IN THE SUPREME COURT
I TE KŌTI MANA NUI **SC 120/2024**

BETWEEN	**BARRY JOHN BAILEY**
	Appellant
AND	**THE KING**
	Respondent

APPELLANT'S SUBMISSIONS

16 May 2025

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COUNSEL FOR THE APPELLANT CERTIFY THAT, TO THE BEST OF THEIR KNOWLEDGE,
THESE SUBMISSIONS CONTAIN NO SUPPRESSED INFORMATION AND ARE SUITABLE FOR PUBLICATION.

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SUMMARY OF SUBMISSIONS FOR APPELLANT

1. This appeal requires the Court to determine the circumstances in which it is open to a trial judge to dismiss charges under s 147 of the Criminal Procedure Act 2011 (**CPA**) after a defendant has been found unfit to stand trial under the Criminal Procedure (Mentally Impaired Persons) Act 2003 (**CPMIP Act**).

2. The Court of Appeal held that once an unfitness finding was made, the special CPMIP Act procedure (requiring an involvement hearing and consideration of the dispositions in ss 24-25) is mandatory unless there are independent reasons for dismissal under s 147 CPA unrelated to the defendants' mental impairment. Therefore it was not open to Judge Savage to dismiss the charges against Mr Bailey.

3. The Court of Appeal's approach was too narrow and prescriptive. It removed a trial judge's discretionary power to dismiss charges under s 147 CPA in circumstances where no useful purpose would be achieved by following through the CPMIP Act procedure. That will often be the case where a mental impairment is permanent and unchangeable, and it is evident that the dispositions available under ss 24-25 CPMIP Act do not respond to the defendant's needs.

4. Mr Bailey is just such a defendant. The medical reports before Judge Savage made clear that Mr Bailey suffered from a degenerative dementia and had a poor prognosis. He was being cared for at home by his family members. The Crown offered no good reason for continuation of the charges. It was open to the Judge to find that the interests of justice were not served by the criminal proceeding continuing in the circumstances.

BACKGROUND

Criminal defendants with dementia

5. Dementia primarily affects older persons. About 4% of New Zealanders aged 60 or older are diagnosed with dementia, with this number rising to approximately 14% of New Zealanders aged 80 or older.[1]

6. Criminal defendants with dementia are a small but persistent problem. In a typical year three to four per cent of defendants found unfit to stand trial will be 65 years or older.[2]

7. The inaptitude of compulsory CPMIP Act dispositions for defendants with dementia is widely understood. Wakefield and others recently conducted a longitudinal audit of court reports addressing unfitness in the Canterbury area over an eight-year period. In relation to clients with dementia, the authors wrote:[3]

> People in this group often present challenges for mental health services. They are less likely to respond to treatment than those with a psychotic disorder, therefore a treatment order pursuant to mental health legislation is often unhelpful. Intellectual disability legislation in New Zealand excludes people with an acquired neurocognitive disorder that began after the development period. There is a need for new legal pathways and better services for this group.

Factual background

8. Mr Bailey faces ten charges of sexual offending against four complainants. The offending is alleged to have occurred between 1983 and 1989 (that is, between 35 and 42 years ago).

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1 G Cheung, E To, C Rivera-Rodriguez et al. "Dementia prevalence estimation among the main ethnic groups in New Zealand: a population-based descriptive study of routinely collected health data" (2022) 12(9) *BMJ Open* (https://doi.org/10.1136/bmjopen-2022-062304). The authors note that dementia is under-recognised and underdiagnosed, so not all cases will be captured by health data sets.

2 Except in 2016/17, when nine per cent of defendants were aged 65 or older: Ministry of Justice (2024) "Outcomes for mentally impaired persons" (https://www.justice.govt.nz/justice-sector-policy/research-data/justice-statistics/data-tables/, accessed 13 May 2025).

3 A Wakefield, S Every-Palmer and J Foulds "Fitness to stand trial: 415 consecutive defendants assessed by a New Zealand forensic psychiatry service" (2024) 33(1) *Australasian Psychiatry* (https://doi.org/10.1177/10398562241290027) at 5. The quotation refers to a group of disorders referred to under the umbrella term "acquired neurocognitive disorder", which includes dementia (see p 3).

9. Mr Bailey is now 82 years old. He has dementia, and is cared for at home by his family. He was first charged in September 2020.

