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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 120/2024

[2025] NZSC Trans 11

BARRY JOHN BAILEY

Appellant

v

The King

Respondent

Hearing:	16 July 2025
Court:	Glazebrook J Ellen France J Williams J Kós J Miller J
Counsel:	M J McKillop and D Steyn for the Appellant

M J Lillico and W J Harvey for the Respondent

CRIMINAL APPEAL

MR McKILLOP:
E ngā Kaiwhakawā, tēnā koutou. Ko McKillop ahau, here with Steyn for the appellant.

GLAZEBROOK J:
Tēnā kōrua.

MR LILLICO:
E ngā Kaiwhakawā, tēnā koutou. Ko Lillico tōku ingoa. Kei kōnei māua ko Harvey mō te Karauna. Lillico and Harvey for the respondent, may it please the Court.

GLAZEBROOK J:
Tēnā kōrua. Can I just check before we start counsels' view on timing because we didn't think, given it's an important but relatively narrow point, that we should be here all day, but…

MR McKILLOP:
Our expectation when we discussed this previously was that we're likely to be finished by lunch time.

GLAZEBROOK J:
Thank you.

KÓS J:
So that's all day then?

MR McKILLOP:
Based off past experience.

May it please the Court, I am going to not step through the written submissions. I intend to make five broad points orally which I'll elaborate on, but I'll set out what those points are now.

The first is addressing what the scope of the appeal is and emphasising that it's an appeal on a question of law against an exercise of discretion and thus relatively narrow.

The second is to look at what Judge Savage actually decided in the District Court which I say is important to the point that we've raised and that contrary to the Court of Appeal's focus I say really there were two distinct bases for dismissal that were considered by Judge Savage and it was really only the "no useful purpose" submission that was actually accepted rather than the "unfairness" point that the Court of Appeal was more focused on.

My third point will be to address why the Court of Appeal was wrong, and what I'll say there is that mental impairment is, while it has its own procedure to deal with unfitness questions, it's not a subject matter trump that removes the section 147 jurisdiction once the Criminal Procedure (Mentally Impaired Persons) Act 2003 process is underway and that nothing about the CP(MIP) Act requires such an interpretation of section 147, which is one of the important general safety valves of the Criminal Procedure Act 2011.

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My fourth point will be to address how our case fits into the principled limits that courts have placed on section 147 through the case law, and what I'll submit there is that concerns raised by courts about the boundaries of section 147 have focused on judges not overstepping into the role of the jury or into the role of the prosecutor and that the dismissal in this case complies with those principles.

And my final point will be to respond to some of the Crown's claims, and in particular I'll respond to the suggestion made in the submissions, the written

submissions, that dementia and unfitness would lead to a dismissal of charges in every case under section 147, which I don't argue for or I don't accept, and I don't accept as a consequence of the argument.

So those are the five areas that I'm intending to address. If there was anything else, and it might be hard to know where any concerns might slot into right now, but if there is anything else that the Court wanted me to also address, I would be grateful to hear about it now.

KÓS J:

Well one should never resist such an invitation, so I've got two things for you. The first is there is very little discussion in the submissions of either side here on the New Zealand Bill of Rights Act 1990 and its potential implication.

The second consideration is you focus on section 147, but it seems to me there are four pathways potentially here that might have responded to the situation. One is section 147, another conceivably of section 176, the Crown stay, but we can put that to one side, but that's just for completeness. Third is the inherent jurisdiction to stay which doesn't result in a deemed acquittal unlike section 147, and the fourth pathway is the unfitness pathway under the CP(MIP) Act, and I think we need to sort of look at all, well at least three of those four anyway in this context and not just focus on section 147.

MR McKILLOP:

Okay.

KÓS J:

That's my two, and I'm sure my colleagues have responses to your invitation.

MR McKILLOP:

And the – just so I'm clear, the second one that your Honour noted was section 176?

KÓS J:

Well that's simply, it's simply for completeness, but there are a whole lot of different ways in which a case can come to a short stop.

MR McKILLOP:

Yes.

KÓS J:

And section 176 is just there for completeness.

MR McKILLOP:

Right, I see. So –

KÓS J:

Which doesn't arise here.

MR McKILLOP:

No, no, no, but I suppose withdrawing charges or not offering evidence or there could be –

KÓS J:

Yes, yes, exactly.

MR McKILLOP:

Yes, okay. Okay.

GLAZEBROOK J:

I think there will possibly be questions as we go along.

MR McKILLOP:

Yes.

GLAZEBROOK J:

But certainly in terms of a stay, that might answer some of the Crown's policy concerns in terms of deemed acquittals.

MR McKILLOP:

Yes, yes. I do obviously accept that – well there is very little practical difference between a stay which would be a permanent stay for someone in Mr Bailey's position and a dismissal which is a deemed –

KÓS J:

Well it makes an enormous difference to the complainants, Mr McKillop.

MR McKILLOP:

Yes. No, I do appreciate that, that practically for Mr Bailey it's not a big difference.

Okay, well I'll proceed through my five points and endeavour to address those points along the way.

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So the first point I wanted to make was about the scope of the appeal and just again to emphasise that this is an appeal against an exercise of discretion. It's a particularly narrow right of appeal, of a first appeal, so an unsuccessful defendant can't bring an appeal. The Crown can seek leave to appeal on a question of law, and that's an indicator of how broad the discretion given to the trial Court is, and as a discretionary decision what the Courts are really looking for is an error of law or principle rather than one of judgment or weight, unless you get to that plainly wrong level of just having to tip something because it couldn't possibly stand up. The reason why I make this point is that at one point in the Court of Appeal's judgment at paragraph 35 the Court introduces a section of the judgment by saying: "For completeness,…the reasons given by the Judge did not provide a sufficient basis for dismissal of the charges." I suggest that a close examination of sufficiency of reasons gets quite close to, or possibly goes over the line of what the Court's role is in an appeal against an exercise of discretion. It doesn't reflect the discretionary nature of the decision at issue and the usual limits on appeals of that nature.

WILLIAMS J:

But that's a little out of context though, isn't it? It's pretty clear that they say there's an error of principle.

MR McKILLOP:

Certainly they already found that there was such an error and then they go on to say there's a further ground on which we would allow this appeal, so I'm just…

WILLIAMS J:

You need to aim your guns at the first point.

MR McKILLOP:

Yes, certainly. I absolutely accept that. It's clear that the main issue here is, first, whether the Court retains any jurisdiction under section 147, once an unfitness finding is made and, if so, what is the scope of that, and those are clearly questions of law.

GLAZEBROOK J:

And I suppose the corollary of that is, you say, that if we say it does retain jurisdiction and the scope allows mental impairment at least to be one factor, if not wholly the factor, then that's the end of it. Is that the submission, because that's the point of law?

MR McKILLOP:

Yes, yes. What I'll –

GLAZEBROOK J:

And we don't go on to – well…

MR McKILLOP:

Re-weigh how things were weighed in the balance. That would be the normal approach to a – yes. So…

ELLEN FRANCE J:

So is it clear in the cases dealing with appeals in relation to 147 that it is treated as requiring "plainly wrong"?

MR McKILLOP:

What I have steps together in the – I think it's quite limited authority on that point but in my written submissions I've addressed the findings that, firstly – and this is at paragraph 24 onwards – that section 147 is a discretionary power and then the approach taken to the appellate approach to discretion appeals in the criminal context is dealt with in my footnote 22, citing this Court's judgment in *R v Reid* [2007] NZSC 90, [2008] 1 NZLR 575 and some other lower court judgments. So that's what I base that on.

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ELLEN FRANCE J:

Yes, I wasn't immediately clear because it would generally be a Crown – well –

MR McKILLOP:

It has to be a Crown appeal.

ELLEN FRANCE J:

Yes, it will be a Crown appeal, and I wasn't aware that the approach was necessarily a strict following of the *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 approach.

MR McKILLOP:

So I think really – now I haven't cited any of these cases so I can't bring one to your attention, but generally those appeals are appeals against a trial judge's conclusion that the evidence isn't sufficient.

ELLEN FRANCE J:

Yes.

MR McKILLOP:

And the –

ELLEN FRANCE J:

Yes, I suppose it's a different context, so you don't – there either is or there isn't. You don't get the sort of issue that you do in this case.

MR McKILLOP:

Yes, they – so what I would say about those appeals is that they tend to turn on a judge applying the wrong test. Instead of asking could a jury find this person guilty, they ask should or would, so there's an error of law or principle in the classic sense, which means that it's necessary for the appellate court to reweigh the available evidence. So –

GLAZEBROOK J:

Plainly wrong is usually a threshold for saying when an error of fact can become an error of law.

MR McKILLOP:

Yes, so a very –

GLAZEBROOK J:

So a conclusion that can't be drawn, so I'm not entirely sure it fits in the same way.

MR McKILLOP:

Well it's a – I would just say it's a very high threshold, which doesn't – it's not engaged in this case, is my submission.

GLAZEBROOK J:S

Yes.

MR McKILLOP:

So this is an error of law case. The point I'm trying to bring it all back to, this is an error of law case.

GLAZEBROOK J:

Yes, yes.

MR McKILLOP:

And hence the focus on section 147.

So I want to go through the District Court hearing just to address what actually happened there. I want to just look at the transcript of what was argued before Judge Savage because it helps to explain what the judgment ended up containing, and I want to submit, I am submitting, that the fairness of the involvement hearing wasn't actually the reason that Judge Savage gives for dismissing the charges. It was certainly the submission that was made to the Judge but there was also a submission about the lack of any utility in the process, and that that was the point which was eventually accepted.

