no useful purpose in this case, rather than the "unfairness" point upon which the Court of Appeal focused.

The Crown

[57] For the Crown, Mr Lillico submitted that applications for dismissal or stay in the context of fitness cannot be grounded in the defendant's impairment or matters related to it. Thus, an unfit defendant whose forgetfulness is (apparently) attributable to a mental impairment (itself attributable to the passage of time) could not, before the CPMIP Act process had run its course, obtain dismissal or stay based on their forgetfulness in respect of alleged historical offending; whereas a defendant whose forgetfulness is the product only of the passage of time could, for the same reason and in respect of the same offending. Were the principle otherwise, the CPMIP Act process would be circumvented, along with the important purpose it serves. That includes the provision of information to a court about the most appropriate means of disposition, which involvement hearings offer. Involvement hearings also operate as an "alternative to trial", being the closest unfit defendants can get to clearing their name or complainants to obtaining vindication. They are also an alternative to dismissal or stay applications advanced because of insufficient evidence. They are "in a guise, a s 147 application". Mr Lillico submitted that it would be "completely duplicative" to consider such an application before holding an involvement hearing. He added that *R v B*, *Codd* and *Corkran* were wrongly decided.

[58] In any event, a dismissal or stay was not warranted in this case. If the court determined Mr Bailey was involved in the offending, he could be dealt with as a special patient or patient under the MHCAT Act or simply released (with the process in effect stayed). All these were possible outcomes under the CPMIP Act process taking its course. In this case, given the degenerative nature of dementia, orders made by the court would not be for the purpose of treating or rehabilitating Mr Bailey. But, Mr Lillico submitted, protection of the public is also an important consideration. It was still open to the court to make an order under s 24(2)(a) or s 25(1)(a) if appropriate in the circumstances. Alternatively, the court could, if it considered it more appropriate, simply make an order for Mr Bailey's immediate release and stay, under ss 25(1)(d) and 27, respectively.

[59] Mr Lillico submitted that in the context of a defendant who has been declared unfit, making an order for stay or dismissal prior to the involvement hearing not only circumvents the mandatory statutory process, but (in the case of a s 147 dismissal) acquits the defendant without factual determination. Such an order, Mr Lillico submitted, thus becomes "detached from its basis in evidential sufficiency and may become misleading and something of a 'fiction'". Such a course of action is unlikely to quell controversy or free a defendant "from the taint of serious criminal allegations", as Ferguson JA put it in *McDonald v R.*[106] Here, the outcome of the two remaining steps, involvement and disposition hearings, could not be predicted with certainty. It may be that Mr Bailey would be assessed as not posing any ongoing risk to the community. But without reference to all relevant information, coming in through the involvement hearing and the disposition reports, it was difficult to understand how a court could be properly satisfied that his condition rendered the CPMIP Act process unnecessary.

Discussion

[60] We have concluded that the answer in the present appeal lies between the more polar stances presented by the parties. Correspondingly, it lies also between the contrasting reasoning offered by the two Courts below. In short, we consider the legislative scheme still permits a stay or dismissal application to be presented after a

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[106] *McDonald v R* [2016] VSCA 304, (2016) 263 A Crim R 356 at [51] per Ferguson JA dissenting.

defendant has been found unfit to stand trial. But in that case, the application must be based on grounds that are not solely dependent on the defendant's unfitness to stand trial. We explain now how we reach that view, and how it may operate in practice in the trial courts.

Principles

[61] We begin by observing that while both parties in effect set the way forward as a contest between opposing alternatives, we have no doubt Parliament intended no such conflict between the earlier statutory discharge (now dismissal) power under the Crimes Act 1961 (now CPA) and the later CPMIP Act procedure.[107] Rather, it must have intended the two legislative schemes to work together, each being concerned with obstacles to fair trial. The courts' responsibility then is to reconcile their application where potential conflict is identified. In that exercise, resort to conflict-breaking maxims such as *generalia specialibus non derogant*—to which the Court of Appeal had recourse—is to be avoided if not absolutely essential.[108] Here, we conclude it was not essential.