10. In October 2021 Mr Bailey filed an application for dismissal or stay under s 147 CPA on the basis that, due to the time that had elapsed since the commission of the offence, it was not possible for him to obtain a fair trial.[4]

11. The hearing of this application was delayed pending reports commissioned under s 38 CPMIP Act, due to emergent doubts about Mr Bailey's fitness to stand trial. A neuropsychological assessment was conducted in March 2022 suggesting a diagnosis of dementia. Initial s 38 reports received in July 2022 were inconclusive, as one report writer (Ms Kingi) reached the view Mr Bailey was unfit to stand trial[5] while the other (Dr McDonnell) felt a dementia diagnosis could not yet be made and that he appeared to be fit to stand trial when assessed.[6]

12. Further health assessment followed, which confirmed the dementia diagnosis. Mr Bailey was treated with Donepezil, which can improve cognitive function in some Alzheimer's patients.[7] In November 2022 Ms Kingi confirmed her view that Mr Bailey was unfit to stand trial.[8] In April 2023 Dr McDonnell re-examined Mr Bailey and concluded that his functioning was much worse than during her first examination, and he could no longer be considered fit to stand trial, despite the Donepezil treatment.[9] Dr McDonnell also noted that Mr Bailey had lost his driver licence, was reliant on family members to leave the house, and could no longer be left alone at home. He experienced increasing confusion and unusual behaviours, for example placing a soiled shirt in a rubbish bin rather than washing it.[10]

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4 Application dated 28 October 2021 (SC Casebook 29).
5 Kingi first report (CA Casebook 75).
6 McDonnell first report (CA Casebook 67).
7 McDonnell second report (CA Casebook 82).
8 Kingi second report (CA Casebook 81).
9 McDonnell third report (CA Casebook 85).
10 McDonnell third report at para 10 (CA Casebook 86).

13. On 28 April 2023 Mr Bailey was found unfit to stand trial.[11] The proceeding was adjourned to the original trial date for an involvement hearing.[12]

14. On 17 August 2023 counsel advanced the s 147 application before Judge Savage. Defence counsel submitted that in light of the defendant's condition and given the available evidence, he would be unable to participate in an involvement hearing or respond to the Crown case or the complainants' evidence. The Police interview of Mr Bailey had been conducted at an early stage and without putting any specific allegations to him, and so contained only general denials. The result would have been an unfair involvement hearing where it was not possible to meaningfully respond to the allegations. The defence relied upon the various health assessor reports.[13]

15. Counsel also noted that there was a "pragmatic" basis for dismissing the charges, which was that there was no form of order under the CPMIP Act that could possibly provide for Mr Bailey's needs, which were ultimately health and welfare needs arising from his dementia.[14]

16. The Crown primarily advanced a jurisdictional objection. The Crown submitted that, an unfitness finding having been made, the Court had no choice but to track along to an involvement hearing, even if no determinative finding of guilt could now be made.[15] In oral arguments the Crown submitted that the "primary reason" the matter was still being pursued by the Crown was "giving the complainants their day in court".[16] Crown counsel also acknowledged that "hard cases make bad law" and that the Court might well disagree with the Crown's continued pursuit of the charges, but that did not permit departure from the statutory CPMIP Act

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11 Minute of Judge Kellar dated 28 April 2023 at [5] (CA Casebook 90).

12 Ibid at [6].

13 Ruling of Judge Savage dated 17 August 2023 at [9]-[15] (SC Casebook 26-27).

14 Legal discussion before Judge C D Savage dated 16 August 2023 (CA Additional Materials 17).

15 Ruling of Judge Savage dated 17 August 2023 at [5] and [14] (SC Casebook 26-27).

16 Legal discussion before Judge C D Savage dated 16 August 2023 (CA Additional Materials 21).

procedure.[17] At no point did the Crown suggest that a CPMIP Act disposition would ultimately be sought.

17. Judge Savage recorded but did not expressly rely on the unfairness arguments advanced by trial counsel in determining the application. Instead, the Judge admitted the health assessor reports and dismissed the charges on the basis that it was not in the interests of justice to prolong the proceeding:[18]

> [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

18. The Crown sought and obtained leave to appeal Judge Savage's decision. The Court of Appeal concluded that CPMIP Act procedure, once triggered, is a code that must be followed to determine the appropriate disposition of a criminal defendant with a mental impairment. Because the reasons for dismissal of the charges advanced related to Mr Bailey's mental impairment, Judge Savage did not have a discretion to dismiss the charges under s 147 CPA. Doing so would circumvent the processes mandated by the CPMIP Act. But the CPMIP Act did not limit the ability to pursue an application under s 147 CPA founded on matters independent of the defendant's mental impairment.[19]

19. With regards to the appropriate disposition, the Court of Appeal held that the conclusion that Mr Bailey would not pose any ongoing risk "can only properly be reached" through the CPMIP Act process. This is because the

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17 Ibid (CA Additional Materials 23).