KÓS J:

Can you help me understand why the matter proceeded with an unfitness finding and then a section 147 application? Surely your argument would be a better one if the section 147 had been – sorry, the unfitness process had entirely been pre-empted by the section 147 application, but here it came half way through, and that's a problem I think for you.

MR McKILLOP:

The section 147 was filed first in time and then Mr Bailey's counsel raised the issue of fitness in terms of his ability to get instructions and that led to the unfitness process. So the section 147 application was extant.

KÓS J:

All right. Can we have a look at the actual application and see what – how it was raised?

MR McKILLOP:

Yes. So that is –

KÓS J:

Supreme – it's the casebook. The –

MILLER J:

It's in the Court of Appeal – the Court of Appeal casebook.

KÓS J:

Page 29, I think.

MR McKILLOP:

Page 29.

KÓS J:

The Supreme Court casebook.

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MR McKILLOP:

So at the time it's filed, if we just scroll down to the grounds: "The time that has elapsed" –

KÓS J:

Right, so fair trial. Fair trial.

MR McKILLOP:

Yes.

And that point about the passage of time giving rise to prejudice also makes, quite independent of mental impairment, also makes its way into the submissions that Mr Williams filed as well which are in the additional materials bundle. I won't go to them right now.

But I do want to go to the transcript of the legal discussion which is starts at page 15 of that bundle. So I say throughout this hearing there were two strands to the argument being advanced and submitted on by the parties and

considered by the Judge: the “unfairness” point and the “no useful purpose” point which is the one I say the Judge actually eventually accepted.

The relevant passage I want to bring attention to is on page 17.

KÓS J:
Where do we find that?

MR McKILLOP:
On the screen. It’s just made very clear in the submission that it’s been suggested here that no form of order under the CP(MIP) Act could possibly provide for Mr Bailey. His health was being dealt with in the community in the way that anyone with dementia is dealt with, currently living at home, ultimately he will need to move to a rest home, and “so from a pragmatic perspective there is no useful purpose in the CP(MIP) process following through. That was a point made by his Honour, Judge Kellar, at the last appearance who asked the prosecutor appearing to go and consider the matter, but here we are...” So there had obviously already been some doubt about the usefulness of this and that was submitted on by Mr Williams at the section 147 hearing.

Now if we go down to page 21, the Judge asks the Crown to address just what this process is to be used for, what is the useful purpose, and the Crown’s response is there, the first answer, “that the merits here are giving the complainants their day in Court”, and it’s obviously accepted that they are serious allegations. But there’s no other basis advanced by the Crown counsel for why this is important, why there’s an important purpose to be pursued here. There’s certainly no suggestion ever made a CP (MIP) Act disposition is in consideration –

MILLER J:
The point being made is the legislation requires it, once you’ve triggered the unfitness.

MR McKILLOP:

Well, the primary submission made in the hearing indeed was this is a jurisdictional objection and we simply must proceed. That wasn't accepted by the Court in the end and nor did the Court of Appeal actually accept that section 147 was jurisdictionally barred but said that it was barred in the particular – it was not available in the particular circumstances but not that as a matter of jurisdiction no section 147 could be brought.

MILLER J:

I was only making the point are you possibly reading too much into the absence of discussion by Crown counsel about the merits of section 147 because their point essentially was we're in a statutory scheme that ought to be followed.
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MR McKILLOP:

Yes, yes. No, no, I certainly accept that the Crown is focused on jurisdiction, absolutely. I'm just making the point that there'd been a submission made that there was nothing to be gained from this process and no real response to that besides the day in court point, which is what ends up finding its way into the judgment.

So the judgment itself, we can go to that which is page 25 of the Supreme Court casebook, and that – well as I say, the – and I think that all parties agree that there actually isn't a jurisdictional limit on section 147, that it's more of a – although I'm not sure if the Court would agree – that it's, as the Court of Appeal also found, it wasn't a jurisdictional limit, it was a matter of fit for the circumstances rather than a hard boundary. So if we go down to paragraph 6 of that –

KÓS J:

I'm not sure I understand that submission. The argument of the Crown appears to be that it is a statutory scheme, the word "must" means "must", and there's a very rare instance possible where section 147 could still trump. I think that's what Mr Lillico is saying.

MR McKILLOP:

Yes, so that –

KÓS J:

He's nodding his head, so that's – I seem to have got that point right.

MR McKILLOP:

So that's not a jurisdictional problem.

KÓS J:

No.

MR McKILLOP:

It's a question of interpretation.

KÓS J:

Well – yes.

MR McKILLOP:

So the – my point really is that the law is correctly stated here by Judge Savage, even in, even given the Supreme – the Court of Appeal's judgment from paragraph 6 to paragraph 8.

So the – then there's a discussion section. The Judge records the various submissions of the parties, but what I want to go down to is paragraph 16 where after recording those submissions the Judge focuses on the Crown's substantive reason for why this process has a purpose, has a valuable purpose going forward, and notes that the Judge doesn't consider that giving the complainants "their day in court" is enough in this case having heed to the medical reports that have been put before the Court, the conclusion being that it's not in the interests of justice to prolong the proceeding.

So my submission there is that the Court of Appeal read a lot into Judge Savage's reasoning by inferring that he'd actually accepted Mr Bailey's

submission as to the unfairness of the involvement hearing. It's not particularly clear that the Judge has done that. The Judge has recorded the submissions that were made but ultimately has focused in on the medical state of Mr Bailey and the – a consideration that the day in court factor doesn't outweigh the interests of justice in the –

MILLER J:

And he goes somewhat further than that, doesn't he? He says it would be "improper" to do that?

MR McKILLOP:

Yes, yes, he says it "would be an improper use of the Court's processes" when that's their – I mean it can be inferred that the Judge is viewing that as being the only thing that would be achieved by prolonging the proceeding.

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WILLIAMS J:

So what are you suggesting? That fairness played no role?

MR McKILLOP:

Well, I'm suggesting that the Judge certainly hasn't explicitly adopted any of those submissions or emphasised that in any way when it came to actually making the decisive judgment here, that the Judge could see the nature of the situation and accepted that there was, besides the satisfaction of the complainant's being able to give evidence in court, that there was very little more to be achieved.

KÓS J:

It seems to me that's a short-hand on the Judge's part, and also, I mean, it's drawn from Crown counsel's observation, but it's a short-hand for saying not only do they get the day in court but that also there is no deemed acquittal. The two things track together. It's a bit more than simply a day in court.

MR McKILLOP:

It's not simply the day in court, yes. No, and this obviously ties into the point your Honours asked me to address about the difference between "stay" and "dismissal".

KÓS J:

I mean on that point, if what the Judge is doing is, as you say, zeroing in on the medical evidence, it's hard to work out, to my mind, when there would ever be a case that was otherwise going down to an involvement hearing where someone's been found unfit on the District Court Judge's approach here where there wouldn't be a section 147 decision. How many involvement hearings would you then have?

MR McKILLOP:

I'm not sure I follow that, your Honour.

KÓS J:

Well, what you're getting here is section 147 almost entirely trumping the statutory procedure under the CP(MIP) Act.

MR McKILLOP:

No, I don't accept that. My submission this is a particular factual setting where normally a court wouldn't think that there was such limited outcomes to achieve with the CP (MIP) Act process because there would be some disposition in mind or in contemplation at the end of that process. So the involvement hearing occurs and then if the person is found involved there's the inquiries and then a decision under section 24, 25.

KÓS J:

But that disposition might be that he remains in exactly the same state of care that he's in at the moment. It's not necessarily adverse to his interests.

MR McKILLOP:

No, I'm not suggesting that. I'm simply saying that in this case it was absolutely clear from the earliest point that none of those compulsory disposition options were going to be in contemplation and everyone recognised that.

KÓS J:

But that's not what the CP (MIP) Act process is necessarily designed to achieve. It is designed to achieve an appropriate disposition and that may not be a compulsory order.

MR McKILLOP:

Well, so 25(1)(d) is one of the dispositions which is no order. But my submission is simply that when it's clear that that is the outcome, that there is nothing compulsory that can be done to assist or needs to be done to assist through the CP (MIP) Act process, then it's open to the Courts to entertain an early dismissal of the charge.

MILLER J:

It seems to introduce efficiency considerations which one can imagine are very appealing to an overstressed District Court judge.

MR McKILLOP:

Well, that's really something –

MILLER J:

It's not just a pragmatic question, is it?

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MR McKILLOP:

It is not just a pragmatic question, and it's something which I say would've just been obviously in the Judge's mind in light of the – well I mean this Court will be aware that there's been another recent case called *Teika v Te Whatu Ora* [2024] NZCA 390, and that – there were a few different habeas corpus applications in that case, but the first one was against an order that was made

by a District Court judge to remand someone in prison custody after being told that there was no beds available at Hillmorton Hospital, and there are obviously other examples of those stress – of the system being a stressed one. There was a case called *Maaka-Wanahi v Attorney-General* [2023] NZCA 217 about delays in, well, it's arisen out of delays in the Waikato area as well, so –

MILLER J:

Well those cases certainly raise BORA issues, don't they, but they're not what we're dealing with here. There's no suggestion here that there is another alternative which would be appropriate for this man, but which is not available because the system simply isn't delivering.

MR McKILLOP:

No. It's – well he's not detained through this process.