[62] We also remind ourselves that in a context in which fair trial rights are at issue, relevantly protected by ss 25 and 27(1) of the Bill of Rights, s 6 of the same Act requires the Court to prefer a construction consistent with those protected rights and freedoms. Ultimately, we see resolution of the issue in this appeal as a matter of construction, guided by s 6. In that exercise, the starting point must always be the protected right to a fair trial in s 25(a), which is absolute and may not be compromised by a court of law.[109] To permit and preside over an unfair trial would be inconsistent with the judicial oath; as Deane J once said, "an unfair trial represents a miscarriage of the curial process".[110]

[63] While addressing the Bill of Rights, we raised with counsel in argument the importance of the right protected by s 19—being the right to freedom from discrimination.[111] We did so because, as the argument for the Crown evolved, and the

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107 Section 147 of the CPA replaced the analogous "discharge" power in s 347 of the Crimes Act.
108 See CA judgment, above n 4, at [29].
109 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [77] and [80].
110 *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 57.
111 In the context of disability, see also Human Rights Act 1993, s 21(1)(h).

decision of the Court of Appeal seemed to require, the rights of a mentally impaired defendant to mount an application for a common law stay or s 147 dismissal would be truncated as soon as they were found unfit.

[64] Is that a necessary construction of the CPMIP Act—either consistent with s 19 or otherwise unavoidably required? Is it, for instance, necessarily implied by ss 8A(5) and 10(2) of the CPMIP Act where the stay or dismissal application was not based on the defendant's unfitness at all—e.g., because it arose from alleged prosecutorial misconduct or delay unrelated to the defendant's condition? The answer to that, obviously, is no.

[65] Given dismissal and stay serve to prevent abuses of process, we do not accept that the CPMIP Act truncates the right of an unfit defendant to seek dismissal or stay on grounds unrelated to their unfitness—and unrelated to that Act—without clear words to the contrary. A restrictive interpretation would be inconsistent with the Bill of Rights. Only a disabled person would be denied that ordinary right where the application is essentially unrelated to their disability.

[66] Exclusion in those circumstances is not the necessary effect of the CPMIP Act, bearing in mind ss 6 and 19 of the Bill of Rights. Instead, the Court should seek an interpretation which avoids differential treatment of defendants found unfit to stand trial, other than in cases where stay or dismissal is sought directly on the basis of unfitness itself—the precise circumstance in which Parliament intended that the CPMIP process *would* be followed, in order to protect fair trial rights.[112] Stay or dismissal of charges might be required in myriad circumstances beyond unfitness itself to avoid unjustified limitation or breach of various procedural rights enumerated under s 25 of the Bill of Rights.[113] The overlay of an unfitness hearing does not oust the right of a defendant to basic trial fairness in, for example, a context where extreme delay has caused substantial prejudice. As for the right to natural justice in s 27(1), although as Mr Bailey's counsel concedes, "natural justice concerns arising from a mental impairment can normally be met through the CPMIP Act procedure",[114]

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112 See above at [34]–[36]. See also s 19(2) of the Bill of Rights.
113 Namely, paras (a), (b), (e) and (f).
114 See also Brookbanks, above n 38, at [3.8].

circumstances outside of unfitness—in particular, prejudicial delay—may warrant stay or dismissal to avoid breaching that right.[115]

[67] Three general points may be made here about the consequences of the CPMIP Act processes. First, the Act created the involvement hearing—known in England as the "trial of facts"—as a mandatory first (now second) step. Its clear purpose is to protect an accused who had not caused the offence at all from further involvement in the criminal justice process, including by protecting them from a finding of insanity.[116] Secondly, the existence of the array of alternative disposition orders set out above at [44] reflects the fact that the CPMIP Act serves both therapeutic and public safety functions where a criminal defendant is unfit to stand trial, as it does also where the verdict is acquittal on the basis of insanity.[117] Thirdly, the potential disposition orders include—as Mr Lillico quite rightly acknowledged—the prospect that the only orders made in Mr Bailey's case are for release and stay, given his condition is said not to be treatable, family care arrangements are in place and public safety may be managed within that arrangement.[118]

[68] It may also be observed that the CPMIP Act process is not necessarily radically different in outcome from a stay or s 147 dismissal:

(a) As to dismissal, there are two practical differences. The first is that a defendant dealt with under the CPMIP Act will only have the charge dismissed (and therefore be acquitted) if he or she is found not to have caused the alleged offences in fact, assessed on the balance of probabilities. The second is that the defendant is exposed to the risk the court makes one of the five orders listed above at [44]—which will trench upon liberty—and which would not be the case if a s 147 dismissal application succeeded. We accept that these distinctions are

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115 See for example *Daniels v Chief Executive Department of Work and Income* [2002] NZAR 615 (HC) at [23]; and *K v Attorney-General* [2015] NZHC 2380 at [126]–[128].

116 See above at [29]–[36].

117 Formally, the verdict is now "act proven but not criminally responsible on account of insanity": CPMIP Act, s 20(1). See further *Cook*, above n 36, at [112]; and *R (SC 64/2022) v Chief Executive of the Department of Corrections* [2024] NZSC 47, [2024] 1 NZLR 114 at [30].

