
IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC3/2026

BETWEEN

ETHAN WEBSTER

Appellant

AND

THE KING

Respondent

RESPONDENT'S SUBMISSIONS ON APPEAL AGAINST CONVICTION

9 July 2026



**Te Tari Ture
o te Karauna**
Crown Law

PO Box 2858
Wellington 6140
Tel: 04 472 1719

Contact Person:

A J Ewing | E P C Duckett

Andrea.Ewing@crownlaw.govt.nz | Emily.Duckett@crownlaw.govt.nz

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Introduction

1. In December 2022 Mr Webster pleaded guilty to his part in a brutal murder. It then became apparent he has foetal alcohol spectrum disorder (FASD). He now appeals his conviction, arguing that:
 - 1.1 he has a defence to the charge because his FASD prevented him forming the requisite intent. In simple terms he says he could not understand that punching and kicking the head of an already unconscious man for several minutes might well kill him.
 - 1.2 he was unfit to stand trial (including because he lacked communication assistance) so this too vitiates his plea. He says the Court below should have considered his fitness to go to trial, despite his decision to plead guilty.
2. The Crown responds that Mr Webster's conviction is valid:
 - 2.1 Mr Webster has not shown his lawyer was wrong about the "real risk" of conviction if he went to trial. There is no substantially helpful expert evidence explaining how his condition would have impacted his ability to form murderous intent, as a principal and as a party. Opinions about his fitness cannot fill this gap.
 - 2.2 Mr Webster was fit to plead in 2022. He could offer a relatively detailed account to his lawyer, just as he had to police, and his FASD did not prevent him understanding the charge and the evidence.
 - 2.3 The Court of Appeal's approach to the validity of his guilty plea was orthodox. If he had the necessary capacities to make that decision, there could be no miscarriage.

Facts

3. Mr Webster (18) and Mr Candy (39) worked on a Taranaki dairy farm with the victim, Jacob Ramsay (33). Mr Ramsay was using methamphetamine and owed both men money. On the evening of 29 July 2022, Mr Ramsay was at the Ōakura cemetery and texted another co-worker – who was with Mr Candy and Mr Webster – asking for a ride. Mr Candy's partner (Ms Hughes) drove him to collect Mr Ramsay instead. Mr Candy assaulted him at

the cemetery, then forced him into the car where he kept hitting him. Ms Hughes drove both men back to the farm where Mr Webster was waiting.

4. When Mr Ramsay was pushed from the car, unconscious, Mr Webster choked, punched and kicked him, screaming with rage. Someone mentioned killing him. Mr Candy then chained Mr Ramsay's left foot to the back of the car and began to drive off down a gravel track (without Ms Hughes). Mr Webster chased after the car and got into the passenger seat. Mr Ramsay was dragged behind the car for 900 metres down a gravel track, then moved to a rubbish pit where he was left, half-naked and still unconscious.
5. Mr Ramsay died of multiple blunt force injuries, including internal brain haemorrhages and a wound to the back of his head which revealed his skull.

First appeal ground: Tenable defence

6. Mr Webster says a miscarriage has occurred because his lawyer's advice did not take account of his FASD.¹ This argument engages the fourth category in *Merrilees*:²

... where trial counsel errs in his or her advice to an accused as to the non-availability of certain defences, or outcomes, or if counsel acts so as to wrongly, and perhaps negligently, induce a decision on the part of a client to plead guilty under the mistaken belief or assumption that no tenable defence existed or could be advanced.

7. To succeed, Mr Webster must show his FASD gave him an arguable defence to murder. The Crown responds there is no evidence suggesting his impairment would have prevented him forming murderous intent.

The legal test and Mr Webster's criticisms of it

8. On its own, a tenable defence obviously cannot vitiate a guilty plea.³ The law's concern is where a defendant pleads guilty based on a "serious misapprehension" of his prospects of defending the charge.⁴ The law

¹ Appellant's submissions at [7.2].

² *R v Merrilees* [2009] NZCA 59 at [34], approved as a category illustrative of when a guilty plea may constitute a miscarriage in *Re Solicitor-General's Reference (No 1 of 2023)* [2023] NZSC 151, [2023] 1 NZLR 457 at [41], [43] and [46].

³ *Kissling v R* [2021] NZCA 6 at [25] (leave declined in *Kissling v R* [2021] NZSC 132).

⁴ See, for example, *Keegan v R* [2010] NZCA 247 at [61]–[62], noting trial counsel's failure to pursue an application under s 44 of the Evidence Act 2006 was one of four errors by trial counsel which collectively had led to a miscarriage.

understandably assumes that only a *tenable* defence, of which the defendant was unaware, could have affected his decision about plea.

9. A “tenable” defence⁵ is one that, on the particular facts, is “arguable”, “credible”, “discernible”,⁶ having a “realistic prospect of success”.⁷ It may exist despite a strong Crown case.⁸ But an appellant cannot simply assert the defence exists;⁹ it must be demonstrated on the facts¹⁰ and based on credible evidence,¹¹ including fresh evidence if necessary.¹²

10. To respond to Mr Webster’s criticisms of this well-established test:¹³

10.1 Mr Webster suggests every “material” error in advice should undermine plea, without any consideration of the available evidence.¹⁴ That argument is circular, though: it is the availability of a defence *on the evidence in the particular case* which will be “material” to a defendant’s plea. If a defendant has not been told of an *arguable* defence, that is obviously a material error; but if the defect in advice did not much affect the likelihood of conviction, it will be hard to suggest it affected the guilty plea.¹⁵

10.2 As to trespassing on the jury’s role,¹⁶ the appeal court is putting itself in the shoes of a defendant, not a jury, and decisions about plea are always made without the benefit of the trial record.

⁵ Mr Webster suggests a tenable defence is not always required, citing *T (CA662/2012) v R* [2013] NZCA 550 as a case where the conviction was overturned despite the availability of a defence to the charge being unclear (at [36]): Appellant’s submissions at [7.15]. But in *T* the Court explicitly relied on T’s counsel’s advice that he had a defence to the charge in finding there had been a miscarriage (at [40]). That case (like *Whichman v R* [2018] NZCA 519) was also about a plea being uninformed because of wrong advice about sentencing consequences, which is arguably in a different category.

⁶ See *Cooper v R* [2013] NZCA 551 at [20], and the cases cited at [20], n 7–9.

⁷ *Nixon v R* [2016] NZCA 589, (2016) 28 CRNZ 698 at [11] (leave declined in *Nixon v R* [2017] NZSC 56).

⁸ *Hancock v R* [2012] NZCA 292 at [31].

⁹ *Nixon v R* (CA), above n 7, at [11].

¹⁰ *Nixon v R* (CA), above n 7, at [11].

¹¹ *Halpin v R* [2018] NZCA 477 at [20] (leave declined *Halpin v R* [2019] NZSC 11).

¹² As in *Wheble v R* [2024] NZCA 541.

¹³ The principles were described as “well-settled” in *Foley v R* [2018] NZSC 57 at [7].

¹⁴ Appellant’s submissions at [7.26].

¹⁵ For example, if there is overwhelming evidence of identity – e.g. a blood sample from a broken window in a burgled property contains DNA that is probably the defendant’s – it will not matter if the defendant was wrongly told that other evidence of identity was admissible. The overall advice (“you are likely to be convicted”) would remain correct.

¹⁶ Appellant’s submissions at [7.30].

10.3 It does not much matter which category of s 232(4) applies.¹⁷ Even if approached as an unfair trial issue, not every minor error in the advice a defendant received would vitiate a guilty plea.¹⁸ Asking whether the defendant was deprived of a tenable defence also does not involve applying the proviso;¹⁹ it forms part of the inquiry into miscarriage,²⁰ for the reasons already explained.

Was Mr Webster unaware of a tenable defence?

11. Mr Bourke told Mr Webster he was at “real risk of conviction” if he defended the murder charge.²¹ That advice was and is accurate, given the evidence.

What a murder conviction required

12. Where (as here) death is caused by multiple injuries, the Crown need only prove that the injuries, collectively, caused death.²²

13. Mr Webster’s contribution to the victim’s injuries was in two phases. First, he attacked the head of an already unconscious person for several minutes (and encouraged Mr Candy to do likewise). If at this point Mr Webster inflicted injuries which contributed to death, appreciated a risk of death, and continued anyway, he would be guilty of murder as a principal.²³

14. At the second phase, once Mr Candy began dragging the victim down a gravel road, Mr Webster jumped into the car, then helped drag the victim to a rubbish pit where he was abandoned, unconscious. If, during this deliberate assistance and encouragement, Mr Webster appreciated

¹⁷ Generally an argument of this kind is approached under s 232(4)(a). See for example *Whichman v R*, above n 5, at [41]; and *Singh v R* [2024] NZCA 395 at [16]–[21].

¹⁸ *Condon v R* [2006] NZSC 62, [2007] 1 NZLR 300 at [78] (“A verdict will not be set aside merely because there has been irregularity in one, or even more than one, facet of the trial. It is not every departure from good practice which renders a trial unfair”. Citing *Randall v R* [2002] 1 WLR 2237 (PC) at [28], it is at the point when the departure from good practice is “so gross, or so persistent, or so prejudicial, or so irremediable” that an appellate Court will have no choice but to condemn a trial as unfair and quash the conviction as unsafe.)

¹⁹ Appellant’s submissions at [7.17].

²⁰ *Cooper v R*, above n 6, at [20]: “In a case like the present, the Court will need to make some assessment of the proposed defence in order to determine whether what has occurred has given rise to a miscarriage”.

²¹ Trial counsel evidence at 7, at [37] (first affidavit) and 24, at [29] (second affidavit) (“real risk of conviction”).

²² See, for example, *Hohua v R* [2019] NZCA 533 at [18]–[20].