18 SC Casebook 27.

19 Court of Appeal judgment at [32] (SC Casebook 21).

court is obliged under ss 24 and 25 to "consider all the circumstances of the case" which includes the facts elicited at an involvement hearing.[20]

The issues on appeal

20. The approved question is whether the Court of Appeal was correct to allow the prosecutor's appeal. The appellant sought leave to appeal on the basis that the Court of Appeal judgment adopted a wrongly confined interpretation of s 147 CPA. That remains the focus of the appeal.

21. The appellant accepts that fair trial or natural justice concerns arising from a mental impairment can normally be met through the CPMIP Act procedure. As such it will not normally be necessary or appropriate to dismiss charges based solely on the proposition that a mental impairment renders an involvement hearing unfair. However, the appellant says that s 147 permits dismissal of a charge at any time in response to both:

    21.1 mental impairments evidently unsuitable for or not requiring one of the compulsory dispositions available under ss 24-25 CPMIP Act; and

    21.2 unfairness unrelated to a mental impairment (such as the passage of time since the alleged crime or prosecutorial misconduct).

22. The Court of Appeal accepted the latter proposition, but not the former. The effect of the Court of Appeal decision is to require the CPMIP Act process to continue to its conclusion even when a trial court is satisfied that the defendant's condition renders it unnecessary as no compulsory disposition would be ordered.

RELEVANT LAW

Nature of this appeal

23. This is a second appeal on a question of law under Part 6 Subpart 8 of the CPA.

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[20] At [40]-[41] (SC Casebook 23-24).

24. Section 147 CPA confers a discretion on the trial judge.[21] This Court has described the four categories of error that can found a successful appeal against an exercise of discretion as follows:[22]

> (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.

25. The Court of Appeal determined that Judge Savage had made an error of law because, on its interpretation of s 147, dismissal was not open to the Judge in the circumstances of the case.

26. The appellant's case is that it was open to the Judge to dismiss the charges under s 147 CPA in light of the health assessor reports about Mr Bailey's condition and the interests of justice not favouring continuation of the proceeding. As such there was no basis on which to overturn Judge Savage's ruling on appeal.

Discretionary power to dismiss charges – s 147 CPA

27. Section 147 CPA provides:

> **147 Dismissal of charge generally**
>
> (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

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21 *Lyttle v R* [2019] NZCA 329, [2019] 3 NZLR 636, at [23]; *Turner v South Taranaki District Council* [2015] NZHC 1869, at [20].

22 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1, at [32]. See to the same effect in a criminal context *R v Reid* [2007] NZSC 90, [2008] 1 NZLR 575 at [21]; *C (CA537/2022) v R* [2023] NZCA 121, at [23]; *Turner*, ibid.

> (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.

28. The s 147(1) power is not expressly fettered, except insofar as it may only be exercised before a verdict is given or a guilty plea entered. Section 147 reflects the power of dismissal earlier codified in s 17 of the Criminal Code Act 1893, s 37 of the Crimes Act 1908, and s 347 of the Crimes Act 1961. The 1893 and 1908 enactments expressly affirmed that a grossly disproportionate process — where "no more than a nominal punishment" would follow — was basis for dismissal.[23] The 1961 Act affirmed the same discretion on an even broader basis, without any substantive qualification.[24] While s 147(4) CPA particularises the evidential grounds on which dismissal *may* occur, that does not limit the generality of the discretion to dismiss charges.

29. Dismissal and stay are often discussed interchangeably. While the power of dismissal is a broad statutory discretion resulting in acquittal, the power to stay proceedings (either temporarily or permanently) is an inherent power necessary to ensure fair trial or avoid abuse of process, and is not deemed to be an acquittal.[25]

30. Section 147 confers a broad discretion, against which there is intentionally no general right of appeal. A prosecutor may seek leave to appeal only on a

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23 Criminal Code Act 1893, s 17; Crimes Act 1908, s 37.

24 Crimes Act 1961, s 347.

25 *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA).

question of law.[26] A defendant may not seek leave to appeal an unsuccessful discharge application.[27]

31. The breadth of this discretion includes dismissal of charges for both disproportionality and lack of utility:

31.1 In *R v ETE* Holland J suggested that any fetter on the power of dismissal under s 347 of the Crimes Act 1961 was inconsistent with the history and purpose of the discretion, which had been put to use in many diverse circumstances.[28] His Honour noted that, while the discretion to dismiss should be "sparingly exercised … it is not desirable for the Judges to place a fetter on the unfettered discretion vested in the Judges by Parliament".[29]

31.2 Triviality of alleged conduct, disproportionality of a criminal process, and the likely nominal nature of any penalty can all be grounds for dismissal of a charge.[30] These cases have been categorised as encompassing circumstances where "no useful purpose would be served by the continuation of the prosecution".[31]

31.3 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. There is no need to make use of the CPMIP Act process when a defendant's fitness is put at

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26 Criminal Procedure Act 2011, s 296.