MILLER J:

Exactly, so –

MR McKILLOP:

So I can't really argue that there's some sort of different balance of rights issue that leads us one way or the other, but it's really a point about what – in my submission it will be pretty clear that District Court judges know throughout New Zealand, which is that there are stressors and strains on the forensic mental health system and the – and what you can infer from that is the prospect of there being a special patient order, which is a compulsory hospital order requiring secure forensic care, is next to zero. It's –

WILLIAMS J:

Your problem is really that it's kind of an unattractive argument to say, well, what's the point? You need something a bit more than what's the point to walk around a statute, I would've thought?

MR McKILLOP:

So –

WILLIAMS J:

So the argument has got to be at some level this guy can't get a fair involvement hearing?

MR McKILLOP:

So the fairness of the involvement hearing isn't the primary thing that I've relied on in this appeal.

ELLEN FRANCE J:

Well –

WILLIAMS J:

But you need to set this up as a contest of rights. It's not – well your set up is much more difficult if all you're saying is what's the point, it's too expensive, because that's to apply the needs of an administrative state over the needs of a statute and of course, as the Judge said, the right of the alleged victims to their day in court. So I'm suggesting you're going to need some big ideas too, not just practical ones.

MR McKILLOP:

I'm not going to restrict myself to just the practical ones, but I have emphasised that because I say that there's ample case law to suggest that section 147 has been used and its predecessors have been used in situations where there is seen as being little to be gained by tracking through a court process, it is in fact just what courts have used it for, so it is something open to courts.

WILLIAMS J:

Yes, but you're up against a statutory edifice of some strength in this particular case.

MR McKILLOP:

One which – one though which has as one of its outcomes, and indeed the only one likely on the facts, no order being made at all. So – but –

KÓS J:

No order made, but no deemed acquittal.

MR McKILLOP:

No.

KÓS J:

You can't just abandon that bit of it.

MR McKILLOP:

No, no, no. I recognise that.

MILLER J:

It seems to me that – sorry.

1040

ELLEN FRANCE J:

I was just going to say it might lead you to a stay rather than section 147, but I'm not quite sure why you are walking away from fairness.

MR McKILLOP:

Well, look, I'm not – I want to be clear that I'm not walking away from fairness. The thing that I've emphasised in the submissions is the futility or the no, nothing to be gained ground. But I want to come on now, in fact, to address why I say the Court of Appeal was wrong on the fairness point as well.

So my submission there is that the Court of Appeal focused on the substantive cause of the fairness concerns rather than on the sorts of prejudices that allow the use of section 147 or stay powers more generally, that the CP(MIP) process addresses mental impairment and its impact on criminal procedure whereas section 147 addresses prejudices to defendants from charges that ought not continue, and that these are two distinct purposes which don't necessarily impact the other, that fettering section 147 is wrong in principle, in my submission.

So I want to basically say that there's one regard in which I have to accept that the Court of Appeal's sort of reasoning is correct and that's this. If a submission was made that mental impairment alone leads to impermissible unfairness in the involvement hearing, I think that that kind of submission really must fail because that essentially would be saying that the Court ought to negate a statutory process under section 147 on the basis that there's something inherently unfair about that process, whereas that is the statutory process created by Parliament and using section 147 to avoid it would, you know, solely on the basis that this person fits within the population that it's designed for, would be to ignore Parliament's intent. So I can't suggest that that mental impairment simpliciter could itself justify stay or dismissal at that stage.

KÓS J:

But your argument seems to be that mental impairment plus the probability of a compulsory order is enough to do this workaround to the Act. That's quite a big argument.

MR McKILLOP:

So I say that it's not just mental impairment on its own but if we look at, say, the way that prejudices to fairness or the prejudice of unfairness can emerge, dividing that up into mental impairment related reasons and other reasons is – and saying that once mental impairment reasons are involved then you just can't have use of the section 147 process – is a problem, that it's unreal to suggest that when you have, say, a combination of dementia, investigatory delay, the passage of time leading to witnesses being unavailable, those are all matters that can affect memory but one of them's a mental impairment point and one of them is, well, this wasn't investigated at the time so we don't have contemporaneous records and so –

1045

MILLER J:

Did the Court of Appeal rule that out?

MR McKILLOP:

Well, the Court of Appeal suggested that once mental impairment is involved, at 32 of its judgment they suggested that once mental impairment is involved that forecloses on a section 147 application whereas what I'm saying is that –

MILLER J:

What paragraph was that again, please?

MR McKILLOP:

It's paragraph 32.

MILLER J:

But that supposes the CP(MIP) process has begun and reached that point, correct? I understood you to say earlier that the Court of Appeal did not rule out the possibility of a section 147 discharge. For instance, had this –

GLAZEBROOK J:

No, but on matters outside of –

MILLER J:

– had this followed the section 147 process before there was an unfitness finding.

KÓS J:

Doesn't the second sentence at paragraph 32 reinforce Justice Miller's proposition and provide you with some support? In other words, it's saying it has to be something independent of disability.

MR McKILLOP:

Yes, yes, but the mental impairment can – what I'm saying is mental impairment can be a feature of the factual matrix that gives rise to the prejudice. It can't simply be a trump that ends access to section 147.

WILLIAMS J:

It's not easy to see whether the Court of Appeal is agreeing or disagreeing with you on that point.

MR McKILLOP:

Well, it's not – in the first sentence it says "the defendant's mental impairment cannot be relied upon as a basis for seeking a stay". So –

WILLIAMS J:

The question is whether the subtext of that is (entirely).

MR McKILLOP:

Yes. No, I agree. But –

GLAZEBROOK J:

Well, I think the second sentence makes it clear that you can't rely on it as part of a suite of issues that you would say cause prejudice.

MR McKILLOP:

And that's the submission that I'm making, that it's been treated as a subject matter that puts you in CP(MIP) and takes you out of section 147 whereas…

GLAZEBROOK J:

Except for matters that are wholly unrelated to the mental impairment?

MR McKILLOP:

Yes, whereas –

GLAZEBROOK J:

I think there's also something about applying for a stay later. Is that the Crown suggests?

MILLER J:

It's ambiguous, isn't it, because pointing to the idea of relying on impairment as the basis for a stay under section 147 is quite odd, but it's the idea that the

impairment is the foundation for the decision as opposed to merely being a contributing factor. I'm not – it's not entirely clear, I accept.

MR McKILLOP:

Yes, so the point I'm making is that it may be a contributing factor, and what I say about this case is that while it was emphasised by Mr Bailey's counsel, that it was far from being the only factor. The application, as we've seen, was founded on unfairness based off of the passage of time and if we went to the actual written submissions that were filed in that hearing as well – this is at, what you're seeing is at the additional materials Court of Appeal bundle at page 13 – what was actually submitted on was the presumptive prejudice of the significant delay, the complainants making complaints at the time that were not investigated, there's a point earlier in the submissions as well which I won't flick up to, but it's that Mr Bailey's wife was interviewed at an earlier time by police and that document was lost, so – or if there was a documentary record of it, it was lost. So this wasn't that kind of case. This was a mixed bag of contributors to unfairness and is just the sort of thing that, in my submission, should not be ruled out as it seems to me the Court of Appeal judgment does, although I do accept – I accept it's ambiguous, but ambiguity is not attractive when you're looking for what the boundaries of jurisdiction to bring an application are.

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WILLIAMS J:

Well your argument is that these matters are matters that should have been taken into account, and if they were, would have led to the result you favour?

MR McKILLOP:

Well I'm saying that the Court of Appeal read the judgment as being exclusively about mental impairment giving rise to unfairness, but this wasn't a hearing which was about mental impairment giving rise exclusively to unfairness, it was a far more complex application which had an unfairness claim advanced which was multifaceted, it wasn't just grounded in unfairness – in, sorry, it wasn't just grounded in mental impairment, but in the passage of time and police investigatory failings, and there was this other thread which was the one that

I've emphasised in the written submissions about the lack of utility in continuing the proceeding in light of the extreme unlikelihood of there being a compulsory disposition at the end.

KÓS J:

So we've got three things going here. We've got, as (c) and (d) say on page 13, we've got his mental frailty, plus we've got the delay/investigative issues, plus thirdly, we've got lack of utility. So you say, if I'm right on that, that cocktail of three considerations takes you into independent factors apart from mental impairment, and therefore enables section 147. Is that your argument?

MR McKILLOP:

Essentially, yes, that – so I say that unfairness or lack of utility could be independent grounds for allowing the section 147, but the – but collectively, however you combine them, they are sufficient.

MILLER J:

Can you help us with respect to the District Court Judge's reasoning at paragraph 13 of his decision? It seems a very abstract consideration. Any historic sex cases like this are she said/he said cases usually and there is none of the circumstantial material that might allow a defendant to raise questions of reasonable doubt. That's inherent in the historic sex cases. I would expect that involvement hearings or preliminary hearings in cases like this would rest on the evidence of the complainants if they come up to brief, as it were. It's unlikely that that evidence is going to be challenged at that stage because in the end it's a jury question. I think it's extremely unlikely that the Judge would rule it out. So I'm not – it's not clear to me where the disadvantage is.

MR McKILLOP:

Well it's not a – it's not a deposition, there's a need for the Judge to – the Judge is the fact-finder in an involvement hearing. But, sorry, can I just go back, I'm not sure what paragraph, which document your Honour is –

MILLER J:

It's 13 of the District Court Judge's reasoning.

GLAZEBROOK J:

Can we get that up, please?