²³ *R v Lewis* [1975] 1 NZLR 222 (CA) at 226; and *R v Tukaki* CA360/05, 14 June 2006 at [14], citing A P Simester and W J Brookbanks *Principles of Criminal Law* (2nd ed, Thomson Reuters, Wellington, 2002) at [6.3]. The updated text (5th ed) is identical. Under s 167(b) of the Crimes Act 1961, the jury must identify the act or acts of the defendant which contributed to death, and the defendant must have appreciated a risk of death at that point in time: *Churchis v R* [2016] NZCA 264 at [30], citing *R v McKeown* [1984] 1 NZLR 630 (CA) at 632–633. See also *Tihema v R* [2022] NZCA 444 at [58]–[64] (overturned on other grounds in *Tihema v R* [2024] NZSC 112, [2024] 1 NZLR 473; see *Tihema v R* [2023] NZSC 37).

Mr Candy was reckless as to a risk of death, he would be guilty of murder as a party.²⁴

The evidence of murderous intent

15. A defence of lack of murderous intent faces difficulties, despite Mr Webster's impairment. The starting point is the nature of the assault, which made a risk of death utterly obvious:²⁵

15.1 The assault was a punishment arising from Mr Candy's and Mr Webster's anger at Mr Ramsay's unpaid debts.²⁶ After Mr Candy had assaulted Mr Ramsay at the Ōakura cemetery,²⁷ Ms Hughes drove both men back to the farm. Mr Webster was screaming with anger – "really, really angry" – even before the car pulled up on the tanker track.²⁸

15.2 When the car arrived Mr Webster walked straight towards it. Mr Candy pushed Mr Ramsay out of the back seat. He was already unconscious: limp and floppy with his eyes closed and making groaning noises.²⁹

15.3 Mr Webster then attacked his head, "screaming at [Mr Ramsay] and choking him and punching the shit out of him".³⁰ He had a knee on Mr Ramsay's chest, his hand on his throat and was punching him across the face.³¹ After about a minute, Mr Webster said he thought he'd broken his hand and Mr Candy then started "booting"

²⁴ Section 66(1) of the Crimes Act; and *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [82]–[83]. Liability under s 66(2) would also be available but the more intuitive characterisation is s 66(1).

²⁵ Mr Webster suggests his age at the time (18) meant he would not have appreciated a risk of death, relying on various quotes from *Dickey v R* [2023] NZCA 9, [2023] 2 NZLR 405: Appellant's submissions at [7.34]. But Dr Lambie's evidence in *Dickey* was aimed at quite a different question, i.e. the impact of imprisonment on young people. And obviously (since all the young people in *Dickey* were being sentenced for murder) it was not suggested an 18-year-old could not form murderous intent.

²⁶ Witness evidence at 101, at [132]–[134] and [145] (Jade Torpey).

²⁷ The witness who observed this (Matthew Peacock) describes Mr Candy being on top of Mr Ramsay and repeatedly punching his face and abdomen, then kicking him several times to the upper torso. Mr Ramsay had a bleeding nose but was still conscious, talking and fighting back.

²⁸ Witness evidence at 100, at [115] (Jade Torpey).

²⁹ Witness evidence at **101**, at [124]–[128] (Jade Torpey).

³⁰ Witness evidence at **102**, at [139] (Jade Torpey).

³¹ Witness evidence at **102**, at [141] (Jade Torpey).

Mr Ramsay in the head and Mr Webster started stomping on his head.³² They were encouraging each other.³³

- 15.4 Other witnesses heard dull thuds and screaming from a house about 60–70 metres away.³⁴ There were two voices and they were “excited and hypo”, like sports fans at a match.³⁵ Another voice (which sounded like a woman) screamed “I’m going to kill him”.³⁶
- 15.5 The key eyewitness (Jade Torpey) thought the screaming, punching and kicking lasted 10 minutes. He told them to stop and take Mr Ramsay to hospital.³⁷
- 15.6 Mr Candy replied: “fuck that, this piece of shit’s not going anywhere” then chained Mr Ramsay to the car and started to drive off, very slowly at first.³⁸ Mr Webster jogged over to the car and got in, saying “I’m going with him”.³⁹
- 15.7 They drove around 900 metres down the gravel road, dragging Mr Ramsay behind the car by one foot. At the end of the tanker track, Mr Ramsay was dragged from the car another 20–30 metres to the edge of a rubbish pit,⁴⁰ where he was left on a July night, shirtless, visibly injured, and with his left leg twisted unnaturally up beside his torso (heel towards his left shoulder).⁴¹
- 15.8 After they drove back from the pit, Mr Webster and Mr Candy told a neighbouring farm owner that Mr Ramsay had owed him a thousand bucks, so they dealt to him and gave him a hiding and he

³² Witness evidence at **102**, at [142]–[143] (Jade Torpey).

³³ Witness evidence at **102**, at [146] (Jade Torpey).

³⁴ Witness evidence at **113**, at [27]–[34] (Philip Mullan) and 136, at [60] (Irene Mullan).

³⁵ Witness evidence at 136, at [58] (Irene Mullan).

³⁶ Witness evidence at **136**, at [65] (Irene Mullan).

³⁷ Witness evidence at 102, at [148] (Jade Torpey).

³⁸ Witness evidence at 103, at [158] and [162] (Jade Torpey).

³⁹ Witness evidence at **103**, at [158] (Jade Torpey).

⁴⁰ Although Mr Webster’s and Mr Candy’s interviews cover these events, the fact the victim was dragged could be proved without those sources through evidence of luminol testing, which was led at Ms Hughes’ trial.

⁴¹ By the time he was found Mr Ramsay had livid bruising to his neck and face. He was not wearing a shirt and his right arm was thrown across his body with elbow lacerations visible on top. The photographs of the body are not in the Case on Appeal.

was down by the dump.⁴² Mr Webster was “amped”, pacing and yelling that he didn’t care about losing his job and “that’s what happens when you don’t pay your bills”.⁴³

- 15.9 Mr Webster and Mr Candy went into a co-worker’s house. They seemed happy and proud of what they’d done; Mr Webster told Mr Candy he’d “never caved a person’s head in before”.⁴⁴
16. Mr Webster’s interview then added two points not covered by other prosecution evidence: (a) halfway down the track, Mr Candy had told him Mr Ramsay might be dead by the time they got to the end of the track, and he had thought “oh no, fuck this” but stayed in the car;⁴⁵ and (b) he had helped Mr Candy drag Mr Ramsay’s body over to the pit.⁴⁶
17. Mr Ramsay died from multiple blunt force injuries. He had:
 - 17.1 bruising and haemorrhage under the sides of his scalp,⁴⁷ patchy bleeding to the brain⁴⁸ and focal bleeding inside the brain and brainstem;⁴⁹
 - 17.2 fractures to his nose, jaw (near the skull) and voice box, and bruising and abrasions to the right and left sides of his neck;
 - 17.3 fractures to six of the left front ribs and sternum, bruising to his left lung, and air outside his left lung which would have contributed to respiratory compromise;
 - 17.4 bruising around his right ankle; full-thickness abrasions on the inside of both elbows and left inner heel; and an 11x10cm defect to

⁴² Witness evidence at 113, at [63]–[64] (Philip Mullan).

⁴³ Witness evidence at 125, at [83]–[85] (Patrick Mullan).

⁴⁴ Witness evidence at 100, at [175] (Jade Torpey).

⁴⁵ Witness evidence at 35.

⁴⁶ Witness evidence at 36. Mr Webster’s role in helping at this point is confirmed in Mr Candy’s interview (Supreme Court additional materials [SC AM] at 138–139 and 188), although at the time Mr Webster pleaded guilty he was not a compellable witness for the Crown.

⁴⁷ See pathologist report dated 4 November 2022 (**RBoA Tab 2**): There was a 5cm abrasion to the left temple with “scalp bogginess” (at 7) and left and right-sided subgaleal haemorrhage (at 12).

⁴⁸ Subdural (left-sided) and subarachnoid haemorrhage. Pathologist report, above n 47, at 12 (**RBoA Tab 2**).

⁴⁹ Pathologist report, above n 47, at 18 (**RBoA Tab 2**).

the back of his scalp, with his skull visible. The last would have resulted in significant blood loss.⁵⁰

No tenable defence

18. Mr Bourke now says had he understood Mr Webster's cognitive functioning, his advice would have been different.⁵¹ But Mr Bourke cannot say what advice he would ultimately have given, because Mr Webster's proposed defence remains in a nascent state. Mr Webster suggests an expert on FASD will be called, along with his mother and Mr Webster himself. What evidence any of these witnesses could give is not explained.⁵²
19. Nor is there any admissible evidence suggesting Mr Webster's FASD would have left him blithely unaware of the risk to Mr Ramsay's life (while still retaining insight into the fact he might be about to lose his job). The fitness reports now available cannot fill this gap.⁵³ Indeed, none of the six expert reports now available was aimed at assessing his capacity to appreciate risk.
20. Mr Webster relies on brief asides in the various reports which refer to his inability to foresee consequences. Placed in context, none can bear weight:
 - 20.1 Dr Christine Fon (psychologist) based her opinions about Mr Webster on a wrong understanding of the extent of his impairment. She tested Mr Webster and found he was intellectually disabled, but Dr Nuth then explained why Dr Fon's testing of Mr Webster was unreliable,⁵⁴ and Dr McFadden ultimately found he was more capable than Dr Fon realised.⁵⁵
 - 20.2 Dr Fon was also briefed for a sentence appeal.⁵⁶ Her focus was assessing whether his impairment reduced his culpability, not whether it provided a defence. Her comments about the drivers of

⁵⁰ Pathologist's report, above n 47 (**RBoA Tab 2**).

⁵¹ Trial counsel evidence at 7, at [40] and 37–38 (NOE).

⁵² Appellant's submissions at [7.37].

⁵³ As in *Wheble v R*, above n 12, at [82] (**ABoA Tab 20**): "We agree with the Crown that, absent an expert opinion, an insanity defence was untenable. Nor can the two s 88 reports fill this gap."

⁵⁴ Court of Appeal additional materials [CoA AM] at 50, at [43].