27 *D (CA716/2015) v R* [2016] NZCA 190.

28 *R v ETE* (1990) 6 CRNZ 176 (HC), at 180: "… Judges have exercised their discretion to discharge an accused in circumstances where pleas of guilty rendered the expense of a trial on associated charges as not being warranted, where uncontestable evidence to be called by the defence rendered an acquittal inevitable, where the offending disclosed in the depositions was of such a technical and relatively blameless nature as not to warrant the invocation of the criminal law, and no doubt other grounds in addition to the more common ground that on the evidence disclosed in the depositions no jury reasonably directed could bring in a proper verdict of guilty."

29 Ibid at 180.

30 Mathew Downs (ed) *Adams on Criminal Law — Offences and Defences* (online ed, Thomson Reuters) at [CAS347.01] (Historic version as at 30 June 2013) and at [CPA147.06]; *R v Harrington* [1976] 2 NZLR 763 (SC) at 764; *R v Harlick* HC Auckland T177/86, 27 February 1987; *Long v R* [1995] 2 NZLR 691 (HC); *Thompson v District Court Christchurch* (2002) 9 NZCLC 262,824 (HC) at [30]–[31]; and *Lincoln v Police* [2024] NZHC 2760 at [22].

31 *R v W (No 1)* (2004) 21 CRNZ 926 (HC) at [20]; see Downs, above n 30, at [CPA147.06].

issue but no compulsory disposition is conceivable. In *R v B* the High Court stayed a murder charge in respect of an elderly accused with terminal cancer, depression and dementia, given his condition and the nature of the alleged crime (a mercy killing).[32] In *R v Codd* the High Court considered that an elderly defendant's health, which "manifest[ed] itself in a way … directly relevant to his capacity to conduct a defence", was a specific prejudice arising from delay and justified a stay of proceedings in the Court's inherent jurisdiction.[33] In *R v Corkran* the High Court stayed proceedings where a fair trial was not possible due to an elderly defendant's complex combination of physical and mental impairments.[34]

CPMIP Act procedure

32. Fitness to stand trial, which includes the ability to conduct a defence or instruct counsel to do so, is a fundamental element of trial fairness in an adversarial criminal justice system.[35] Originally a common law concept,[36] inability to plead and its consequences have long been codified in New Zealand.[37]

33. Section 8A(5) CPMIP Act provides that following an unfitness finding, the court "must inquire into the defendant's involvement" under ss 10, 11 or 12 (which define the different processes to be followed before or during trial).

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32 *R v B* HC Wellington CRI-2003-091-2902, 17 November 2003.

33 *R v Codd* [2006] 3 NZLR 562 (HC) at [15].

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

35 *R v Cumming* [2005] NZCA 260, [2006] 2 NZLR 597, at [37]-[38]; *Nonu v R* [2017] NZCA 170, at [24]; *J v Attorney-General* [2023] NZCA 660, at [140].

36 The 17th century position was influentially recorded by Sir Matthew Hale in *The History of the Pleas of the Crown* (E. and R. Nutt and R. Gosling, London, 1736) at 34: "If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but be remitted to prison until that incapacity be removed; the reason is, because he cannot advisedly plead to the indictment…" A similar formulation would later appear in Blackstone's *Commentaries on the Laws of England* (3rd ed., Callaghan and Co, Chicago, 1884), at vol IV p 23.

37 The consequences of unfitness to stand trial have been codified since 1800 (see Criminal Lunatics Act 1800 (39 & 40 Geo 3 c 94), s 2; see also Mental Defectives Act 1911, s 32; Mental Health Amendment Act 1957, s 5; Criminal Justice Act 1954, Part 5A (as inserted by Criminal Justice Amendment Act 1969, s 2); Criminal Justice Act 1985, Part 7).

The word "must" is repeated in ss 10(2), 11(2) and 12(2) in the following format:

> 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.

34. Section 13 defines the mandatory outcomes of the involvement inquiry, again using the word "must". If involvement is not proven, s 13(2) provides that the Court must dismiss the charge. If involvement is proven, s 13(4) provides that the court must dispose of the charge under Part 2 subpart 3 which permits the making of various types of order under the mental health or intellectual disability legislation.

35. Section 15 provides that the unfitness and involvement process may be conducted in the absence of the defendant if they are too mentally impaired to come to court.