1055

MILLER J:

It's unclear. He doesn't really evaluate this argument, which is part of the problem we have. We don't have an actual finding. Paragraph 13 of his decision. He doesn't really evaluate this. I'm asking you to explain what that might be, just as a matter of experience. It's not at all obvious to me that there is any actual unfairness, given that all we're looking at here is an involvement hearing. How likely is it that the defendant would be giving evidence but for his dementia? I would have thought extremely unlikely, and one would expect there to be some kind of basis for that submission rather than just the hypothetical inability to answer the complainants at this stage. All of these issues become very important at trial. The jury gets a Longman direction about historic complaints and so on. But they're managed at trial.

MR McKILLOP:

Yes.

MILLER J:

So an involvement hearing is something less than that.

MR McKILLOP:

Well, I mean, I'm not quite following why your Honour says that it was extremely unlikely that he would give evidence in an involvement hearing.

MILLER J:

Because like Justice Williams I'm interested in the unfairness of this process to this defendant, if we accept that he's not able to give instructions, and I'm concerned about the absence of any substratum for a finding that it was actually

unfair to him, given the limited purpose of an involvement hearing. We just have a submission which the trial Judge hasn't actually dealt with, except perhaps implicitly.

MR McKILLOP:

Well, I mean, it's – the concern essentially is that there is no evidential basis to – well, your Honour mentioned this being he said/she said – there's no evidential basis for the "he said" part of that without there being some sort of evidence in some form from…

MILLER J:

Well, it's in the nature of these cases though that that's all you'll ever have, even at trial, is the "she said" part of it. A decision then has to be made whether evidence is led at trial, assuming you go to trial. I find it unlikely that any defendant in this situation in an involvement-type hearing would seek to persuade the Judge on credibility grounds really that it hadn't happened.

MR McKILLOP:

Well, the point here though is that there was also no police interview that put – so there would be truly –

MILLER J:

I mean those things very commonly happen in these cases, is it comes up for the first time 40 years later.

MR McKILLOP:

Yes. Sure.

MILLER J:

We've all tried this kind of case and we're aware of the difficulties for the defendants in trying them.

MR McKILLOP:

Yes. Well…

MILLER J:

Where's the lost opportunity is what I'm asking you. It's not obvious to me that there is one and one would expect the trial Judge to have said what it is.

MR McKILLOP:

My only submission really can be that the lost opportunity lies in both the inability to seek and receive instructions but also to – and frankly, from meeting with Mr Bailey, the ability to envisage him giving evidence even in an involvement hearing.

WILLIAMS J:

Isn't the point this? In these sorts of historical cases you almost always get a counter-narrative from the defendant, often of impossibility: "The house didn't look like that then, the school was set up differently, I wasn't in the country then," we've all seen those.

MR McKILLOP:

Yes.

WILLIAMS J:

If he's too impaired to offer a response and he's the only possible responder, because everyone else, according to the submission, is dead, too old or their statements have been lost, then the only chance he would have in an historical case like this is lost because he's the only chance.

MR McKILLOP:

Because he's – yes, exactly.

GLAZEBROOK J:

And if it had come out earlier, and especially if the earlier complaints had been looked at, then he would have been not mentally impaired and, one, able to give instructions closer to the time if those complaints had been investigated, but even in this situation he seems to have been not quite so impaired when they first came up as he became later.

1100

MR McKILLOP:

Yes, and at that point he was able to, as the earlier reports indicate, was able to talk about defence strategy and why he said that people were being untruthful and et cetera, but all of that opportunity was lost, and that is, as I say, one factor in the unfairness. It's the mental impairment tinged factor but there were others.

GLAZEBROOK J:

Even in an involvement hearing the Judge would have to give him or herself the sort of warnings that *CT* [2014] NZSC 155, [2015] 1 NZLR 465, for instance, requires.

MR McKILLOP:

Yes, I'm sure the Judge would have them in mind.

GLAZEBROOK J:

I know that sounds a bit odd but it would have to be in a case of this elderly nature.

MR McKILLOP:

Yes. That's – yes.

KÓS J:

There is another argument for you, just to wear your hat for a moment, which is possibly helpful and it's that there may be an inherent unfairness in saying that a person who has a mental disability but who otherwise, if they did not have that, would be entitled to make a section 147 or stay application based on delay and associated unfairness is denied that by being stuck in the CP(MIP) route and so that if one can bring yourself into the more florid cocktail that I put to you before, which is that it's not just a mental impairment but there really is an unfairness issue, why should they not be entitled to bring that application? Then we come to the question which you were taxed with before: well, should it be a section 147 or a stay? We'll come to that in due course, no doubt.

MR McKILLOP:

Yes, well, I suppose that's sort of a disability discrimination point essentially that someone doesn't have the same opportunity and it's not something, I'll admit, it's not something that – it's not a point that had crossed my mind but it does have some attraction. Yes…

GLAZEBROOK J:

And possibly also the unfairness if you do it before you're in the CP(MIP) process then maybe you can get home or if there's a mental impairment that doesn't mean you're unfit to stand trial but does mean you can't remember anything and therefore are unable to…

MR McKILLOP:

Sorry, I'm…

GLAZEBROOK J:

In a particular context that…

MR McKILLOP:

I was trying to imagine a case where that could happen, but I suppose it's possible, yes.

GLAZEBROOK J:

I mean it is possible you don't meet the unfitness test and yet have a mental impairment that somehow affects your ability in a particular situation to defend yourself.

MR McKILLOP:

Yes.

WILLIAMS J:

The problem that we have in these sorts of situations is that if there is a question of fitness it's always CP(MIP), it comes up through that process, unless perhaps the defendant has enough money to hire a psychiatrist and a psychologist for

themselves to provide independent evidence that would go to stay, but that seems pretty unrealistic. This is always going to go through CP(MIP) and the State's going to pay for the advice, one hopes, although that's under stress right now, and then we run into this clash.

MR McKILLOP:

Well, it's not always the first time that someone's mental impairment comes to the attention of them or their family though.

WILLIAMS J:

That's true.

MR McKILLOP:

I mean someone with dementia may well have had a bunch of reports already establishing something, so I wouldn't say it's inevitable.

WILLIAMS J:

Right, but a trial judge would default to CP(MIP) almost immediately and so would counsel because that's the track that's taken.

MR McKILLOP:

Well, of course, I mean that allows the reports to be prepared, so…

WILLIAMS J:

And we get the latest – you'd always want the latest information and there's the statutory track to provide that, and then we run into this potential clash.

MR McKILLOP:

Yes, yes, I accept that.

KÓS J:

I would like you to think about the argument I put to you before on discrimination, perhaps over the break.

1105

MR McKILLOP:

Yes.

KÓS J:

I did mention before that there is a missing strain of BORA analysis in this case.

MR McKILLOP:

Yes, I'll consider that, your Honour. It seems safe that I'll be making it to the break at this point.

WILLIAMS J:

You'll be making it to the break, yes. It may not be a fair trial right because that's criminal process, it may be a natural justice right. I don't know, I haven't thought about it, but…

MR McKILLOP:

What may not – what may be?

WILLIAMS J:

Well, because this is criminal-adjacent.

MR McKILLOP:

Oh, yes.

WILLIAMS J:

Not criminal in terms of section – what is it – 25. It may be the natural justice right.

MR McKILLOP:

Well that's an open question, the –

WILLIAMS J:

Yes, quite.

MR McKILLOP:

As to whether or not this is a proceeding in the determination of the charge as a –

WILLIAMS J:

Yes.

MR McKILLOP:

It's not – again, it's – and this is the missing BORA analysis, with apologies, but –

WILLIAMS J:

There's a natural justice right in BORA, isn't there?

MR McKILLOP:

Yes, section 27.

WILLIAMS J:

That would've done you anyway, if that argument had any wings.

MR McKILLOP:

Well, yes. I mean obviously fairness is a – fairness under section 25 though is seen as nearing an absolute value that can't be impeded on. I suppose natural justice is obviously something similar, but –

WILLIAMS J:

Yes, I think that's pretty fundamental too.

MR McKILLOP:

Yes, but I mean I would suggest that people would want to rely on section 25 rather than section 27 in terms of criminal or criminal-adjacent proceedings, given the strength of the Court's holdings about the fundamental nature of fair trial to the safety of convictions, et cetera.

So – look, let me move on to – let me just move on to some of the case law around the basis for section 147 discharge, and my central submission here is that the approach we've put forward does gel with that case law.

Now the case I really want to refer the Court to is called *Long v R* [1995] 2 NZLR 691 (HC), which was about the former section 347, but this was – and again all these cases are in their own context, this wasn't about mental impairment, but it's a more general point that I'm taking from it about what courts have said about the boundaries of something which in the statute book is a pretty relatively unconstrained discretion on its wording, and that limits on the scope of that power as it's interpreted are rare, but essentially reflect the limited role of a judge in an adversarial trial system where the jury and the Crown have distinct roles and that the judge shouldn't step into those shoes too much. And that's really the point I was making earlier when talking about the typical section 147 appeal being about evidential insufficiency and whether the Judge has made an error in saying, well, the jury shouldn't find this rather than the jury couldn't find this to be proven.

1110

So I'm looking at this case of *Long* because it's got a long discussion of section 347 as it was then. The Judge says – I'm really looking at line 35, the one on the screen and onwards – that the Judge obviously says that there is not an unfettered discretion, it's a "broad discretion", and goes on to note from about line 40 there: "The section was not designed to be a portable palm tree enabling a given Judge to release an accused in a case where the Judge thinks there should not have been a prosecution. The decision to prosecute rests with the prosecutors; not the Court."

And then from about line 47: "Further, the section does not enable a Judge to substitute his or her views for matters which should (properly) be left to a jury. This policy reason recognises the traditional functional dichotomy between Judge and jury. The foregoing propositions may be thought to be self-obvious." And they are relatively uncontroversial. But the Judge says: "Articulating 'tests'

as to precisely when the section can properly be invoked has proven to be more elusive."