⁵⁵ CoA AM at 65–66, at [45].

⁵⁶ CoA AM at 14.

his offending⁵⁷ fall well short of an opinion about his capacity to appreciate a risk of death.

20.3 Dr Barry-Walsh (psychiatrist) was likewise briefed for a sentence appeal, not to explore intent.⁵⁸ He noted Dr Fon’s findings “may also be relevant to consideration of [Mr Webster’s] capacity to form the relevant intent”.⁵⁹ He was simply noting this could be explored.

20.4 For Dr McFadden, Mr Webster’s “expressed belief that the victim may still have been alive the following morning” illustrated a tendency towards “magical thinking”.⁶⁰ But Mr Webster’s interview explained the non-magical basis for this belief: the next day Mr Candy told him he’d gone to the pit and the victim was not there.⁶¹

20.5 Dr Maxwell-Panckhurst’s generic comments about how FASD can impact on executive function⁶² fall well short of a considered opinion about Mr Webster’s individual deficits.

21. As things stand, there is no expert evidence drawing the necessary link between Mr Webster’s impairment and a lack of murderous intent,⁶³ and hence no tenable defence.

There is no sign the interview would have been ruled inadmissible

22. Mr Webster says he is entitled to have his conviction overturned so that he can *inquire into* whether his police interview is inadmissible, under ss 29 and 30 of the Evidence Act 2006.⁶⁴ But the interview does not feature anything

⁵⁷ CoA AM at 31, at [87] (and see also [88]). The only obvious basis for Dr Fon’s comment about an “inability to foresee consequences” is a hearsay opinion from Mr Webster’s sister, who told Dr Fon that (at an unspecified age) Mr Webster was unable to foresee that his actions could be dangerous (CoA AM at 24, at [47]).

⁵⁸ CoA AM at 3 and 36.

⁵⁹ CoA AM at 38. In this context he mentions “difficulties ... in foreseeing consequences”, but this refers to Dr Fon’s findings rather than his own: CoA AM at 37–38.

⁶⁰ CoA AM at 72, at [110] and 76–77, at [145]. While Mr Webster also cites Dr Maxwell-Panckhurst’s report (CoA AM at 93, at [56]), this source simply records Mr Webster’s comments and does not suggest any “magical thinking” on Mr Webster’s part.

⁶¹ Witness evidence at 65: “He [Mr Candy] goes there he tells me he’s [Mr Ramsay] not there the next morning and I was like good he’s alive.” Mr Candy had no recollection of this conversation (SC AM at 190) but his recollection overall appears patchy. Ms Hughes also told police during a witness interview, on 2 August 2022, that Mr Candy had told her “he went back to go and have a look and he thought he’d gone because he was not on the paddock” (at 30); this was on the Saturday morning (at 40). Ms Hughes’ witness statement is not in the Case on Appeal.

⁶² CoA AM at 107–108, at [101], [104] and [106].

⁶³ *Nixon v R*, above n 7, at [23]–[26].

⁶⁴ Appellant’s submissions at [7.31].

approaching oppression,⁶⁵ and since at the outset he could accurately define his rights to silence and to consult a lawyer,⁶⁶ it is unclear how Mr Webster could establish the interview was unlawfully obtained.⁶⁷

Second appeal ground: fitness to plead or stand trial?

23. Mr Webster argues the Court of Appeal wrongly limited its inquiry to his capacity to plead.⁶⁸ On his interpretation of the law, a defendant cannot enter a valid guilty plea unless they also have the capacity to follow proceedings, including giving evidence if necessary.
24. But the Court of Appeal did not err by focusing on Mr Webster's fitness to plead: first because it was tasked with determining whether his plea represented a miscarriage, not whether he was fit to stand trial; and second, because defendants can plead guilty provided they are fit to do so, even if they might be unfit to face the more complex prospect of a jury trial.

The inquiry on appeal

25. On a conviction appeal, the sole issue is whether something has gone wrong with the appellant's trial,⁶⁹ or here, plea.⁷⁰ The *Merrilees* test encapsulates the requirements of a valid plea, which must be both voluntary and informed:⁷¹

If a plea of guilty is made freely, after careful and proper advice from experienced counsel, where the offender *knows what he or she is doing and of the likely consequences, and of the legal significance of the facts alleged by the Crown*, later retraction will only be permitted in very rare circumstances.

⁶⁵ Evidence Act, s 29(5). Oppression sets a high threshold: see the cases cited in Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (2nd ed, Thomson Reuters, Wellington, 2024) at [29.06(2)].

⁶⁶ In the interview Mr Webster explained his right to silence as meaning "I don't have to say anything" and "I don't have to like I can just be quiet." (Witness Evidence at 5–6). He explained his right to a lawyer as meaning "I can speak to a lawyer before speaking to you", "you guys have lawyers I can speak to for free basically" (Witness Evidence at 7–8).

⁶⁷ Again, Mr Webster cannot rely on his hearsay statements to Dr McFadden (s 25(3) of the Evidence Act). And the "risks of confabulation and false admission in those with FASD" could only be relevant under s 28, not s 30 (*R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [69]–[70] and [120]). Under s 28, Mr Webster's difficulty would be the remarkable degree of consistency between his own account and those of Mr Torpey, Mr Candy and Ms Hughes: see the SC AM for Mr Candy's and Ms Hughes' interviews. The actual reliability of admissions is a relevant factor under s 28: *R v Wichman*, above n 67, at [83]–[84].

⁶⁸ *Webster v R* [2025] NZCA 679 [CA judgment] at [53]–[54], Supreme Court Case on Appeal [SC CoA] at 23.

⁶⁹ *Cumming v R* [2008] NZSC 39, [2010] 2 NZLR 433 at [13].

⁷⁰ Criminal Procedure Act 2011, s 232(5).

⁷¹ *Merrilees v R*, above n 2, at [35] (emphasis added).

26. Someone who was unfit to plead will necessarily fall short of these requirements, so will have suffered a miscarriage.⁷² But if the plea was valid on these terms *despite* mental impairment, an appeal court need not also consider whether the appellant would have coped with a trial that did not actually occur. The miscarriage inquiry under s 232(4) of the Criminal Procedure Act 2011 (CPA) is backward-looking (“did something go wrong?”), rather than the forward-looking inquiry under s 8A of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CP(MIP)) (“is this person capable of facing a trial in future?”).
27. For decades, therefore, appeal courts in New Zealand have approached such appeals by asking whether, when a defendant pleaded guilty,⁷³ he had:⁷⁴
- 27.1 sufficient capacity to convey his version of events to counsel;
 - 27.2 an adequate understanding of the nature of the charges he was facing and the defences available to him. As Asher J held in *R v Komene*, the “nature of the charge” includes an understanding of the facts that support the charge;⁷⁵ and
 - 27.3 an adequate understanding of the implications of his guilty pleas and his counsel’s advice.
28. These capacities must have been present to a degree enabling *effective* (not perfect) participation in the proceedings.⁷⁶ Four types of intellectual

⁷² As an example of the first category of *Le Page* (“where the defendant did not appreciate the nature of, or did not intend to plead guilty to, a particular charge”): *Tuira v R* [2018] NZCA 43 at [64], citing *R v Le Page* [2005] 2 NZLR 845 (CA) at [16]–[17].

⁷³ *Tuira v R*, above n 72, at [68]; and *Tihema v R* (SC), above n 23, at [105]–[106].

⁷⁴ *Britz v R* [2012] NZCA 606 at [95] and [113] (ABoA Tab 7), endorsed in *Tuira v R*, above n 72, at [68] and *Wheble v R*, above n 12, at [54]–[56] (ABoA Tab 20); *Tarrant v R* [2026] NZCA 148 at [47] (ABoA Tab 21); and *Thomas v New Zealand Police* [2022] NZHC 3622 at [43] (“There is also a well-established distinction between fitness to enter a guilty plea and fitness to defend a matter at trial. Whereas the former is said to require an understanding of the nature of the charge, the implications of a guilty plea and the sentencing process, the latter requires additional, more cognitively demanding skills.”)

In Canada, on a conviction appeal of this kind the appellant must show their guilty plea was involuntary due to mental impairment. The standard applied is the same standard that applies when determining an accused’s fitness to stand trial. The court need only be satisfied that an accused understands the process, can communicate with counsel and can make an active or conscious choice: *R v W (MA)* 2008 ONCA 555 at [24] and [27].

⁷⁵ *R v Komene* [2013] NZHC 1347 at [18] (ABoA Tab 28).

⁷⁶ *Nonu v R* [2017] NZCA 170 at [29]; *Hanara v R* [2022] NZCA 608, (2022) 34 FRNZ 437 at [108]–[109] and [127]; and *Tihema v R* (SC), above n 23, at [45]–[46] and [105]–[106].

capacity are relevant: could the defendant understand and evaluate relevant information, make decisions, and communicate?⁷⁷

29. For three reasons, this approach does not involve “bifurcating” the statutory test for unfitness to stand trial.
30. First, an appeal court is not applying the CP(MIP) nor can it make a formal finding of unfitness.⁷⁸ It is answering a different and narrower question, limited to the validity of the decision an appellant has actually made in the context of the proceedings the appellant actually faced.
31. Second, the three criteria developed above do not somehow set a lower standard. They encompass all but one of the *Presser* criteria,⁷⁹ which remain influential (but not determinative) as a list of the capacities a defendant in New Zealand should have to be fit to stand trial.⁸⁰ The exception is the capacity to challenge a juror:

<i>Presser</i> criteria
i. Understand what it is that he is charged with
ii. Plead to the charge and exercise his right of challenge [of a juror]
iii. Understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with
iv. Follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities
v. Understand the substantial effect of the prosecution evidence
vi. Make his defence in answer to the charge by:
• giving instructions to counsel • letting his counsel know what his version of the facts is and, if necessary, telling the court what it is
vii. He need not have the mental capacity to make an able defence but he must have sufficient capacity to decide what defence to rely on, and to make his defence and his version of the facts known to the court and his counsel.