36. Part 2 subpart 3 requires the court to first consider whether a person should be made a special patient (in terms of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (**MHCAT Act**)) or special care recipient (in terms of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (**IDCCR Act**)).[38] If neither of those orders are necessary, the court must either make a "civil" order under the MHCAT Act or IDCCR Act, decline to make an order if the person is already subject to imprisonment, or order the person's immediate discharge.[39]

37. If a special patient or special care recipient order is made under s 24, the charges are not stayed. Instead they remain active for the duration of the person's time subject to that "special" status, and are only stayed once that status is removed.[40] If any other order is made under s 25, the court has a

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38 CPMIP Act, s 24.
39 CPMIP Act, s 25.
40 CPMIP Act, s 32.

discretionary power to stay the criminal proceedings at the time of that order.[41]

38. The CPMIP Act is not an exhaustive code for criminal processes involving mentally impaired defendants. Relevant CPA provisions may continue to apply even if a CPMIP Act process is underway:

38.1 In *Teika v Te Whatu Ora* the Court of Appeal held that powers of detention in the CPMIP Act were non-exhaustive and that the CPMIP Act and CPA powers "are complementary and operate together."[42]

38.2 *Maangi v R* concerned a judge granting leave to withdraw charges under s 146 CPA during a CPMIP Act involvement hearing. The Crown position was that the usual powers of trial courts remained available during that process.[43] The Court of Appeal accepted the Crown submission, concluding that:[44]

> We see no reason in principle why such of the Court's procedures which are not inconsistent with the statutory procedure should be suspended.

England and Wales position

39. The Criminal Procedure (Insanity) Act 1964 provides for findings of unfitness to plead,[45] which "shall" be followed by an involvement hearing.[46] The available dispositions are defined as a hospital order under the Mental Health Act, a "supervision order", or an immediate discharge.[47] The power to make a supervision order includes a broad discretion to require a defendant to be supervised by a social worker or probation officer, and to

41 CPMIP Act, s 27.
42 *Teika v Te Whatu Ora* [2024] NZCA 390, at [23].
43 *Maangi v R* [2017] NZCA 534, at [30]-[31].
44 *Maangi v R* [2017] NZCA 534, at [33].
45 Criminal Procedure (Insanity) Act 1964 (UK), s 4.
46 Criminal Procedure (Insanity) Act 1964 (UK), s 4A.
47 Criminal Procedure (Insanity) Act 1964 (UK), s 5.

impose certain medical treatment and residence conditions, for up to two years.[48]

40. In *Regina v M* the England and Wales Court of Appeal considered that despite the apparently "mandatory wording" of s 4A seeming to require an involvement hearing after an unfitness finding, a criminal court's inherent power to stay proceedings continued to apply and there was "no reason in principle why application that the proceedings against the defendant should never have been entertained by the court should not be made at any stage".[49] However, the Court held that "the defendant's disability, or matters related to it, cannot…in themselves found a successful abuse application" as this would "avoid the whole point" of the statutory procedure.[50]

41. The lack of public interest or utility in continuing a prosecution after a finding of unfitness means that dismissal of charges without an involvement hearing occurs in about 4% of cases involving unfit defendants in England and Wales.[51]

42. The Law Commission for England and Wales has reviewed criminal procedure for mentally impaired defendants with a view to modernising that procedure and ensuring its consistency with human rights law. While English courts have an inherent power to dismiss charges to avoid abuse of process, there is no equivalent to the broad statutory discretion conferred by s 147 CPA. In that context, one of the recommendations made by the Law Commission was that there ought to be an express statutory discretion

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48 Criminal Procedure (Insanity) Act 1964 (UK), Schedule 1A.

49 *R v M* [2001] EWCA Crim 2024, [2002] 1 WLR 824, at [36].

50 Ibid, at [37].

51 R D Mackay, B Mitchell and L Howe, "A Continued Upturn in Unfitness to Plead – more disability in relation to the trial under the 1991 Act" [2007] Criminal Law Review 530, at 538 and Table 8. No involvement hearing occurred in 12 out of 329 cases examined, being 3.6%. In nine cases the Crown offered no evidence after the unfitness assessment. In two cases the court dismissed the charges on the basis that there was no public interest in continuing. In one case the Attorney-General entered a *nolle prosequi*. These cases included murder, rape, and indecent assault (see 539, Table 9). While there is no express link drawn by the authors between a dementia diagnosis and a lack of progression from an unfitness finding to an involvement hearing, a similar number (14, or 4.3%) of the cases analysed involved a dementia diagnosis (see 533, Table 2).

enacted to permit the court to dismiss charges prior to an involvement hearing, the Commission explaining that:[52]

> …in some cases it will have become apparent during the determination of unfitness that none of the range of available disposals is appropriate or necessary in the case of the particular defendant.