Then there's some discussion of case law there but if we can go down to the paragraph starting at about line 8: "It is apparent enough, I think, that those Judges who have favoured a narrower view of the discretion under s 347 have been heavily influenced by the respective functional roles of Court and jury. Those Judges who have favoured a wider view have either been more pragmatic, or have been concerned about other factors going to the 'justice' of the individual case…"

There's some discussion of how these cases have been summarised in *Adams* and the last line of the paragraph suggests that: "The difficulty with that approach is that such categories can never be closed, and can be no more than illustrative. In the end I doubt if any satisfactory intrinsic test(s) can be adopted."

So the Court is – I've had reference to that just because I think it's a useful summary of the tensions in interpreting section 147 and at its height it says that the main concerns that Judges have had in interpreting whether or not they should exercise this discretion are principled concerns grounded in the role of the prosecutor and the role of the jury, so avoiding overstepping the judicial role. And my submission is that this case, Mr Bailey's case, complies with those broader concerns about the boundaries of the discretion as well. So once someone is found unfit from a permanent impairment, the charge is never going to be determined, so it becomes relatively unimportant to avoid stepping on the prosecutor's toes, and nor is a jury ever required to weight evidence. So there's not that level of interference with fact-finding or the prosecutory functions in granting a section 147 application once permanent unfitness has been established.

KÓS J:

I'm not persuaded because it comes back to this question of section 147 versus stay. I agree with you if the outcome is a stay. I'm not sure I agree with you if the outcome is a deemed acquittal.

MR McKILLOP:

Well, it seems likely I'll have a short time after the break to respond to that, so I'm going to reserve that.

KÓS J:

Yes, add that to your list.

1115

MR McKILLOP:

The final point on my list, which probably will take us to the break, is just to respond to some of the Crown's submissions, and the first – the thing that I really want to focus on here is the Crown's suggestion that dementia, a dementia finding, an unfitness finding grounded in dementia leads inexorably to discharge, and I say that that's not the case at all. This is at paragraph 72 of the Crown's submission and it's worth responding to just because it's a suggestion that there's a floodgates issue, and I say that there's nothing of the sort.

So the first point I want to make is that the two health regimes that the CP(MIP) Act links into address a wide range of concerns and it's not all about treatable conditions. The Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 is not premised on a treatment that can alleviate intellectual disability, but rather it's about providing care and support to people to – who can over time have their reoffending risk reduced, and it's actually relatively common for people with intellectual disability to also have Alzheimer's, in particular people with Down syndrome due to the nature of how that works. There's – neither Down syndrome nor dementia can be treated, but the presence of dementia doesn't stop someone from qualifying for care and rehabilitation, for a care order under the ID(CCR) Act. So there may very well be things that can be done for people under the compulsory regimes.

Likewise, even with dementia itself, it's clear – and just looking at the facts of this case, it's clear that there are, there is some limited medical treatment that can be given that can arrest or slow the progress of dementia, and there's no

reason why that couldn't be given under a compulsory treatment order under the Mental Health (Compulsory Assessment and Treatment) Act 1992. And it might in fact be quite relevant to a trial setting because that might – such an order might improve someone's functioning to the point where they're fit to stand trial, so it would be a good reason to make use of a compulsory disposition, and I note this case's facts is that treatment had been tried and failed – well he had continued to deteriorate.

Third point is that the existence of a mental disorder requiring treatment is a prerequisite for the section 25 civil order, the compulsory treatment order under the Mental Health Act, but it's not a prerequisite for a special patient order. So a special patient order might well result in a situation where risk led one to that outcome. That was – one of the cases cited by the Crown is called *R v Garibovic* [2014] NZHC 2199, G-A-R-I-B-O-V-I-C, and that's an excellent example of that kind of situation playing out where you've got a very serious violent assault occurring during a person's mental deterioration due to dementia and then evidence of ongoing violent behaviour towards nurses, for example, during remand. So that's all to say that I don't at all accept that there's a ruling out of compulsory orders being made under section 24 or 25 CP(MIP). It's simply a submission that on the facts of this case, and there will be similar cases, a court can be quite sure at an early stage that the thing you're really focused on, which is a special patient order, there's no prospect of that being needed, and Mr Bailey's case was one of those cases.

1120

Now I want – part of something inherent to this argument is that one of the cases relied on by the Crown, *R v Mulholland* [2015] NZHC 881, I say that that was wrongly decided, that it was clearly wrong for the Court to make the civil mental health order at the end of that, and I wanted to just show the Court what that order says to just explain why I say that. This is in a footnote in the submissions that I've filed but it's not deeply expanded on and the Crown relies on it rather heavily. So this is from 440, the Judge notes that despite having received evidence that what was really needed for this person was secure aged care, the sorts of arrangements that can be put in place under the PPPR, the

Protection of Personal and Property Rights Act 1988, that it would be inappropriate to order his release. Instead an order was made under the Mental Health Act which the Judge said recognises the seriousness of the offending, the harm caused and the views of the victims, and if we go down to the next paragraph, just the terms of the order there, it's said to be a secure – that he's to be detained as a secure patient and treated under the Mental Health Act. "The form of that treatment is to be a community treatment order. It is strongly recommended, however, that he be detained in a secured aged care facility."

This is not good authority, in my submission, for this being an appropriate outcome in this kind of case. The treatment needed was welfare arrangements, not mental health treatment, and just noting – and that had come out of the expert reports, and essentially the Judge had said something, made an order that was something close to that but said: "What I really want is that he be detained in a secure aged care facility," eg, someone please make a PPPR Act application. The suggestion in paragraph 441(c), that he be detained as a secure patient and that the form of the treatment is to be a community treatment order, those two things are fundamentally inconsistent with each other. There is no obligation in the community treatment order to be detained in a facility in any particular place. A community treatment order, the only requirement is to accept treatment which is explicitly counterposed to an inpatient treatment order which is about being in a hospital.

So it wasn't an apt order to achieve what was –

KÓS J:

I haven't read *Mulholland*. It's quite long, but –

MR McKILLOP:

It's quite long.

KÓS J:

Is that because Mr Mulholland was a danger to others or a danger to himself?

MR McKILLOP:

The…

KÓS J:

The secure order recommendation.

MR McKILLOP:

Because it was – himself, as I understand the – I can't point to an exact paragraph right now, but it was essentially about him being, well, the sorts of things that happen when people get dementia, wandering and, you know.

KÓS J:

Right.

1125

MR McKILLOP:

So both the order isn't – doesn't achieve secure care, but also, and I understand there may be some resistance to me suggesting this, but in paragraph 440, if we could just go back up to that, the considerations in the second to last sentence: "The seriousness of the offending, the harm caused, and the views of the victims," in my submission they aren't legitimate considerations when it comes to whether or not to impose a Mental Health Act order, even at the conclusion of a criminal process, that this is an order which has to be grounded in necessity to ensure safety prospectively, not focused on a measure of disapproval or opprobrium or anything like that in relation to what's been proven at the involvement hearing.

ELLEN FRANCE J:

If you look at 433(a), that's quoting from one of the reports: "No longer able to care for himself and he requires supervision and care in a locked aged care facility," but are you saying that had no part in where the Judge got to?

MR McKILLOP:

I'm accepting that that's what the Judge has – this is motivating what the Judge says about well, really, they should be in a secure aged care facility. What I'm saying though is that that's not something that you can order with a community treatment order under the Mental Health Act. It's just not – doesn't – it's not part of the regime.

GLAZEBROOK J:

And the Judge obviously recognised that by making it a recommendation, not an order.

MR McKILLOP:

Yes. There's actually another case the Crown has cited, *R v I* [2017] NZHC 1021, where there's essentially a long adjournment and a strong encouragement to make a PPPR Act application, which is made, and then the result is that there's a section 25(1)(d) discharge. So courts have grappled in various cases with what's been described sometimes as a lacuna in the legislation, the inability to tap into these welfare-related needs at the end of a CP(MIP) Act process, it's been the subject of various judgments, various submissions, including when the order was flipped of the involvement and unfitness hearing.

GLAZEBROOK J:

Yes.

MR McKILLOP:

There were submissions made by the courts about this lacuna and it wasn't picked up on, so it's obviously legitimate and proper that judges should have these concerns, but in the absence of a need to make such arrangements, especially in a case such as this where Mr Bailey is being cared for at home by his family, he's no longer left alone, he can't go out on his own, that sort of PPPR Act consideration just doesn't arise. So there might be some point at which he needs care, structured care, but that's not been reached and nor could it be actually forcibly dealt with in any way under the CP(MIP) Act process.

I think I've already dealt with one other point the Crown makes in paragraph 7, suggesting the section 147 was filed after the unfitness finding was made. It was – that's not the case. It was heard after that stage was reached but it was filed prior, and that's probably everything I wanted to respond to in the Crown's submissions and it takes us to the break, so…

GLAZEBROOK J:
And you're going to take a moment after the break to discuss the stay issue?

MR McKILLOP:
A brief moment, shouldn't be more than five minutes.

GLAZEBROOK J:
Right, we'll take the adjournment.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.50 AM

MR McKILLOP:
I'll address the stay versus section 147 point first. The unfairness argument could be advanced under either section 147 or the inherent power to stay. The focus I've taken has been on section 147. That's obviously been the focus of the Court of Appeal decision but it's also been a useful focus because the other point, other than unfairness, the "no useful purpose" point, is recognised as a section 147 ground but doesn't fit neatly into the abuse of process concerns that would be the driver of the inherent power to stay. So that's really the reason for the focus.