⁷⁷ *Nonu v R*, above n 76, at [30] (ABoA Tab 26); *Hanara v R*, above n 76, at [127] (ABoA Tab 33); and *Tihema v R* (SC), above n 23, at [45]–[46] (ABoA Tab 27).

⁷⁸ On a conviction appeal, the appeal court cannot make a finding of unfitness to stand trial under s 8A of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CP(MIP)): *Cumming v R*, above n 69, at [13]. A formal finding can only be made between the commencement of criminal proceedings and the conclusion of all the evidence at trial: CP(MIP), s 7(1). *Cf* the position in England and Wales: Criminal Appeals Act 1968 (UK), s 6.

⁷⁹ *R v Presser* [1958] VR 45 (SC) at 48.

⁸⁰ *Hanara*, above n 76, at [99] and [118] (ABoA Tab 33).

32. What is different is the *context* in which those capacities will be exercised: one-on-one conversations with one's lawyer, rather than the more formal, rapid, stressful, and unpredictable setting of a jury trial. There is no real difference between the two tests, but they may demand different levels of capacity depending on whether the proceeding goes to trial.
33. Third, as explained next, trial courts may accept a guilty plea from someone who might be unfit to face a full trial. There is no miscarriage in validating such a plea on appeal.

Fitness to stand trial where there will be no trial

34. Mr Webster asks this Court to recognise a new form of miscarriage: when a defendant validly pleads guilty but would have been unfit to face a trial. The issue may rarely arise in practice,⁸¹ and – as he acknowledges – does not arise in this case.⁸² His complaint is that his mental impairment gave him a defence he was unaware of, which he would now like to run.
35. Fundamentally, though, there is nothing unfair about a mentally impaired defendant pleading guilty if competent to do so. Both case law and policy considerations support this approach.
36. Beginning with statute, it is true s 4 of the CP(MIP) creates a single concept of unfitness to stand trial, defined to mean “unable...to conduct a defence or to instruct counsel to do so”. Viewed in isolation, the statute does not expressly permit a trial court to make a finding limited to “fitness to plead”.
37. But case law makes clear assessments of fitness to stand trial are always contextual and case-specific. Whether a defendant's difficulties render them unfit will turn on the nature of the proceedings they face;⁸³ what defences

⁸¹ Defendants are sometimes said to be fit to plead but not to face trial: see i.e. *G (CA374/2015) v R* [2015] NZCA 327 at [16]; and *JA (CA402/2014) v R* [2014] NZCA 590 at [5]–[6]. But in practice courts may well treat competency to plead *guilty* as setting a more exacting threshold than pleading not guilty, since a not guilty plea is a protective position (and not necessarily a final one). See *Thomas v New Zealand Police*, above n 74, at [52] (Isac J noting “the complexities of a properly informed decision to plead guilty may not be readily distinguishable from effective participation in a trial”).

⁸² The fitness assessors in Mr Webster's case do not suggest he was fit to plead but not to stand trial. And Mr Webster does not accept he was in this category either: Appellant submissions at [4.11] and n 30.

⁸³ *Solicitor-General v Dougherty* [2012] NZCA 405, [2012] 3 NZLR 586 at [56] (“complexity and nature of the charges being faced”); *M (CA424/2019) v R* [2019] NZCA 461 at [57] (a defendant's “deficits are to be considered in the context of the particular trial the defendant is facing”); *Tuira v R*, above n 72, at [68]; *Nonu v R*, above n 76, at [31]; *Hanara v R*, above n 76, at [145]–[146]; *Tarrant v R*, above n 74, at [47]; and *Wheble v R*, above n 12 at [52].

are available and how they might be run;⁸⁴ the defendant's likely role, including whether he will give evidence;⁸⁵ and the decisions that will be required of him.⁸⁶ The Court must "consider what is likely to occur" and whether it can be fairly managed.⁸⁷

38. A defendant's intention to plead guilty changes the nature of the proceedings he faces. He will not need to give instructions, follow evidence, or give evidence, in the more stressful context of a trial.⁸⁸ So the same person may simultaneously be fit to plead guilty to shoplifting, but unfit to face a trial involving a complex aggravated robbery allegation.⁸⁹ Or they may be fit to plead to a charge, but unfit to be tried on it.⁹⁰
39. Taking this approach, where the defendant wishes to plead guilty "the entirely hypothetical question of whether the defendant is able to conduct a defence can be put to one side": *R v Komene*.⁹¹ As Brookbanks and Skipworth explain, citing *R v Komene*:⁹²

[5.24] ... it is now clear that judges may now differentiate between fitness to plead guilty and fitness to undergo a trial in making a fitness assessment, and that an intention to plead guilty does not constitute a bar to fitness for that purpose being assessed.

⁸⁴ *G (CA374/2015) v R*, above n 81, at [49]–[52]; and *JA (CA402/2014) v R*, above n 81, at [11].

⁸⁵ *Hanara v R*, above n 76, at [120] ("the complexity of the trial, whether the defendant will need to give evidence, what if any communication assistance is available for the defendant, and what changes can be made to the trial process to assist the defendant" may be significant considerations) and [127] ("This assessment needs to take account of the nature of the trial and the defendant's likely role in it. In this case, careful attention needed to be given to the complexity of the evidence, the length of the trial and whether it was likely Haami would need to give evidence"). See also *R v Bharwani* 2025 SCC 26, 450 CCC (3d) 143 at [65].

⁸⁶ *Britz v R*, above n 74, at [94] (necessary to consider "the matters requiring [the appellant's] decision"); *Hanara v R*, above n 76, at [146] ("determining whether or not a defendant is fit to stand trial entails an evaluation of the nature of the trial and what steps the defendant needs to take in order to receive a fair trial"); and *Tarrant v R*, above n 74, at [47] ("the test for determining unfitness to stand trial under the CPMIP Act is grounded in the requirement that a defendant's fitness to stand trial must be assessed in the context of the nature of the trial and what decisions the defendant is able to make in his or her trial (their decisional capacity)."

⁸⁷ *T (CA372/2019) v R* [2019] NZCA 551 at [29]. This was a pre-trial fitness decision for the appellant in *Tihema v R* (SC), above n 23, but not the decision later reversed by this Court.

⁸⁸ *Britz v R*, above n 74, at [113]; *Tarrant v R*, above n 74, at [47]; and *R v Komene*, above n 75, at [19].

⁸⁹ *Nonu v R*, above n 76, at [31] (ABoA Tab 26).

⁹⁰ *Tarrant v R*, above n 74, at [47] (ABoA Tab 21) (a contextual approach "recognises that a defendant may be fit to enter a plea but lack the capacity to give evidence or participate in a complex trial").

⁹¹ *R v Komene*, above n 75, at [20]. While the issue has rarely arisen in Australia, in *Squance v WA Police* [2023] WASC 479 a determination of unfitness was overturned on appeal because the magistrate had wrongly taken into account capacities required for a defended trial, whereas the defendant had pleaded guilty (at [48], [54], [64]–[73]).

⁹² Warren Brookbanks and Jeremy Skipworth "Unfitness to stand trial and disposition" in Warren Brookbanks and Jeremy Skipworth (eds) *Psychiatry and the Law* (2nd ed, LexisNexis, Wellington, 2026) at [5.23]–[5.24] (RBoA Tab 1). Notably Dr Barry-Walsh, an eminent forensic psychiatrist, noted in his second report that "the threshold for fitness would be lower given [Mr Webster] pleaded guilty than if he had pleaded not guilty": CoA AM at 38.

40. Policy considerations, including finality and individual autonomy,⁹³ support this approach.⁹⁴
41. A finding of unfitness may simply delay finality, not only for victims but also for the defendant.⁹⁵ A defendant who is found unfit may yet face trial downstream;⁹⁶ detention and treatment aims to restore their fitness,⁹⁷ among other things.⁹⁸ The dispositional consequences under ss 24 and 25 of the CP(MIP) can be serious,⁹⁹ and include prolonged detention.¹⁰⁰ For Mr Webster – who is neither mentally disordered nor intellectually disabled – the only options would be detention as a special patient (s 24(1)(a)) or immediate release (s 25(1)(d)),¹⁰¹ and the latter option is rarely appropriate for those facing serious offences.¹⁰² It is unclear why a defendant who wants to accept responsibility should instead be detained, perhaps for longer than any finite sentence,¹⁰³ to restore their ability to run a defence they do not

⁹³ Both of which underpin guilty pleas: *Re Solicitor-General's Reference (No 1 of 2023)*, above n 2, at [45].

⁹⁴ See Victorian Law Reform Commission *Review of the Crime (Mental Impairment and Unfitness to be Tried) Act* (June 2014) at [3.78]; and Law Commission (United Kingdom) *Unfitness to Plead Volume 1: Report* (Law Com No 364, 12 January 2016) at [3.149]–[3.150] and [10.26]–[10.28].

⁹⁵ *G (CA374/2015) v R*, above n 81, exemplifies this possibility. G was found unfit in 2011, then detained in hospital as special patient, but in 2013 the Attorney-General concluded he was now fit to stand trial and made a s 31(3) direction. In 2015 the Court of Appeal found him fit to stand trial. See also *R v Stone* [2018] NZHC 1340.

⁹⁶ Unless a stay is ordered, the criminal charges generally remain live, and can be pursued if the defendant becomes fit again. Under s 24 there is a time limit on how long the charges can remain live; under s 25 there is no such limitation, although charges can be stayed by the court under s 27. The exception is an order under s 25(1)(c) which results in charges being automatically stayed: *H (CA841/2012) v R* [2013] NZCA 628, (2013) 26 CRNZ 628 at [8] and [20]–[23].