43. The Commission proposed a discretionary power whereby the court could balance public interest factors in a public involvement hearing against the utility of the available dispositions in the defendant's circumstances.[53]

SUBSTANTIVE SUBMISSIONS

44. Section 147 CPA confers a broad discretion to dismiss charges "at any time" before conviction or guilty plea, which has been exercised for many varied purposes since first enacted in 1893. The Court of Appeal's interpretation narrows s 147 and leaves the CPMIP Act process as effectively the only method for dealing with mentally impaired defendants, even when that process lacks any real utility.

45. The appellant accepts that s 147 CPA dismissal will 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. Avoiding an involvement hearing on the same unfairness basis on which a defendant cannot stand trial would vitiate the purposes of the CPMIP Act, and could prevent public safety concerns from being met in circumstances where a person cannot be held criminally liable. The interests of justice will normally require the CPMIP Act process to continue, so that enduring public safety risk can be addressed in circumstances where criminal culpability (and punishment) is not possible.

46. But s 147 CPA continues to apply and it is therefore not mandatory to complete the CPMIP Act procedure in every case, particularly where it is tolerably clear at an early stage that no compulsory disposition under ss 24-

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52 Law Commission for England and Wales *Unfitness to Plead Volume 1: Report* (2016) Law Com No 364, at 5.27.

53 Law Commission for England and Wales *Unfitness to Plead Volume 1: Report* (2016) Law Com No 364, at 5.49-5.52 and 10.38.

25 CPMIP Act is necessary or appropriate in the circumstances. This was just such a case. Mr Bailey was elderly and effectively incapacitated by an incurable degenerative cognitive disorder.

47. Involvement hearings were introduced to avoid compulsory dispositions of factually innocent defendants. The Crown's only substantive justification for continuation of the proceedings – that the complainants would thereby have their "day in court" – was unrelated to the purpose of an involvement hearing and an insufficient reason to prolong a process that was unnecessary to meet any public safety concern. It was open to Judge Savage to find that prolonging the proceeding for that purpose was inconsistent with the interests of justice.

Purpose of involvement hearing is to protect factually innocent defendant from compulsory disposition

48. Before the CPMIP Act was enacted, unfitness findings and mental health dispositions could be made under the former part 7 of the Criminal Justice Act 1985. No statutory involvement hearing was required. This could potentially result in unfairness to the defendant, in that they did not have an opportunity to be factually acquitted before a compulsory disposition was ordered.

49. The CPMIP Act introduced involvement hearings for first time. As section 3(b) explains, the purpose of these is to protect a defendant by:

> …[providing] that a defendant found unfit to stand trial for an offence must be the subject of an inquiry to determine whether the evidence against the defendant is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence:

50. The involvement hearing was introduced "to avoid the possibility of a person who is found unfit to stand trial being subjected to detention or similar measures in circumstances where he or she has not, in fact, committed an offence".[54] It has a protective purpose for the defendant, and is not an

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[54] *R v Te Moni* [2009] NZCA 560 at [68]; see also *Ruka v R* [2011] NZCA 404, (2011) 25 CRNZ 768 at [92] where the Court of Appeal described the relevant purpose of an involvement hearing as "the public interest in detaining and treating those who present a risk through no fault of

avenue for an alternative trial for the complainants, as the finding of involvement is not a finding of criminal culpability and does not carry with it any prospect of punishment.[55]

51. When first enacted, the CPMIP Act process required satisfaction as to involvement *before* a finding of unfitness was made. This was the opposite ordering that many comparable jurisdictions had adopted,[56] and presented significant problems for trial courts. As the Court of Appeal noted in *Te Moni*, this ordering resulted in:[57]

    51.1 too many involvement hearings to the detriment of complainants and witnesses, in that if someone was found fit to stand trial after an involvement hearing they would need to give evidence twice; and

    51.2 the risk of unfairness to defendants, in that the involvement hearing was not tailored to the defendant's capacities.

52. Another unanticipated impact was the potential for tactical misuse of the unfitness process, by which a defendant might trigger the procedure in order to convene an involvement hearing to test prosecution evidence at an early stage.[58]

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their own"; and *R v Antoine* [2001] 1 AC 340 at 375–376 where Lord Hutton held the purpose of the equivalent of an involvement hearing is: "to strike a fair balance between the need to protect a defendant who has, in fact, done nothing wrong and is unfit to plead at his trial and the need to protect the public from a defendant who has committed an injurious act which would constitute a crime if done with the requisite mens rea".