But in terms of the impact on the complainants of either process, my submission on that would be that the substantive impact is really the same, once an involvement hearing is avoided, it is not a significant difference from a complainant's point of view between deemed acquittal and permanent stay, and

this would be a permanent stay situation for obvious reasons. That's, in my submission, something that lawyers know about and understand but it's not something that's going to be particularly differently impactful to complainants, in my submission.

KÓS J:

On what basis do you advance that argument which seems to be utterly counterintuitive?

MR McKILLOP:

Well, that just on the facts of this case, the day in court was the substantive focus but also that appreciating the distinction between a deemed acquittal and a permanent stay as a lay person is rather a difficult distinction to get when the practical impact is the same.

KÓS J:

Right, okay. This'll be when the practical impact is the same the labels start to matter.

MR McKILLOP:

I've made the point that I think I can make.

The point about whether BORA drives or impacts upon the availability of section 147 applications when CP(MIP) Act is engaged, as I say, it wasn't a consideration that I'd thought of prior to your Honour, Justice Kós', question, but I do submit that that point supports my argument that in terms of a meaning of section 147 that is available and can be preferred, that the Court should not read that section out of relevance based off of a mental impairment which will meet the definition of disability in terms of disability discrimination and thus avoiding section 19 inconsistency would be a driver favouring the argument that I've made.

And that's everything I wanted to say unless there was further questions.

1155

GLAZEBROOK J:

Thank you very much. Mr Lillico.

MR LILLICO:

May it please the Court, I was, with the Court's leave, going to address you about the New Zealand legislation and landscape which has really been the focus of the submission for my learned friend, Mr McKillop, but with the Court's leave Mr Harvey may address you very briefly about the Australian case law which is averted to in our submissions because we think it provides some help, superficially provides help for Mr McKillop's position, but we would like to put it into context.

So initially I'd like to – there's been some concentration by my learned friend on the basis of the section 147 application which was that there was no useful purpose served by continuation of the proceedings and it's not disputed by the Crown that that's a legitimate basis for a section 147 or a stay because while Judge Savage's decision was framed in the worst possible terms, section 147, we say that that has no coherency. While it's still objectionable, we say, it could have been less objectionable if it was framed in terms of a stay.

So there's been some concentration in terms of my friend's submissions. When he submits to you that there's no useful purpose, he says that there could never have been a coercive option, a coercive order, and my submission to you is really an orthodox one that courts make good decisions if courts have good information, and the good information here comes from the involvement hearing itself which tells you something about the index offending and how people reacted to it, how the complainants dealt with, how the defendant behaved.

GLAZEBROOK J:

What's that got to do with disposition, because I would have thought nothing much.

MR LILLICO:

Disposition draws in all the circumstances of the case, your Honour, under the statute.

GLAZEBROOK J:

Well, I understand that, but what's the involvement hearing going to give you in terms of disposition?

MR LILLICO:

I think I'll –

GLAZEBROOK J:

Apart from the person was involved in the offending and therefore you then move to the disposition options?

MR LILLICO:

And what risk they might present, your Honour, and I'll bring you to the cases which use the disposition, which discuss disposition in light of the offending, firstly, but secondly, of course, they discuss it in light – as the Court is well aware, having dealt with *Teika* – in light of the health assessor's reports.

So, in my submission, the concentration on coercive orders tends to shut off that we are dealing with a hierarchy of orders right from very much coercive, special patient with special care orders, the intermediary position which is care orders or patient orders which are in fact compulsory treatment orders in the civil regime, they're converted to that, or no order at all. But even with no order at all, the Court's comfort in making no order for someone who is obviously in an invidious position, there's an allegation of criminal offending plus there is either a disability or an intellectual impairment or a mental health problem, the Court's confidence about making no order is informed by the health assessor's reports, by the involvement hearing, and that is a very important point to make because while the learned District Court Judge has probably, in a sense, backed a winner, he's used his experience of the system and said: "Well, this is dementia. We can't combat that. He's not going to be well enough to ever

have a trial," and here the Crown said as much. We don't know that that is the result and we don't know what investigations the Court will do and what they will require before they are confident enough to say no order plus stay, which the Court is also able to consider under section 27. And the cases illustrate that. None of them in particular I say should've been the outcome here, but they do illustrate how the courts in the way that you would expect step through the process, obtain the information, and then make an appropriate order.

1200

So the first case I want to take you to very briefly –

WILLIAMS J:

How do you get through the problem of fairness in the involvement hearing itself?

MR LILLICO:

Only – well we don't, your Honour. Only in the way that the cases have said. This is a way of dealing with people who are in the criminal justice system and are yet unable to participate in it, and therefore we – because of what it is, because there's already been a finding of unfitness, we have to countenance that awkwardness. So the cases don't square that particular circle, if you see what I mean.

WILLIAMS J:

It probably needs squaring though, because at some level some basic right to fairness needs to be protected here, doesn't it?

MR LILLICO:

Yes, and we, and the Crown doesn't say that – we don't want to be understood as saying or undervaluing section 147 or stay which are very, very central mechanisms to ensuring that people don't face unfair trials, that they don't face charges which are insubstantial. We don't wish to be understood as undermining those very important mechanisms. We simply say that they're postponed in this case.

WILLIAMS J:

But the involvement hearing itself is a potentially jeopardising process affecting this person's rights. They will have some fundamental – albeit residual given the context – fairness-based rights, won't they?

MR LILLICO:

Yes, health – yes, and the –

WILLIAMS J:

What would they be?

MR LILLICO:

And the courts just don't – haven't been able to square that particular circle that's inherent, but at least –

WILLIAMS J:

Yes. Can you help?

MR LILLICO:

No. I'm not – as will be apparent shortly – not cleverer than the, you know, the High Court of Australia or any of these other august bodies. But the involvement hearing itself protects the defendant because it sees that it requires at least to the civil standard, again another issue that this Court is going to be dealing with later in the year, at least requires the Crown to prove to the civil standard some physical actus reus involvement in the offending before any of these orders, some of which may be coercive, are visited on them.

WILLIAMS J:

So do you – right. So do you say that in this, in the context of involvement hearings, fairness does not require the ability to respond in this particular context?

MR LILLICO:

No, because we've already – in our system, well since 2018 at any rate, we had them around the other way, in our system at least there's an earlier finding of mental impairment and secondly of unfitness. So it's a feature of the system that often the person won't – and we have to remember that there's gradations of – well there's types of unfitness.

WILLIAMS J:

Yes, sure.

MR LILLICO:

Sometimes you'll – you'll have seen reports of course which say this person would be fit to plead if they were going to plead guilty, but if they're going to involve themselves in a multi-defendant High Court trial, then maybe not. But it's a feature rather than a bug, I think is the expression.

KÓS J:

Could we imagine two men in their 70s who find an allegation made against them of something that they did, you know, 50 years before when they were young, in one case they have no memory of it because they mentally have no memory, other case they have no memory of it because they simply have no memory of the event. One is fit, one is unfit. Why should the unfit one not have the ability that the fit one has to apply for a stay?

MR LILLICO:

Well I would say that the distinction is timing, because both could apply for stays.

KÓS J:

Yes.

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MR LILLICO:

So if we imagine – the Associate Minister said there would be two judicial phases. There are actually three, aren't there?

KÓS J:

Exactly.

MR LILLICO:

Because there's impairment and fitness firstly –

KÓS J:

Involvement, and disposition.

MR LILLICO:

Secondly involvement, and thirdly disposition. So if we – so we have someone who is unfit firstly to take the impaired path, we have someone who is unfit, firstly they go to involvement, then the Act quite explicitly says if the Crown can't discharge its lowered burden then you have the benefit of section 147. And because of the case that we're discussing, if that holds as good law then that won't be for ordinary memory reasons. It's just too old, 50 years is too old. It'll be because the Crown can't discharge its evidential burden and the case and the – they'll be acquitted.

KÓS J:

But in one case they have to go to the involvement hearing, in the other case it's dealt with pre-emptively. I don't really see why they can't both be dealt with pre-emptively.

MR LILLICO:

Yes, and then in the second path, as you say, if they're shown to be involved then stay becomes available under section 27. So as well as this gradation of coercive orders to less coercive orders to no order, the Court must – the Court can consider whether there's a stay as well, and I cannot –

GLAZEBROOK J:

Can I –

MR LILLICO:

And I just – sorry, your Honour, I'll come back to you.

GLAZEBROOK J:

No, no, finish what you were saying. I just want to –

MR LILLICO:

I was just going to say that I cannot – it's obiter in this case because the process was interrupted up here after the first stage, but I cannot – you can envisage a case where we've stepped through impairment, we've stepped through involvement, we get to disposition, the health orders are considered, i.e. patient care, special patient special care, the judge says: "Well, what do we have to say about stay?" And there may be a case where the defendant's counsel doesn't think they may get to stay purely on the basis of mental impairment basis and may need to add power to their arm by raising any of the other proper bases for a stay, improper conduct by the prosecution, delay, and those other things, because at that point we've gone – the statute, there's no inconsistency with the statute at that point. The statute says you can look at stay now.

GLAZEBROOK J:

Well I just need to check what your submission is then, because I had understood the submission to be that, yes, you can apply for a stay beforehand or a section 147, but when the Court is looking at that they can't take into account mental impairment. And so under Justice Kós' example with two 70-year-old men, they would both be able to apply for a stay, or –

MR LILLICO:

Yes.