There is some uncertainty about whether charges automatically terminate on disposition under s 25(1), so that they have to be relaid (see *Balemi v R* [2014] NZCA 176 at [19]; and *C v R* [2020] NZHC 225, [2020] NZAR 343 at [25]–[32] and [43]) and about whether a stay can be lifted once granted (Brookbanks and Skipworth, above n 92, at [5.58]–[5.59]; and Mathew Downs (ed) *Adams on Criminal Law – Procedure* (online looseleaf ed, Thomson Reuters) at [CM27.02]). But it is clear an unfitness finding does not protect a defendant from facing the same charges again.

⁹⁷ Brookbanks and Skipworth, above n 92, at [5.65]; and Downs, above n 96, at [CM4.17.07].

⁹⁸ The purposes of a compulsory care order also include protection of the health, safety and rights of the care recipient, and the interests of the community: *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2025] NZSC 103, [2025] 1 NZLR 485 at [88].

⁹⁹ Warren Brookbanks *Competencies of Trial: Fitness to Plead in New Zealand* (LexisNexis, Wellington, 2011) at [3.1] (“Important dispositional consequences may flow from such a finding, resulting in serious loss of liberty to the defendant”).

¹⁰⁰ Brookbanks and Skipworth, above n 92, at [5.2] (**RBoA Tab 1**): “unfit offenders with an intellectual disability ... may experience lengthy periods of detention as ‘care recipients’ or ‘special care recipients’ following a finding of unfitness”. The test for extension of a compulsory care order requires proportionality to the original offending: *J v Attorney-General*, above n 98, at [96]–[114].

¹⁰¹ Brookbanks and Skipworth, above n 92, at [5.70] (**RBoA Tab 1**). The seriousness of the alleged offending is an important consideration when determining risk: at [5.73]. The appellant in *Kaitai v New Zealand Police* [2026] NZHC 1737 was in the same position: see at [14].

¹⁰² Brookbanks and Skipworth, above n 92, at [5.81] (**RBoA Tab 1**); Sylvia Bell and Warren Brookbanks *Mental Health Law in New Zealand* (3rd ed, Brookers, Wellington, 2017) at [3.6.16] (“Immediate release is seldom likely to be ordered in a case where an offender has been found unfit to stand trial and there is a prospect of the person recovering trial competence in the foreseeable future.”) This was also what Parliament envisaged: “Normally, a person who is found unfit to stand trial or insane will be remanded to a hospital or a secure facility, but that will not inevitably be the case. The person may, for example, be charged with a relatively minor offence.” (21 October 2003) 612 NZPD 9545.

¹⁰³ For example, the appellant in *J v Attorney-General*, above n 98, had been detained for over 19 years, far longer than the maximum penalty applicable to his offence (which involved property damage).

want to advance. (Therapeutic disposition options remain available even after conviction.¹⁰⁴)

42. As to autonomy, mentally impaired defendants should not be prevented from making decisions they are competent to make. The CP(MIP) must be interpreted consistently with New Zealand's obligations under the Convention on the Rights of Persons with Disabilities, which require it to support people with disabilities to make their own decisions¹⁰⁵ and avoid an "excessively paternalistic assessment that too readily denies status".¹⁰⁶
43. Different concerns may arise where a defendant pleads guilty *because* their mental impairment has deprived them of the ability to defend the charges, for now at least, and they prefer prison to a more uncertain disposition under the CP(MIP).¹⁰⁷ Capacity aside, a plea must also be voluntary, and the law will always define what kinds of pressure can undermine free choice (though notably disposition outcomes, such as likely sentence, have always been seen as legitimate reasons to plead guilty). But as Mr Webster was not in this position,¹⁰⁸ his case is not the ideal vehicle to consider the point.

Third appeal ground: Lack of communication assistance did not cause a miscarriage

44. Mr Webster says he ought to have received communication assistance,¹⁰⁹ and without it he could not understand his lawyer's advice about recklessness¹¹⁰ nor the evidence against him.¹¹¹
45. But this point does not really advance the case for miscarriage. The key question remains factual: whether (without assistance) Mr Webster understood these things to the extent necessary for a valid plea. If he did

¹⁰⁴ CP(MIP), subpart 4; and Bell and Brookbanks, above n 102, at 71 ("legislation also allows for inmates who are not legally mentally disordered, but who would benefit from psychiatric care and treatment in a hospital, to be admitted and detained in hospital for treatment").

¹⁰⁵ *Tihema v R* (SC), above n 23, at [44].

¹⁰⁶ *T (CA372/19) v R* [2019] NZCA 551 at [29], citing Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12; Disability (United Nations Convention on the Rights of Persons with Disabilities) Act 2008; and Bell and Brookbanks, above n 102, at [13.5].

¹⁰⁷ Appellant's submissions at [4.14] and [4.20(ii)]. See Victoria Law Reform Commission, above n 94, at [5.24] and [5.40].

¹⁰⁸ Appellant's submissions at [4.21].

¹⁰⁹ Appellant's submissions at [5.7].

¹¹⁰ Appellant's submissions at [5.8]–[5.11].

¹¹¹ Appellant's submissions at [5.13].

not, plainly his plea was uninformed. If he did, the absence of communications assistance cannot of itself constitute a miscarriage.¹¹²

Fourth appeal ground: Why Mr Webster was fit to enter his guilty plea

The difficulties of retrospective assessment

46. Retrospectively assessing fitness is difficult.¹¹³ As both assessors in this case noted, there is little objective data to draw on.¹¹⁴ An expert opinion about the likely impact of an appellant's impairment cannot rest on his retrospective account of his functioning.¹¹⁵ Additionally, few people can reliably distinguish between their knowledge now and at some earlier point in time, and Mr Webster is less able than most to do so.¹¹⁶
47. Despite these risks, both assessors appear to have relied considerably on Mr Webster's retrospective account – for example, Dr Maxwell-Panckhurst's finding that in 2022 Mr Webster had little understanding of the weight of evidence against him,¹¹⁷ and Dr McFadden's finding that in 2022 he "did not signal when he was unsure or communicate his lack of understanding".¹¹⁸

Why the available evidence suggests Mr Webster was fit to plead in 2022

48. The assessors' reports, and trial counsel's evidence, are summarised in an appendix (below). Applying the criteria above at [27], there appears no concern about Mr Webster's ability to understand the implications of his guilty plea or his counsel's advice about what he should do. The key questions raised by the assessors relate to the first two criteria:

¹¹² See i.e. *Mathews v R* [2019] NZCA 131 at [26]; and *I (CA128/2018) v R* [2019] NZCA 625 at [126].

¹¹³ *Britz v R*, above n 74, at [92] (ABoA Tab 7). See also *Ismael v R* [2024] EWCA Crim 301 at [15]: "This court approaches after the event challenges to fitness to plead with caution", citing *R v Erskine* [2009] EWCA Crim 1425 at [89].

¹¹⁴ CoA AM at 76, at [142] and 110, at [112].

¹¹⁵ *Tarrant v R*, above n 74, at [234] and [242] (ABoA Tab 21). See also *Mahoney on Evidence*, above n 65, at [25.06(1)]: the Evidence Act makes "inadmissible the expert opinion of a psychiatric report based largely or completely on facts provided to the psychiatrist by the defendant (unless those facts have been or will be separately proved)."

¹¹⁶ CoA AM at 69, at [84].

¹¹⁷ This issue is most evident when Dr Maxwell-Panckhurst addresses some *Presser* criteria by simply recording what Mr Webster told him: for example, CoA AM at 102, at [88(v)].

¹¹⁸ CoA AM at 77, at [149]. Dr McFadden consulted Mr Bourke on the "processes he undertook with Mr Webster" (CoA AM at 69, at [83] and 72–73, at [113]–[128]) but it was Mr Webster who told her he would not have asked his lawyer for clarification (CoA AM at 71, at [105]).

- 48.1 Was Mr Webster able to offer a sufficiently detailed account to his lawyer so that his state of mind at the time could be explored? (Only Dr Maxwell-Panckhurst raised this concern.)
- 48.2 Did Mr Webster understand the prosecution evidence, and its impact on his chances of defending a charge of reckless murder? (Both Dr McFadden and Dr Maxwell-Panckhurst raise this concern, albeit Dr Maxwell-Panckhurst's concern was limited to understanding of the evidence.)

Adequate understanding of the charge, evidence, and available defences

49. The available evidence suggests Mr Webster understood what the Crown had to prove under s 167(b), and what evidence it would rely on to do so.
50. First, the key evidence Mr Webster needed to understand related to real-world events he had himself experienced and could recall, as opposed to abstract concepts. At its core the Crown case turned on what Mr Webster had done, seen, and thought at the time. As explained below, he proved able to engage in detail with the facts of the murder, both in his police interview and when telling Mr Bourke what had occurred.
51. Second, sensibly, Mr Bourke took Mr Webster through the key prosecution evidence (again) in detail just before he decided to plead guilty. While Dr McFadden notes Mr Webster's recall of Mr Bourke's verbal advice may have been problematic, his decision on plea immediately followed careful advice.
52. Third, Mr Webster became upset as Mr Bourke traversed the evidence against him.¹¹⁹ It is apparent he struggles to understand how he ended up participating in a brutal murder. Tearfulness when faced with the evidence of his involvement rather suggests comprehension; a more logical reaction to incomprehension would be indifference.

¹¹⁹ Trial counsel evidence at 24, at [32] (second affidavit).