55 See the speech from the Hon Phil Goff (Minister of Justice) in his third reading speech for the introduction of the Bill that became the CPMIP Act in (21 October 2003) 612 NZPD 9545: "… 'Criminal Justice' as a title for this bill was no longer appropriate because the thrust of the bill was that a person who was found not to be competent to stand trial, or who was found to be insane, was, therefore, not criminally culpable"; *Ruka v R* [2011] NZCA 404, (2011) 25 CRNZ 768 at [92]; *R v H* [2003] UKHL 1, [2003] 1 WLR 411 at [18]; and *J, Compulsory Care Recipient by his Welfare Guardian, T v Attorney-General* [2023] NZCA 660 at [156]–[157] citing *M (CA677/2017) v Attorney-General (in respect of the Ministry of Health)* [2020] NZCA 311 at [63] and [121], *Winko v The Director, Forensic Psychiatric Institute* [1999] 2 SCR 625 at [93]–[94] and *R v Morris* [2002] ACTSC 12, (2002) 128 A Crim R 110 at [28].

56 The Court of Appeal surveyed those jurisdictions in *R v Te Moni* [2009] NZCA 560, at [69].

57 *R v Te Moni* [2009] NZCA 560, at [96].

58 Ministry of Justice (2016) "Regulatory Impact Statement – Order of inquiries to determine fitness to stand trial under the Criminal Procedure (Mentally Impaired Persons) Act 2003" at para 12.

53. For all of these reasons, the order of the unfitness and involvement inquiries was reversed by the Courts Matters Act 2018.

54. In enacting involvement hearings, Parliament sought to protect factually innocent defendants from compulsory dispositions. In reversing the order of inquiries, Parliament sought to reduce instances of unnecessary involvement hearings, with all the consequences such hearings have for complainants, witnesses and defendants, as well as reducing the impact of unnecessary procedures on other court users. At no stage in this reform process did Parliament intend to:

    54.1 require unnecessary involvement hearings in cases where no compulsory disposition is in contemplation; or

    54.2 introduce a vindicatory purpose whereby complainants would get their "day in court".

55. It is consistent with Parliament's intention that the broad discretion under s 147 CPA continues to be available despite the CPMIP Act process.

Interpretive presumption of *generalia specialibus non derogeant* inapplicable

56. The Court of Appeal's interpretation of s 147 CPA suggests that Parliament, in enacting a specific process for mentally impaired defendants in the CPMIP Act, intended to fetter a historic and otherwise broad discretion by requiring courts to complete a criminal process even when satisfied it would serve no useful purpose. Such an interpretation is inherently unlikely and inconsistent with the presumption in favour of liberty.[59]

57. Contrary to the Court of Appeal's judgment, the interpretive principle *generalia specialibus non derogeant* does not assist to interpret the scope of s 147 CPA.[60] It is wrong to describe s 147 CPA as "later" legislation; it was a reenactment and restatement of the statutory discretion to dismiss charges

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[59] By way of analogy, in Canada "the continued subjection of an unfit accused to the criminal process, where there is clear evidence that capacity will never be recovered and there is no evidence of a significant threat to public safety" is regarded as unlawful "overbreadth" in terms of the s 7 Charter right to liberty: *R v Demers* [2004] 2 SCR 489 at [43].

[60] Court of Appeal judgment at [29] (SC Casebook 19).

that had existed in some form for over a century. The same interpretive question could have arisen in relation to s 347 of the Crimes Act, which was in force when the CPMIP Act was enacted. The relevant question is whether the s 147 CPA discretion is to be interpreted as constrained in law by the CPMIP Act process, not whether their ordering in time affects their interpretation.

English caselaw reflects a particular statutory context not shared in New Zealand

58. The Court of Appeal's reasons focus primarily on the reasoning in *Regina v M*, where the England and Wales Court of Appeal concluded that the defendant's disability, or matters related to it, could not found a successful application for a stay.

59. In *M* the Court was considering the effect of the statutory unfitness procedure on the inherent power to grant a stay of proceedings due to unfairness. In other words, the question was how the statutory process shaped the Court's inherent power of stay. This was not the same question raised by Mr Bailey's case, which is the interaction between two statutory procedures (the CPMIP Act and s 147 CPA) where the power to dismiss charges may be exercised for a broad range of reasons including disproportionality and lack of utility.

60. By contrast to the closed list of dispositional orders available under ss 24–25 CPMIP Act, England and Wales criminal procedure grants the trial court a broad discretion to impose a "supervision order" including whatever combination of residence, probation or social work supervision, reporting, and medical treatment conditions is appropriate in the circumstances.[61] Were such a "catch-all" disposition power present in New Zealand law, it would be more understandable to apply the reasoning in *Regina v M* in full to interpret the scope of s 147 CPA because Parliament could be taken to have intended a criminal court to broadly deal with the risks and needs presented by an unfit defendant under the specialised statutory procedure.

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61 Discussed above at paragraph 38.