GLAZEBROOK J:

But is that not the submission then, that you say that as soon as you're unfit to stand trial you have to go through the CP(MIP) process before you can even look at a stay or a section 147? Whether it's evidential sufficiency or what the issue is, is that the submission, because it wasn't what I understood, or in fact not really understood what the Court of Appeal was saying either?

MR LILLICO:

So the submission is that if mental impairment is relied upon as a basis for stay –

GLAZEBROOK J:

Well relied upon as one factor, relied upon as the sole factor?

MR LILLICO:

As one factor, as one factor.

GLAZEBROOK J:

So if mental impairment is relied on.

MR LILLICO:

And we haven't differentiated in the submissions because it's not this case.

GLAZEBROOK J:

So if it's relied on as one factor, you've got to go through CP(MIP).

MR LILLICO:

Yes, your Honour.

GLAZEBROOK J:

So what – say you say: "Well, I'm not relying on that, I'm relying on the fact this is too elderly to go to trial"?

MR LILLICO:

You can hear it any time, that must be the case.

GLAZEBROOK J:

Okay.

MR LILLICO:

Because, for instance, what if you had a case of outrageous malicious prosecution, you wouldn't need to wait for health assessors to produce –

GLAZEBROOK J:

Well, no, that was what was worrying me slightly, because –

KÓS J:

Yes –

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MR LILLICO:

Yes. No, no, I – and that was the purpose of me highlighting with Justice Williams hopefully that it's a powerful tool and it needs to have expression in cases where that is coherent and right, but if mental health is relied upon or disability is relied upon then the process mandated for it should take place.

KÓS J:

All right, well, if you have a look at the applications made in this case, page 13 of the Court of Appeal additional materials, the first two grounds are general stay-type grounds and 3 and 4 are lack of fitness. You say the effect of filing that application was to compel the thing to start, the analysis to start with unfitness, so effectively that forces you into the CP(MIP) course. I don't understand why you should be forced down that track. I mean, why can't you simply advance an argument that this case should be stayed for all reasons without being compelled to submit your own unfitness for trial?

MR LILLICO:

For those reasons I tried to advance earlier that you have someone who is at this intersection of the criminal law but they also have, we understand, health

needs, and the statute essentially sets out a process where those health needs are unpacked and an appropriate health order is made as soon as that is flagged.

GLAZEBROOK J:

It's not – you can't say they've got health needs and the appropriate order's made because an appropriate order is only made if, in fact, they're involved in the offending.

MR LILLICO:

Yes, your Honour.

GLAZEBROOK J:

So it's not a health order in the normal sense of the word, is it?

MR LILLICO:

Except we've already, I'm not sure this is an answer to your Honour's question but, of course, we've already gone through the – now, since 2018 – gone through the impairment date. So you do have someone who is involved perhaps in the criminal justice system and is also, we have found, mentally impaired and unfit.

ELLEN FRANCE J:

So you're saying if mental impairment has got anything to do with your application for section 147 or a stay you can't have it?

MR LILLICO:

At that stage, yes, because, of course, I say that stay in section 147 is built into the system at any rate and, of course, that might mean that the defendant has to wait, but the submission is made to you, of course, that – and this is probably counsel with perfection – but there have been instances where impairment has been rolled into involvement.

KÓS J:

Okay, so my example, there are now three elderly gentlemen, and the third one –

MR LILLICO:

Is it a bowling club, your Honour?

KÓS J:

Absolutely. You've no idea what you're raising with that question, Mr Lillico. The third gentleman says: "I'm actually just rather doddery, but I'm certainly not unfit. Gosh, I'm a cracker. I can work out a maths problem. But memory's a bit shot."

MR LILLICO:

I think I've met him, yes.

KÓS J:

Yes, you know the guy? Yes, it's us.

MR LILLICO:

No.

KÓS J:

So what do you do with that one? He says in his application to stay: "My memory's a bit shot but I'm not suggesting I'm unfit." So what are you saying there? Does his stay application just run, including his dodderiness, because he hasn't asserted his own unfitness, or are you going to say: "Oh, that looks like an unfitness thing to me, Mr Jones. You'll have to go down the unfit-to-plead route"?

MR LILLICO:

Yes, it does look like unfitness, doesn't it, your Honour, because part of unfitness, outside the cases where someone comes along and says: "I know what I'm being charged with. I do have an impairment but I want to plead guilty

and we'll just get this done with," but one of the aspects that's considered in terms of unfitness is the ability to provide a narrative to your counsel about, you know, the kinds of bases that Justice Williams was talking about in a delay case where you might face arguments about how the school was laid out or what your work routine looked like at the time, and if we have a doddery old man, shall we say, who can't quite grasp that narrative or can't communicate that where there are serious charges, as there were for *Mulholland* where there were 95 of them with 10 complainants…

KÓS J:

Yes, but Mr Mulholland was unfit. This man's just a bit patchy; well, he's not unfit to plead. He's raised the fact that his mental capacity is not as good as it was.

MR LILLICO:

Yes.

KÓS J:

He's not actually unfit. He could be coached through the process.

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MILLER J:

It's not entirely in the defendant's control, is it, because the statute is triggered whenever – it's triggered if during trial the defendant is found unfit to plead. So the Court has an interest in these processes being triggered.

MR LILLICO:

Yes.

MILLER J:

The Court does not want to be party to something that's grossly unfair. It is not entirely going to leave it to the defendant to decide which way to run it.

MR LILLICO:

No, and –

MILLER J:

If – for some reason or another, and it's most likely during trial the Court thinks something is badly wrong with this defendant, the Court will instigate the processes.

MR LILLICO:

Yes, and perhaps there's an analogy with the misunderstanding that often is prevalent in criminal cases where if a guilty plea is made it has to be accepted by the Judge. It doesn't, because the Judge doesn't want to preside over a miscarriage.

MILLER J:

Yes.

MR LILLICO:

And wants to make sure that they're represented, that they've been advised properly.

MILLER J:

That's right.

MR LILLICO:

And so there's a parallel here, isn't there, because we have the – shall we –

MILLER J:

The Court has to decide, yes.

MR LILLICO:

It wasn't a word used by Justice Kós, but sprightly, we have a sprightly 70-year-old and they're saying: "Look, I'm a bit doddery," then that brings some caution to the Court's attitude to how they deal with them.

MILLER J:

So it's the Court that decides whether this is a material reason for the section 147 or stay decision, how material it is.

MR LILLICO:

Yes, yes.

MILLER J:

And to the point – to the question whether there's a threshold at which the Court says: "No, you're in CP(MIP), you've got to go through it," that's in the Court's control. It's not entirely in the control of the defendant to just say this is only a peripheral consideration.

MR LILLICO:

No.

MILLER J:

Right.

MR LILLICO:

And I think the case is *Balemi v R* [2014] NZCA 176 where the – it was considered how much of a trigger was needed before we went down the CP(MIP) path and the policy decision was made to –

GLAZEBROOK J:

Well, but the –

MR LILLICO:

Sorry, your Honour?

GLAZEBROOK J:

But Justice Kós' example was an example that I put to your friend that said you have somebody who has a mental impairment that doesn't amount to unfitness to stand trial, but has an effect on how fair the trial would be if it went ahead.

So I can understand the argument that says you can't put a mental impairment that is unfitness to stand trial, but what about that intermediate category?

MR LILLICO:
Yes.

GLAZEBROOK J:
Because unfitness to stand trial is – I mean the courts will try and put into place as much as possible to make sure that a trial is fair and I mean sometimes, and we've had an example of that recently, it turned out that it just was not fair.

MR LILLICO:
It's not enough. Yes, I think when we're at the stage, as I understood, the hypothetical right at the beginning when we're in the intake phase and pleas are being decided on and so forth and the future of the case is being mapped out, at that stage we just don't know and we don't know what side of the line unfitness will fall because it's not just a test of whether you're mentally impaired, it's a test of whether you can cope with whatever demand is being placed on you. Is it, you know, to be ridiculous, is it a shoplifting case or is it fraud, documentary fraud? So that is probably the distinction to be made, whereabouts in the process are we, because early on in the process there will be I suggest some reticence by a judge about what kind of level – whether justice has been delivered by his or her court.

GLAZEBROOK J:
But I think the point being put to you was that you would surely be able to take mental impairment into account in that intermediate case that we're talking about?

MR LILLICO:
Yes, you would, and –

KÓS J:
On the stay application?

MR LILLICO:

Sorry, Sir?

KÓS J:

On a stay application?

GLAZEBROOK J:

Yes.

KÓS J:

Or a section 147?

MR LILLICO:

On a stay application or a section 147 where it is provided for by the process.

GLAZEBROOK J:

What does that mean, sorry?

ELLEN FRANCE J:

You mean only under CP(MIP)?

MR LILLICO:

Only under CP(MIP).

GLAZEBROOK J:

Well no, because we've got somebody – the hypothetical being put to you is somebody who doesn't come under CP(MIP) either because – because they are fit to plead but are nevertheless mentally impaired.

MR LILLICO:

Oh, that's right, you have to have both legs of the double. So at the first stage of the CP(MIP) process after it's been triggered you need mental impairment plus unfitness. So if they're fit, that's fine, they're out of it.

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KÓS J:

So it's only the third gentleman who's the one who's unfit who finds himself forced into a CP(MIP) route? The other two can run their stay applications?

MR LILLICO:

If he's unfit?

KÓS J:

Yes.

MR LILLICO:

Yes, that's right. Can I –

GLAZEBROOK J:

And also the person under CP(MIP) can run, just so I'm absolutely clear –

MR LILLICO:

Yes, this is my original point.