53. Fourth, Dr McFadden notes in 2024 Mr Webster was not immediately clear on what it meant to act “recklessly” (although his last attempt at a definition was remarkably accurate). But that tells us nothing about his likely understanding in 2022. In any case, to enter a valid plea, Mr Webster did not need to be able to define “recklessness”. Understandably, Mr Bourke resorted to real-world examples to explain this concept when dealing with Mr Webster.¹²⁰ It was counsel’s job to understand the abstract definition of murderous intent, and to translate it into advice about how this meshed with Mr Webster’s case.¹²¹ What Mr Webster needed to understand was more concrete – what fact(s) would make him guilty of murder? – and this point could be explained in quite straightforward language: “did you think he could die?”
54. Fifth, both Dr McFadden and Dr Maxwell-Panckhurst place weight on Mr Webster’s passivity and deference to Mr Bourke – meaning if he did not understand he may not have signalled this. It is true Mr Webster was sometimes silent in response to Mr Bourke’s explanations. But silence of this kind does not necessarily denote incomprehension; Dr Maxwell-Panckhurst did not detect any tendency to feign understanding. And the contemporaneous evidence suggests Mr Webster *did* assert himself if he did not understand something:
- 54.1 He asked for clarification even in stressful situations. Throughout his police interview, if a question was too vague he would ask the police officer “what do you mean?” Once the question was reframed, he gave a logical answer.¹²²
- 54.2 He told Mr Bourke, repeatedly, that he could not be guilty of murder as he had not intended to kill Mr Ramsay.¹²³ It took him some time to accept this was not a defence – the lay definition of murder is misleading. But until Mr Webster understood that point,

¹²⁰ Trial counsel evidence at 36 (NOE).

¹²¹ *JA (CA402/2014) v R*, above n 81, at [17]; and *Nagatayi v R* [1980] HCA 18, (1980) 147 CLR 1 at 9.

¹²² Witness evidence at 5, 12–14 and 40.

¹²³ Trial counsel evidence at 5, at [21] (first affidavit); and 20, at [8] (second affidavit).

he resisted Mr Bourke’s advice that he could be convicted of murder.

Sufficient capacity to convey his version of events to counsel

55. Dr Maxwell-Panckhurst does not suggest Mr Webster’s innate linguistic or cognitive abilities prevented him giving his counsel a sufficiently detailed account. He could do just that in 2024, as he did in his police interview on 2 August 2022. Rather, the concern was whether in 2022 – when he was less mature – he could *raise* significant matters in sufficient detail: did he sit silent even if he had things he could usefully say?
56. Mr Webster’s police interview (2 August 2022) is a helpfully objective and contemporaneous source.¹²⁴ It demonstrates his ability, unaided, to volunteer a relatively detailed account, extending to his and Mr Candy’s thoughts during the killing. Responding to open questions, he said:
 - 56.1 He didn’t know what Mr Candy’s intentions were when he pulled up.¹²⁵ His intention had just been to throw a few punches at the victim and that’s it.¹²⁶ The victim “already looked half ... dead”.¹²⁷
 - 56.2 He “wasn’t thinking” what was going to happen to the victim if he got dragged.¹²⁸ When Mr Candy told him the victim might be dead by the time they got to the end of the track, “at that point in my mind[] I was like this is stupid”, “oh no fuck this”. But (stupidly, he said) he stayed in the car.¹²⁹ Once they left he was “scared for his life” because of what had just happened.¹³⁰
57. Mr Webster was also able to reject other witnesses’ accounts:
 - 57.1 When the officer explained what Mr Webster had said according to an eyewitness, Mr Webster disagreed (“Will [Candy] said that

¹²⁴ The interview on 2 August 2022 was four days after the murder (29 July 2022).

¹²⁵ Witness evidence at 77.

¹²⁶ Witness evidence at 29.

¹²⁷ Witness evidence at 32.

¹²⁸ Witness evidence at 65. See also at 70.

¹²⁹ Witness evidence at 35.

¹³⁰ Witness evidence at 80.

part[,] I never said that[,] I was standing right next to him”) then volunteered what he *had* said (“I was like[] Francis he owed me a thousand dollars”).¹³¹

57.2 When the officer suggested an eyewitness had been hiding inside the house according to Ms Hughes, Mr Webster disagreed: “Yeah well he wasn’t inside ... He was at home. ... He wasn’t inside. Fuck she’s all bullshit.”¹³²

58. In 2022 Mr Webster did not tell Mr Bourke he (or Mr Candy) believed the victim would be fine. But this was not because he lacked capacity to do so: it was simply not the position he was taking at the time. He had told police, spontaneously and independently,¹³³ that the penny had dropped for him well before they left Mr Ramsay near the pit.

59. Mr Webster sometimes did not offer Mr Bourke any rebuttal of what the Crown witnesses had said. But again, his own narrative differed very little from theirs. The only point of difference was how long the assault had lasted, and Mr Webster proved well capable of raising this with Mr Bourke.

Conclusion on fitness to enter plea

60. In 2024 Dr Maxwell-Panckhurst found Mr Webster could understand the distinction between murder and manslaughter, and defences available, “more than adequately”. He could give a comprehensive and detailed account and did not feign understanding. His cognitive impairments are predominantly unchanging; what had changed since 2022, in both assessors’ views, was that he has matured and is less likely to defer. But even in 2022, Mr Webster showed himself able to ask a police officer for clarification; able to dispute others’ accounts when they were put to him; and able to question his counsel’s advice on murderous intent. He had the capacities required to make the decision he did.

¹³¹ Witness evidence at 81.

¹³² Witness evidence at 88.

¹³³ When the interview started, Mr Webster was unaware of the statements of the Crown witnesses and co-defendants.

Summary

61. Mr Webster's guilty plea did not represent a miscarriage. The appeal must be dismissed.

9 July 2026

A J Ewing | E P C Duckett
Counsel for the respondent

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: The appellant

Appendix: The available evidence about Mr Webster's fitness in 2022

Mental impairment

62. Both assessors agreed Mr Webster is mentally impaired,¹³⁴ due to exposure to alcohol in utero.¹³⁵ He is not intellectually disabled, though. Dr McFadden tested Mr Webster's cognitive ability using the WAIS-IV.¹³⁶ Because his performance validity scores were mixed,¹³⁷ the data she obtained may underestimate his abilities.¹³⁸ With that caveat, the results suggested an IQ of 75 (borderline); with a 95 per cent level of confidence his IQ falls between 71–80, over the threshold for intellectual disability.¹³⁹ Mr Webster meets the other criteria:¹⁴⁰ his adaptive functioning, including communication skills, indicated significant impairment.¹⁴¹

Dr McFadden's opinion on Mr Webster's fitness to stand trial in 2022

63. Mr Webster had "obvious working memory and executive functioning difficulties": although he tried hard to attend, his mind often wandered or went blank.¹⁴² With time and encouragement, he could apply reasoning skills, but this was not always productive.¹⁴³ His verbal processing was slow, with a long latency between question and response.¹⁴⁴ His discussion of the offending was not linear; he missed details necessary for coherence.¹⁴⁵
64. In her opinion, it is difficult retrospectively to say whether Mr Webster was unfit or not.¹⁴⁶ Overall, she considered it was "not clear the Court would have found him fit to plead or stand trial"; his capacity is finely balanced.¹⁴⁷

¹³⁴ CoA AM at **109**, at [110].

¹³⁵ CoA AM at **106**, at [99] (Dr Maxwell-Panckhurst) and **75**, at [137] (Dr McFadden).

¹³⁶ CoA AM at **65**, at [44]. As a psychiatrist, assessing whether Mr Webster is intellectually disabled was outside the scope of Dr Maxwell Panckhurst's practice: at **80**, at [2].

¹³⁷ CoA AM at **64**, at [39].

¹³⁸ CoA AM at **65**, at [43].

¹³⁹ CoA AM at **66**, at [66].

¹⁴⁰ CoA AM at **68**, at [79].

¹⁴¹ CoA AM at **66**, at [71].

¹⁴² CoA AM at **61**, at [15].

¹⁴³ CoA AM at **61**, at [13].

¹⁴⁴ CoA AM at **61**, at [13].

¹⁴⁵ CoA AM at **61**, at [14].

¹⁴⁶ CoA AM at **76**, at [142].

¹⁴⁷ CoA AM at **77**, at [150].

65. On one hand, it was relatively clear-cut that Mr Webster had understood:
- 65.1 he was charged with murder¹⁴⁸ and had to plead to that charge;¹⁴⁹
- 65.2 the consequences of pleading guilty or not guilty,¹⁵⁰ including the potential benefits of an early guilty plea;¹⁵¹ and
- 65.3 the concept of intention and in basic terms the difference between his actions and state of mind.¹⁵²
66. On the other hand, it was unclear whether Mr Webster had:
- 66.1 understood and processed the element(s) of murder most relevant to his case.¹⁵³ He was initially unsure what it meant to act recklessly, and tentatively offered: “You don’t know what is happening, or you don’t care about what happens? Or maybe you knew death was going to happen, but you wouldn’t care?”¹⁵⁴
- 66.2 understood the prosecution evidence and its impact.¹⁵⁵ Even if his lawyer explained the evidence, he was reliant on retaining verbal communications which is “problematic” given his learning difficulties.¹⁵⁶ Mr Webster “still lack[s] insight” on these issues”.¹⁵⁷
67. In Dr McFadden’s view these challenges would have been compounded by Mr Webster’s “passivity and deference to Mr Bourke’s advice”; she suggests “Mr Webster did not signal when he was unsure or communicate

¹⁴⁸ CoA AM at **77**, at [146].

¹⁴⁹ CoA AM at **76**, at [143.1].

¹⁵⁰ CoA AM at **76**, at [143.3].

¹⁵¹ CoA AM at **76**, at [143.7].

¹⁵² CoA AM at **76**, at [143.4].

¹⁵³ CoA AM at **77**, at [146].

¹⁵⁴ CoA AM at **72**, at [110]. Dr McFadden interviewed him on 10 and 18 September 2024; Dr Maxwell-Panckhurst’s first interview with Mr Webster was before this (on 4 September 2024).

¹⁵⁵ CoA AM at **77**, at [147].

¹⁵⁶ CoA AM at **77**, at [149].