But outside of the mental health and intellectual disability dispositions available under ss 24-25 CPMIP Act, broad powers to deal with general welfare and medical treatment needs are here only available to the Family Court under the Protection of Personal and Property Rights Act 1988 (**PPPR Act**). The Court of Appeal judgment would require the completion of the CPMIP Act process even when discharge without a disposition order is inevitable. In those different circumstances, it was wrong for the Court of Appeal to apply *Regina v M* by analogy to determine the scope of s 147 CPA.[62]

61. Unfit defendants with dementia may require welfare orders under the PPPR Act. But these are unavailable in law as part of a criminal proceeding. Whether a New Zealand equivalent of the England and Wales "supervision order" *should* be available is a matter for Parliament.[63] But it will often be tolerably clear once a finding of unfitness is made that no compulsory disposition is appropriate or necessary and that, the mental impairment being permanent and degenerative, it is not in the interests of justice for the criminal process to continue.

No prospect of a compulsory disposition in this case

62. The Court of Appeal erred in law in that it foreclosed a dismissal under s 147 CPA in circumstances where the mental impairment is permanent, degenerative and untreatable, and where no compulsory disposition will be appropriate. It was both open to the trial court and substantively appropriate to dismiss Mr Bailey's charges in the circumstances of this case.

63. The Court of Appeal's reasoning proceeded on the basis that there was a conceivable prospect of a MHCAT Act disposition, under either s 24(2)(a) or

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62 Court of Appeal judgment at [28] (SC Casebook 19).

63 This was a recommendation of the Chief Justice to the select committee for the Court Matters Bill 2017 (285-2): letter from Elias CJ to Raymond Huo (Chairperson of the Justice Committee) regarding the Court Matters Bill 2017 (285-2) (14 December 2017). This submission was noted by the Ministry of Justice in its Departmental Report, which said that the Ministry was aware of these concerns and a separate review of the matters was on the Ministry's policy work programme: Ministry of Justice | Te Tāhū o te Ture *Departmental Report*: *Courts Matters Bill* (2018) at [469].

s 25(1)(a) CPMIP Act.[64] But in reality there was no prospect of any such order. Special patient status, which requires detention in a hospital, can only be imposed under s 24(2)(a) CPMIP Act if necessary in the public interest. There was no prospect of a court making such an order in Mr Bailey's case in light of his progressive cognitive deterioration, his frailty and his reliance on others for safety and self-care, not to mention that forensic mental health hospital beds are an expensive and limited resource.

64. Similarly, orders under s 25(1)(a) CPMIP, which are premised on a mental disorder giving rise to a need for treatment, have no utility in relation to a progressive and untreatable cognitive disorder.[65] Such orders are civil in nature, and can be sought at any time (independently of the CPMIP Act process) under the compulsory assessment and treatment process enshrined in pt 1 of the MHCAT Act. No such assessment has been pursued in respect of Mr Bailey, either before or after Judge Savage's decision.

65. The s 38 reports Judge Savage relied upon made clear the degenerative and permanent nature of Mr Bailey's Alzheimer's disease and the ineffectiveness of the only available treatment. Further, it was clear from the argument before the Judge that no compulsory disposition was in prospect.

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64 At [13] and [40]–[41]. The Court only considered MHCAT Act dispositions, as Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 dispositions are not available except in cases of intellectual disability as defined by s 7 of that Act, which requires that the impairment became apparent during the person's developmental period (generally ending at age 18).

65 The purposes of a compulsory treatment order under the MHCAT Act are to provide compulsory treatment for a "mental disorder" as defined in s 2, which is an abnormal state of mind (including a disorder of cognition) giving rise to a risk of harm to self or others. Alzheimer's disease meets the mental disorder definition when it gives rise to serious self-care concerns, but necessity of an order to ensure appropriate treatment is also a precondition to a compulsory treatment order being made (MHCAT Act s 27(3)). In the absence of any treatment need or prospects, only the Protection of Personal and Property Rights Act 1988 processes respond to the needs of people with Alzheimer's disease. The only case identified by the Crown in the Court of Appeal where a MHCAT Act order was made in respect of a defendant with dementia was *R v Mulholland* [2015] NZHC 881, which the appellant says was wrongly decided. A community treatment order was made under s 25(1)(a) despite the contrary evidence from health practitioners, for the purposes of recognising the seriousness of the offending, the harm caused, and the views of the victims (at [440]), which were irrelevant considerations. By contrast, in *Codd* the High Court accepted that no disposition orders were required when staying a proceeding against a defendant with Parkinson's disease and associated loss of mental functioning (above n 33 at [13]).

CONCLUSION

Orders sought

66. It was open to Judge Savage to dismiss the charges on the basis that continuation of the proceeding was not necessary in the interests of justice. The Court ought to allow the appeal and reinstate the s 147 CPA order.

List of authorities

67. A list of authorities is **annexed**.

16 May 2025

M J McKillop / D Steyn
Counsel for the appellant

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