118 That is however not the issue before us.

important ones and that the right to bring a s 147 application should not be ousted unless that is the necessary effect of the CPMIP Act.

(b) Where release and stay is directed at the end of the CPMIP Act process, under s 27, that must come with a finding of involvement. That finding is not made where a proceeding is stayed before the involvement hearing. This is an important distinction and similarly suggests stay should remain available unless the contrary is the necessary effect of the CPMIP Act.

[69] The central question before us is whether reliance on the defendant's mental impairment in a dismissal or stay application disqualifies such an application, and compels the CPMIP Act process to be completed first. We do not think the CPMIP Act necessarily has that consequence. We reason to that conclusion iteratively.

[70] First, where fitness to stand trial has not yet been determined, ss 8A(5) and 10(2) do not preclude a defendant from seeking dismissal or stay. Indeed, and to the contrary, s 8 permits a court to postpone the determination of unfitness where it is in the interests of the defendant to do so. It may well be in the defendant's interests at that stage to allow him or her to advance a dismissal or stay application. This is the legacy of the English case law and legislative reform discussed at [29]–[32] above. In New Zealand, the case law in the High Court discussed at [47]–[53] above—the cases of *R v B*, *Codd* and *Corkran*—show this approach in action. Entry of a stay in each case, because fair trial had become impossible, was appropriate. There was no need to distort the process in order to retain these defendants within the criminal justice process, via use of the CPMIP Act, when mental impairment was only one of the considerations in play.

[71] Secondly, where the defendant has been found unfit, an application for dismissal or stay *unrelated* to the defendant's mental impairment—e.g., based on physical impairment, undue delay or prosecutorial misconduct—may proceed despite the CPMIP Act otherwise being engaged. We reached that conclusion above at [64]–[66]. It follows that the use of the word "must" in ss 8A(5) and 10(2) does not have the effect of creating an immediate duty to move directly to the involvement

hearing or of ousting an alternative application for dismissal or stay. The statutory purpose of the CPMIP Act does not compel that, and Bill of Rights-consistent interpretation principles do not permit it. Rather, the purpose of the statutory imperative "must", in those provisions, is to compel the second stage inquiry (involvement) to always precede the third stage (the making of disposition orders under the CPMIP Act).[119]

[72] Thirdly, where the defendant has been found unfit by reason of mental impairment, and the parallel dismissal or stay application is wholly reliant on the same unfitness, we think it clear that application cannot then displace the requirement of ss 8A(5) and 10(2) that an involvement hearing take place. That would not be consistent with the statutory scheme. It is clear from the legislative history set out above at [34]–[44] that Parliament intended that the CPMIP Act provide the pathway for defendants in that situation.

[73] Fourthly, there will be some cases where there may be a measure of overlap between mental impairment, physical impairment and delay, all of which in combination have caused fair trial to become impossible. *R v B*, *Codd* and *Corkran* are examples. None of them involved a prior finding of statutory unfitness. But *had* there been such a finding, the grant of a stay would not necessarily have amounted to an abuse of process. As we see it:

(a) ss 8A(5) and 10(2) necessitate use of the CPMIP Act pathway where unfitness by reason of mental impairment is the *sole* basis for diversion from the criminal trial process; but

(b) they do not have that effect where other independent grounds (i.e., grounds apart from those within the scope of the CPMIP Act) are substantially engaged—such as physical impairment and delay.

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[119] The range of orders is set out above at [44]. Although s 23 of the Act appears to require that inquiries regarding disposition be made *before* an involvement hearing is held, the necessity of determining involvement before considering disposition calls for a different interpretation: see *T (SC 95/2024) v Te Whatu Ora Health New Zealand*, above n 52, at [38], n 37.

[74] In the latter case, we do not consider ss 8A(5) and 10(2) should be given a more expansive reading—one that would prevent an application for stay under the inherent jurisdiction, or dismissal under s 147, being advanced despite a prior unfitness finding under the CPMIP Act. In such a case, mental impairment is just one of a number of substantial considerations affecting the right to a fair trial, and the approach taken in *R v B*, *Codd* and *Corkran* remains open to a defendant. But where the other grounds lack substance, the position in [72] above applies and the CPMIP Act process must be followed.