¹⁵⁷ CoA AM at **77**, at [147].

his lack of understanding”,¹⁵⁸ although this factual assumption on Dr McFadden’s part appears based on Mr Webster’s account.¹⁵⁹

68. Dr McFadden concluded in 2022 Mr Webster was more likely than not unable to effectively participate in a trial without special measures to scaffold the four intellectual capacities identified in *Nonu*.¹⁶⁰ But he is likely fit to plead and stand trial now, with communication assistance and education to fill the gaps in his knowledge. What has changed, in her view, is that he now understands he cannot be passive.¹⁶¹

Dr Maxwell-Panckhurst’s opinion on Mr Webster’s fitness to stand trial in 2022

69. Mr Webster demonstrated many of the impairments related to FASD,¹⁶² most significantly in language and executive function.¹⁶³
70. Despite these deficits, he was “well engaged at interview, capable of sustaining attention and highly motivated to understand and work through more complex issues”.¹⁶⁴ He struggled to grasp more abstract concepts, but consistently demonstrated the ability to apply himself, retain and process information, and to recall, and demonstrate understanding of, key information in subsequent meetings.¹⁶⁵ He could focus and sustain attention for a meeting lasting over three hours.¹⁶⁶ With sufficient time and discussion, he was able to demonstrate a reasonable understanding of very complex issues – for example, the legal definition of recklessness¹⁶⁷ – and retain that understanding at their next meeting, over two months later.¹⁶⁸ Dr Maxwell-Panckhurst commented:¹⁶⁹

I did not observe a strong tendency to feign understanding. He would openly admit that he didn’t understand things, as a means of inviting

¹⁵⁸ CoA AM at 77, at [149].

¹⁵⁹ CoA AM at 71, at [105].

¹⁶⁰ CoA AM at 77, at [150].

¹⁶¹ CoA AM at 77, at [152].

¹⁶² CoA AM at 106, at [99].

¹⁶³ CoA AM at 107, at [102]. He had difficulty with more complex abstract thought and language tasks: at 106, at [98].

¹⁶⁴ CoA AM at 106, at [98].

¹⁶⁵ CoA AM at 106, at [98].

¹⁶⁶ CoA AM at 97, at [81]. Their first meeting on 4 September 2024 lasted three hours ten minutes.

¹⁶⁷ CoA AM at 100, at [88(i)].

¹⁶⁸ CoA AM at 96, at [79]. Their meetings were on 4 September and 12 November 2024.

¹⁶⁹ CoA AM at 96, at [79] (footnote added).

further discussion and working through.¹⁷⁰ He would however, on occasion, tend to cede to my authority in a way that was overly trusting. The key aspect to successful communication was the repeated checking in on his understanding.

71. Dr Maxwell-Panckhurst focused on whether Mr Webster was able to plead to the charge.¹⁷¹ With that focus, he considered Mr Webster may have been unfit to stand trial in 2022.¹⁷² He had had a “good understanding” of the consequences that would follow a guilty plea,¹⁷³ and what guilty and not guilty meant.¹⁷⁴ He does not suggest Mr Webster would have struggled to understand the charge or the defences available to him. But there were “questions” in two areas:¹⁷⁵

- 71.1 capacity to give adequate instructions to counsel (the “key question”). Most relevant was whether Mr Webster had the foresight and ability to discuss his account and temporal thought processes in sufficient depth to allow adequate consideration of his best legal strategy.¹⁷⁶ “While he had some capacity to make his version of events known to the court, there is a concern that he may not have conveyed these events in the way that reflected key aspects of his mental state.”¹⁷⁷ He opined Mr Webster can be deferential, and a key question is whether, had he more strongly asserted his 2024 version of events (detailing the extent to which he was influenced by others), this may have influenced his plea.¹⁷⁸
- 71.2 understanding the substantial effect of the prosecution evidence,¹⁷⁹ and his ability to seek exclusion of his interview.¹⁸⁰

¹⁷⁰ See also CoA AM at **101**, at [88(iii)]: “For the duration of our meetings, Mr Webster was attentive and well engaged. He demonstrated the ability to signal a lack of understanding in relation to more complex issues, although there was a need to check in on his understanding and educate him on frequent occasions”.

¹⁷¹ CoA AM at **110**, at [112].

¹⁷² CoA AM at **111**, at [116].

¹⁷³ CoA AM at **99**, at [88(i)].

¹⁷⁴ CoA AM at **100**, at [88(ii)].

¹⁷⁵ CoA AM at **110**, at [115].

¹⁷⁶ CoA AM at **110**, at [112].

¹⁷⁷ CoA AM at **110**, at [115].

¹⁷⁸ CoA AM at **110**, at [114]. Dr Maxwell-Panckhurst declined to outline what Mr Webster had told him about the offending: CoA AM at **93**, at [54].

¹⁷⁹ CoA AM at **110**, at [115].

¹⁸⁰ CoA AM at **110**, at [115] (suggesting it is unclear whether Mr Webster understood he had the “ability to challenge the evidence stemming from his police evidential interview in order to mount a defence against the charge”).

While Dr Maxwell-Panckhurst does not explain why Mr Webster would have lacked such understanding, it appears his concern was that Mr Webster's limitations were not then understood.

72. Dr Maxwell-Panckhurst found Mr Webster fit to stand trial in December 2024.¹⁸¹ He:

72.1 had a "more than adequate" understanding of the evidence against him and how he could go about challenging it;¹⁸²

72.2 could give a comprehensive and detailed account of events, largely consistent with his earlier accounts¹⁸³ and extending to what was in his and others' minds;¹⁸⁴

72.3 had a "more than adequate understanding" of the charges and his potential avenues of defence.¹⁸⁵ He understood the "complex legal issues relating to the distinction between murder and manslaughter".¹⁸⁶ At their second meeting in November, Mr Webster had retained the concept of "reckless disregard" from their September meeting, and "demonstrated an understanding that murder equates to either having intent to end someone's life or showing reckless disregard for their life".¹⁸⁷

72.4 He could decide between available defences "more than adequately"¹⁸⁸ and instruct his lawyer: he was "more than able to work through complex legal issues and provide input in how decisions may be made, while also acknowledging the need to listen to, and take the advice of, his legal counsel".¹⁸⁹

¹⁸¹ CoA AM at **111**, at [118].

¹⁸² CoA AM at **111**, at [118]. See also at **102**, at [88(v)] (opining Mr Webster currently had a good understanding of what would constitute evidence against him, including his interview, witness evidence, and physical evidence such as chains and clothes).

¹⁸³ CoA AM at **93**, at [54].

¹⁸⁴ CoA AM at **93**, at [55].

¹⁸⁵ CoA AM at **111**, at [118].

¹⁸⁶ CoA AM at **100**, at [88(i)].

¹⁸⁷ CoA AM at **100**, at [88(i)].

¹⁸⁸ CoA AM at **102–103**, at [88(vii)].

¹⁸⁹ CoA AM at **103**, at [88(viii)].

73. This (2024) opinion was not contingent on communication assistance; Dr Maxwell-Panckhurst suggested it would be important to *consider* it.¹⁹⁰
74. Dr Maxwell-Panckhurst noted Mr Webster’s cognitive deficits are predominantly unchanging. What had changed, since 2022, is that Mr Webster had matured and made progress socially, meaning he was less likely to defer, and – now more distant from an intensely stressful period – seemed more capable of thinking through complex legal issues.¹⁹¹

Trial counsel’s evidence

75. Trial counsel, Nathan Bourke, represented Mr Webster from the day he was arrested (3 August 2022).¹⁹² He pleaded guilty on 9 December 2022.
76. Mr Webster seemed naïve, a “deer in the headlights”¹⁹³ and heavily reliant on Mr Bourke’s advice.¹⁹⁴ Mr Bourke did not contemplate he might suffer from FASD:¹⁹⁵ while he sometimes seemed overwhelmed, this was understandable given his situation.¹⁹⁶ But it was evident Mr Webster had some limitations, so Mr Bourke was concerned to ensure he understood the charge, the evidence, and his options.¹⁹⁷
77. *Sufficient capacity to convey his version of events.* Mr Webster instructed:
- 77.1 A few minutes before the victim arrived at the farm, Mr Candy and Ms Hughes contacted him and said they were bringing the victim back to the farm in their car and Mr Webster should meet them.¹⁹⁸
- 77.2 He then punched and kicked Mr Ramsay to the head and body.¹⁹⁹ Mr Ramsay was in a bad state – not putting up any resistance and

¹⁹⁰ CoA AM at **111**, at [117]–[119].

¹⁹¹ CoA AM at **111**, at [117].

¹⁹² Trial counsel evidence at **2**, at [4]–[5] (first affidavit).

¹⁹³ Trial counsel evidence at **2**, at [7] (first affidavit).

¹⁹⁴ Trial counsel evidence at **6**, at [33] (first affidavit) and **21**, at [14] (second affidavit).

¹⁹⁵ Trial counsel evidence at **3–4**, at [14] (first affidavit).

¹⁹⁶ Trial counsel evidence at **3–4**, at [14] (first affidavit).

¹⁹⁷ Trial counsel evidence at **26**, at [42] (second affidavit).

¹⁹⁸ Trial counsel evidence at **4**, at [16] (first affidavit) and **20**, at [3]–[4] (second affidavit).

¹⁹⁹ Trial counsel evidence at **4**, at [17] (first affidavit) and **20**, at [5] (second affidavit).

semi-conscious.²⁰⁰ Mr Webster said his assault lasted three to four minutes, not 10 (as the summary of facts suggested).²⁰¹

77.3 Mr Candy chained the victim to his car²⁰² and started driving.²⁰³

77.4 Mr Webster chased after the car and got into the front passenger seat.²⁰⁴ He helped Mr Candy drag the victim to the pit where he was left.²⁰⁵ Mr Ramsay was not moving or making any noise.²⁰⁶

78. Mr Webster explained his actions by saying he felt scared of Mr Candy and wanted to go along with him.²⁰⁷ He was often silent when asked to explain what the witnesses described him saying.²⁰⁸ Mr Bourke assumed he had no viable answer.²⁰⁹

79. *Understanding of the charge, the evidence, and defences available.* Mr Webster told Mr Bourke he couldn't read or write,²¹⁰ and did not want disclosure in prison. Mr Bourke therefore assessed which evidence should be read thoroughly to Mr Webster and what did not require his input.²¹¹

80. Mr Webster denied intending to kill Mr Ramsay and believed this meant he had not murdered him.²¹² Intent was central to almost all their discussions: Mr Webster always maintained he didn't intend to kill Mr Ramsay, and this was always followed by Mr Bourke explaining this was not the only pathway to a murder conviction.²¹³

²⁰⁰ Trial counsel evidence at **20**, at [6] (second affidavit).