The present case

[75] In the present case, Mr Bailey was entitled to pursue an application for stay under the inherent jurisdiction, or dismissal under s 147, after he was found unfit, so long as (1) that application was not wholly reliant on the mental impairment on which the finding of unfitness was made; and (2) other factors preventing fair trial were substantially engaged. Those prerequisites are met in this case. The application itself was based on delay; written submissions drew both on prejudice arising from delay and the fact of Mr Bailey's mental impairment.[120] In addition, the medical reports identify (but do not assess) a series of physical disorders potentially affecting Mr Bailey's capacity to participate in a trial of these charges.[121] The net effect of his impairments is that fair trial is not possible, as the unfitness finding has already confirmed.

[76] As we see it, however, there are two difficulties with the decision in the District Court. The first is that the judgment appears to be based primarily on the medical reports' findings, which are concerned with the mental impairment which resulted in Mr Bailey being found unfit to stand trial under the CPMIP Act. The judgment does not, at least expressly, justify departure from the CPMIP Act process by identifying substantial other reasons why the application for dismissal should be entertained despite the CPMIP Act findings of mental impairment and unfitness to stand trial. Only limited information as to the effects of delay, and of Mr Bailey's physical impairments, appears to have been before the Court.

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120 See above at [6] and [11].

121 These physical conditions include chronic obstructive pulmonary disease, angina, significant sleep apnoea, diabetes, a prostate issue, diminished hearing and diminished vision (glaucoma).

[77] The second difficulty is that, were such substantial other reasons demonstrated, the decision does not consider the alternative of granting stay rather than dismissal. For the reasons noted above at [26], dismissal may not be an appropriate course in this case. Relatedly, nor does the judgment consider a third potential option, which may be to decline both stay and dismissal, and allow the CPMIP Act process instead to continue to take its course in the case of a defendant who has been shown to be unfit to stand trial. Although it seems unlikely on the material before us and would require proper justification, that option may prove appropriate where the application is based at least in part on unfitness considerations and one of the treatment-based orders available under that Act is clearly preferable.[122]

[78] These conclusions mean neither the District Court judgment nor the Court of Appeal judgment may stand. We have considered whether we have sufficient information to determine ultimate disposition ourselves. However, we conclude that we do not, particularly as to the effects of delay on fair trial, and the extent of the effects of Mr Bailey's physical impairments (e.g., whether they might be compared to those assessed in *R v B*, *Codd* or *Corkran*). It will therefore be necessary to remit the s 147 application for further consideration by the District Court in light of this judgment.

Result

[79] The appeal is allowed.

[80] The application under s 147 of the CPA is remitted to the District Court for rehearing.

MILLER J

[81] I agree in the outcome, and generally with the reasons given in the principal reasons. I add brief reasons because I differ in two important respects.

[82] I agree that an error was made in the District Court. A judge should be reluctant to dismiss a charge under s 147 of the Criminal Procedure Act 2011 unless for

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122 See above at [44].

evidential insufficiency.[123] And a decision to dismiss or stay should not be based on the anticipated outcome of involvement and disposition hearings. Expediency should not be permitted to prevail.

[83] I agree also that a defendant who has been found unfit may pursue dismissal or stay on grounds independent of mental impairment. To do otherwise would be discriminatory. An involvement hearing cannot end in a guilty verdict, but it does serve as a functional equivalent of trial, opening the door to compulsory disposition.

[84] I take the view that as a matter of *process* an application for stay must be based on grounds that are independent of the qualifying mental impairment. To do otherwise would be to circumvent the process in the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP Act), which the legislature has prescribed for mentally impaired defendants. Defendants cannot escape an involvement hearing and/or compulsory disposition by invoking the very mental impairment that triggered those processes.

[85] It does not follow, however, that when *evaluating* the application a judge must separate the effects of the qualifying mental impairment from the other considerations, such as long delay between offence and charge, that may justify a (presumably permanent) stay of proceedings. The cases cited in the principal reasons above at [47]–[53] demonstrate that it may be practically impossible to do so, as a matter of fact. So, an overall evaluation must be made. At the same time, the primacy of the CPMIP Act process must be respected. The judge must ensure that the qualifying impairment does not become a leading consideration in a decision to stay for another cause.

[86] Rather than attempt to tease out cause and effect, I consider that the judge must stand back and ask as a matter of overall impression whether a stay would be granted

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[123] And in case the judge does not dismiss the charge, s 13 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 would govern the decision, which would be made *after* the involvement hearing. Under that section a charge must be dismissed under s 147 of the Criminal Procedure Act 2011 where the Court is not satisfied on the balance of probabilities that the defendant was involved.

were it not for the qualifying mental impairment. If the answer is no, the CPMIP Act process must run its course.

[87] It is in the two respects discussed at [83] and [85]–[86], respectively, that I apprehend my reasons differ from the principal reasons.

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