²⁰¹ Trial counsel evidence at **4**, at [17] (first affidavit).

²⁰² Mr Webster disputed involvement in this: Trial counsel evidence at **30** (second affidavit, Exhibit C).

²⁰³ Trial counsel evidence at **4**, at [18] (first affidavit) and **20**, at [7] (second affidavit).

²⁰⁴ Trial counsel evidence at **4**, at [18] (first affidavit) and **20**, at [7] (second affidavit).

²⁰⁵ Trial counsel evidence at **4**, at [19] (first affidavit) and **20**, at [7] (second affidavit).

²⁰⁶ Trial counsel evidence at **28** (second affidavit, Exhibit A).

²⁰⁷ Trial counsel evidence at **5**, at [20] (first affidavit).

²⁰⁸ Trial counsel evidence at **25**, at [39] (second affidavit).

²⁰⁹ Trial counsel evidence at **25**, at [40]–[41] (second affidavit) and **35** (NOE).

²¹⁰ Trial counsel evidence at **3**, at [9] (first affidavit).

²¹¹ Trial counsel evidence at **3**, at [12] (first affidavit).

²¹² Trial counsel evidence at **5**, at [21] (first affidavit); and **20**, at [8] (second affidavit).

²¹³ Trial counsel evidence at **21**, at [9] and [11] (second affidavit).

81. Mr Bourke attempted to explain the concept of reckless murder on several occasions,²¹⁴ for example on 14 September 2022²¹⁵ and again on 1 December 2022,²¹⁶ when Mr Webster ultimately decided to plead guilty. Mr Webster was often silent in response to Mr Bourke's explanation of the elements.²¹⁷ Mr Bourke assumed Mr Webster had understood because he didn't ask questions²¹⁸ or suggest he had not understood.²¹⁹
82. On 1 December 2022 Mr Bourke took Mr Webster through excerpts of his interview, the formal written statements of Jade Torpey and Philip Mullan, and the pathologist report.²²⁰ He explained the key evidence supporting reckless murder: the victim's state when he first exited Mr Candy's car;²²¹ the fact he was assaulted and dragged behind a car in that state; Mr Candy's comment that the victim might be dead by the end of the track; the fact Mr Webster then helped drag him to the pit; and Mr Webster's comment he'd never "caved someone's head in" before.²²²
83. Mr Webster was visibly upset and crying when read this evidence.²²³ He did not respond to these points or rebut what the witnesses said.²²⁴ Mr Bourke told him this confirmed he would struggle to give evidence.²²⁵
84. Mr Bourke considered Mr Webster had understood the risk he would be found guilty of murder, and accepted his advice.²²⁶ He took Mr Webster through the amended²²⁷ summary on 9 December 2022.²²⁸

²¹⁴ Trial counsel evidence at **5**, at [22] (first affidavit) and **21**, at [9] and [12] (second affidavit).

²¹⁵ On 14 September 2022 Mr Bourke explained that the level of violence involved (punching, kicking, and dragging behind a car) would make it very difficult to argue he did not realise this could cause very serious harm which could kill Mr Ramsay: Trial counsel evidence at **21**, at [10] and [13] (second affidavit) and **28** (second affidavit, Exhibit A).

²¹⁶ Trial counsel evidence at **21–22**, at [16] (second affidavit) and **29** (second affidavit, Exhibit B).

²¹⁷ Trial counsel evidence at **25**, at [39] (second affidavit).

²¹⁸ Trial counsel evidence at **25**, at [40]–[41] (second affidavit) and at **35** (NOE).

²¹⁹ Trial counsel evidence at **24–25**, at [35] (second affidavit).

²²⁰ Trial counsel evidence at **21–22**, at [16]–[21] (second affidavit) and **29** (second affidavit, Exhibit B).

²²¹ Trial counsel evidence at **24**, at [28] (second affidavit).

²²² Trial counsel evidence at **23**, at [22]–[28] (second affidavit) and **29** (second affidavit, Exhibit B).

²²³ Trial counsel evidence at **24**, at [32] (second affidavit).

²²⁴ Trial counsel evidence at **23**, at [25] (second affidavit).

²²⁵ Trial counsel evidence at **23**, at [25]–[26] (second affidavit).

²²⁶ Trial counsel evidence at **24**, at [33] and at **29** (second affidavit, Exhibit B).

²²⁷ Trial counsel evidence at **30**, (second affidavit, Exhibit C).

²²⁸ Trial counsel evidence at **33** (second affidavit, Exhibit E).

List of Authorities

Statutes

New Zealand

1. Evidence Act 2006, ss 25, 28–29, 30 and 44.
2. Criminal Procedure Act 2011, s 232.
3. Disability (United Nations Convention on the Rights of Persons with Disabilities) Act 2008.
4. Criminal Procedure (Mentally Impaired Persons) Act 2003, ss 4, 8A, 24, 25, 27, 31 and subpart 4.
5. Crimes Act 1961, ss 66 and 167.

England and Wales

6. Criminal Appeals Act 1968 (UK), s 6.

Cases

New Zealand

Supreme Court

7. *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2025] NZSC 103, [2025] 1 NZLR 485.
8. *Tihema v R* [2024] NZSC 112, [2024] 1 NZLR 473.
9. *Re Solicitor-General's Reference (No 1 of 2023)* [2023] NZSC 151, [2023] 1 NZLR 457.
10. *Foley v R* [2018] NZSC 57.
11. *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753.
12. *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493.
13. *Cumming v R* [2008] NZSC 39, [2010] 2 NZLR 433.
14. *Condon v R* [2006] NZSC 62, [2007] 1 NZLR 300.

Court of Appeal

15. *Tarrant v R* [2026] NZCA 148.
16. *Singh v R* [2024] NZCA 395.
17. *Wheble v R* [2024] NZCA 541.
18. *Dickey v R* [2023] NZCA 9, [2023] 2 NZLR 405.
19. *Hanara v R* [2022] NZCA 608, (2022) 34 FRNZ 437.
20. *Tihema v R* [2022] NZCA 444.
21. *Kissling v R* [2021] NZCA 6 (leave declined in *Kissling v R* [2021] NZSC 132).
22. *Hohua v R* [2019] NZCA 533.
23. *I (CA128/2018) v R* [2019] NZCA 625.
24. *M (CA424/2019) v R* [2019] NZCA 461.
25. *Mathews v R* [2019] NZCA 131.
26. *T (CA372/19) v R* [2019] NZCA 551.
27. *Halpin v R* [2018] NZCA 477 (leave declined in *Halpin v R* [2019] NZSC 11).
28. *Tuira v R* [2018] NZCA 43.
29. *Whichman v R* [2018] NZCA 519.
30. *Nonu v R* [2017] NZCA 170.
31. *Churchis v R* [2016] NZCA 264.
32. *Nixon v R* [2016] NZCA 589, (2016) 28 CRNZ 698 (leave declined in *Nixon v R* [2017] NZSC 56).
33. *G (CA374/2015) v R* [2015] NZCA 327.
34. *Balemi v R* [2014] NZCA 176.
35. *JA (CA402/2014) v R* [2014] NZCA 590.

36. *Cooper v R* [2013] NZCA 551.
37. *H (CA841/2012) v R* [2013] NZCA 628, (2013) 26 CRNZ 628.
38. *T (CA662/2012) v R* [2013] NZCA 550.
39. *Britz v R* [2012] NZCA 606.
40. *Solicitor-General v Dougherty* [2012] NZCA 405, [2012] 3 NZLR 586.
41. *Keegan v R* [2010] NZCA 247.
42. *R v Merrilees* [2009] NZCA 59.
43. *R v Tukaki* CA 360/05, 14 June 2006.
44. *R v Le Page* [2005] 2 NZLR 845 (CA).
45. *R v Lewis* [1975] 1 NZLR 222 (CA).

High Court

46. *Kaitai v New Zealand Police* [2026] NZHC 1737.
47. *Thomas v New Zealand Police* [2022] NZHC 3622.
48. *C v R* [2020] NZHC 225, [2020] NZAR 343.
49. *R v Stone* [2018] NZHC 1340.
50. *R v Komene* [2013] NZHC 1347.

England and Wales

51. *Ismael v R* [2024] EWCA Crim 301.

Australia

52. *Squance v WA Police* [2023] WASC 479.
53. *Nagatayi v R* [1980] HCA 18, (1980) 147 CLR 1.

Canada

54. *R v Bharwani* 2025 SCC 26, 450 CCC (3d) 143.

55. *R v W (MA)* 2008 ONCA 555.

Texts

56. Mathew Downs (ed) *Adams on Criminal Law - Procedure* (online looseleaf ed, Thomson Reuters).
57. Warren Brookbanks and Jeremy Skipworth “Unfitness to stand trial and disposition” in Warren Brookbanks and Jeremy Skipworth (eds) *Psychiatry and the Law* (2nd ed, LexisNexis, Wellington, 2026).
58. Elisabeth McDonald and Scott Optican (eds), *Mahoney on Evidence: Act and Analysis* (2nd ed, Thomson Reuters, Wellington, 2024).
59. Sylvia Bell and Warren Brookbanks *Mental Health Law in New Zealand* (3rd ed, Brookers, Wellington, 2017).
60. Warren Brookbanks *Competencies of Trial: Fitness to Plead in New Zealand* (LexisNexis, Wellington, 2011).

Other

61. Law Commission (United Kingdom) *Unfitness to Plead Volume 1: Report* (Law Com No 364, 12 January 2016).
62. Victorian Law Reform Commission *Review of the Crime (Mental Impairment and Unfitness to be Tried) Act* (June 2014).
63. (21 October 2003) 612 NZPD 9545.