GLAZEBROOK J:

– can run a section 147 or stay application but they cannot include mental impairment in their reasons for running it. Is that…

MR LILLICO:

Correct, your Honour, yes.

ELLEN FRANCE J:

And they can only do it after the involvement hearing?

MR LILLICO:

Yes, your Honour.

GLAZEBROOK J:

That's what I'd also heard, yes.

MILLER J:

Because that's what section 13 provides for.

MR LILLICO:

Section 13 provides for section 147 and then section 27 provides for stay, and as –

WILLIAMS J:

But it's interesting – well, are you going to make another point because I was –

MR LILLICO:

I was just going to say that Justice Kós reminded us at the start of the hearing that there is a distinction and that's illustrated by the statute itself. That was the only –

GLAZEBROOK J:

Can I just check again, say there is evidential insufficiency –

WILLIAMS J:

I'll get back to you.

GLAZEBROOK J:

– you know, the actual section 147, I thought the Crown said that application can be made any time, not just because you're in CP(MIP) you can't make any application until later, but if that's not what the Crown's saying then I need to know.

MR LILLICO:

Sorry, I didn't hear the first part of it, your Honour.

GLAZEBROOK J:

Well, I thought you'd said that if you're making a section 147 application on absolutely standard grounds that this doesn't disclose an offence or there's insufficiency of evidence, that whether you are unfit to stand trial or not you can make that at any time. Is that not right?

MR LILLICO:

If there has been no trigger and the trigger is low, then of course.

GLAZEBROOK J:

I don't understand "trigger" or "low", sorry.

MR LILLICO:

Well –

GLAZEBROOK J:

They're found unfit to stand trial. As soon as they're found unfit to stand trial does that mean they cannot make a section 147 or a stay application until after the involvement hearing, no matter what grounds, or does it mean you can make it but it just can't be on the grounds of mental impairment?

MR LILLICO:

Well, the Court, if you have an unfit person, then you would have to resolve the rest of the process.

GLAZEBROOK J:

So even if…

MR LILLICO:

The example –

GLAZEBROOK J:

Even if you say this doesn't disclose an offence because the evidence doesn't show whatever it needs to show…

MR LILLICO:

Yes, I mean that would come under the involvement which is essentially a lower evidential sufficiency standard, so the Act still provides for it.

GLAZEBROOK J:

So the submission actually is as soon as you're in CP(MIP) you can't actually make those applications until after the involvement hearing? Is that the submission?

MR LILLICO:

Yes, your Honour, yes.

GLAZEBROOK J:

Okay.

ELLEN FRANCE J:

I'm not sure then I understand on what basis do you say someone could make a section 147 or stay application once they've been found to be unfit, outside of the CP(MIP) process, or is your argument really that once you're unfit it's CP(MIP) only?

MR LILLICO:

I mean perhaps we're getting into territory which is outside the case.

ELLEN FRANCE J:

Well, it's quite a different proposition to say, as I had understood you to say initially, that there might be a range of factors, delay –

GLAZEBROOK J:

Prosecutorial misconduct.

ELLEN FRANCE J:

– prosecutorial misconduct, et cetera, that would enable you to make an application for a stay or a section 147 application outside of CP(MIP) despite being found to be unfit to stand trial. That's one proposition. It's quite a different one if you're saying you can only ever –

MR LILLICO:

Yes, I'm not sure I have a considered – I'd like to withdraw what I've said. I don't think I have a considered view about that because it's sort of, to a large extent, isn't it something of a practical fiction? If you've got someone who's unfit to plead, then how are you, as counsel, pursuing these other avenues? It's available theoretically, I'm not sure how it's available practically.

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KÓS J:

I mean, prosecutorial abuse doesn't depend on instructions or evidence from the defendant.

MR LILLICO:

No, it's there or not there.

MILLER J:

That's right. And so section 13 applies in circumstances – in other words, you have to discharge the defendant in circumstances where the Court is not satisfied that the evidence is sufficient to establish cause of the act or omission. There may be many other reasons why you would stay a proceeding, and abuse by the prosecutor is one of them.

MR LILLICO:

Yes.

MILLER J:

So it's only in this category of cases where the ground for section 147 is evidential insufficiency that you would say you're tied to CP(MIP)?

MR LILLICO:

At that involvement stage.

MILLER J:

Yes, right.

MR LILLICO:

If you're then involved then there's no impediment to stay, considering a raft of reasons. You wouldn't have to suspend – so under section 27 after, as I –

GLAZEBROOK J:

So you're going to put everybody through an involvement hearing even though there's evidential insufficiency, clear evidential insufficiency?

MR LILLICO:

Well there has to be a hearing in any case, so if you – it's completely duplicative, isn't it, your Honour?

GLAZEBROOK J:

Well, no, you wouldn't have complainants giving evidence and putting them through the difficulties of being cross-examined. That's the whole point about evidential insufficiency.

MR LILLICO:

Sorry, who is being cross-examined, your Honour?

GLAZEBROOK J:

Well, you say you have to have an involvement hearing.

MR LILLICO:

Yes.

GLAZEBROOK J:

Here, it would mean the complainants are giving evidence.

MR LILLICO:

Not – only if the oral evidence threshold is crossed. So very, very often – we've given you some examples where complainants have given evidence, and they do sometimes, but it is like the old depositions or one of the forms of the old depositions process where you had to apply at committal for some witnesses to give evidence. It's not a given. So very often involvement is a paper exercise

as section 147 is in any ordinary case, so there's no massive imposition on the defendant, I wouldn't have thought, being made to go through involvement. It is in a guise a section 147 application, as the section makes clear by referring directly to section 147.

WILLIAMS J:

So your theory is that the "must" in section 10, the explicit reference to section 147 in section 13, and stay in section 27 means that section 147 and stay live only in those provisions and not otherwise?

MR LILLICO:

Yes, your Honour, but there's no violence done to the Act, is my point, if for reasons other than evidential sufficiency you get to disposition and you, because you – for whatever reason defence counsel believe that they might not get to stay on reasons of mental impairment only, there's no violence done to the statute I would suggest by bringing in prosecutorial misconduct at that stage or delay, purely delay, the person who doesn't remember.

ELLEN FRANCE J:

Well I'm not – I'm a bit unclear now. Are you taking a different view from that of the Court of Appeal in *R v M* [2001] EWCA Crim 2024, [2002] 1 WLR 824, the English one?

MR LILLICO:

I'm not sure that the statute in the UK brings me into conflict. The – on our statutory scheme, the difficulty is interrupting the statutory scheme before everyone has a chance, including the complainants, to participate in something that is an alternative to trial and allows the facts to be brought out.

1230

Violence is also done to the scheme, in my submission, where it's interrupted before the information from that hearing and information from the health assessors has been brought to light so that the health orders can be properly informed, and I'm not sure it does any violence to our scheme in New Zealand

to do so, because the statute explicitly says you may refer to stay, you may choose to make a stay at this point. If there was a hard line about that, if there was no ability to refer to stay for reasons other than mental impairment, the Judge would be forced into a rather strange exercise where he or she might say: "Look, I'm going to make these health orders," or not make these health orders. "As for stay, I think you're going to get better. The prognosis is good. With this treatment you will get better, so I'm not going to order a stay, and thank you, Mr McKillop, I know you've got other reasons for a stay. I've made my decision about CP(MIP) and the disposition. I will now hear you about stay for these other reasons." That would be somewhat artificial and it wouldn't be objectionable in my reading of the scheme to consider those all at once, otherwise the Judge would have this somewhat artificial line to draw where they say you don't get to stay purely on the mental impairment aspects because of – we're imagining a non-dementia case here, I suppose, or a – but next week I'm going to –

MILLER J:

So if we put ourselves into the shoes of the District Court Judge here, had he said: "I've got an application for 147 before me on the grounds that this man has dementia and also that there's prejudice by reason of delay and I find that the delay considerations alone justify the decision. We can put CP(MIP) to one side and give him a 147 now," the Judge didn't do that though here?

MR LILLICO:

No.

MILLER J:

He's mixed it all up, hasn't he?

MR LILLICO:

He has and Mr McKillop's three independent factors, mental frailty and the no use clearly derive from mental impairment. There's no use because there's no health order that fits the bill, the learned Judge thought, and mental frailty is

obviously related to mental impairment. The investigative delay, the Judge, I would say, didn't understand that as a pure delay argument –

MILLER J:

No.

MR LILLICO:

– just looking at 13 of the judgment, but…

MILLER J:

He didn't really evaluate it at all, as I've said.

MR LILLICO:

No.

MILLER J:

No.

MR LILLICO:

So the discrimination, if we're going to use that term, I think that was the term used before, is discrimination of delay. You wait for the appropriate point in the process. The Act rather forces you to do so because it values or it sees purpose in the delay, and the purpose in the delay is having the facts of the index offending happen and being aired and, secondly, in the health assessor's process being gone through.

MILLER J:

When we look at the cases where delay has been a reason for stay, it very rarely or, in fact, almost never, is delay itself. I mean the cases may be more than 50 years old. Usually it is delay during which something else has happened, such as loss of a police file or the death of someone who was said to be an eye witness, that sort of thing, and you would accept that those grounds might justify a stay or a discharge even for someone who was mentally impaired, or would be found to be so if the Court followed down that pathway?

GLAZEBROOK J:

No, but you say only after the involvement hearing.

MILLER J:

But I'm positing that the grounds, this person is mentally impaired but the only grounds being advanced are delay coupled with these sorts of considerations which are usually other things that result in a delay complaint succeeding.

MR LILLICO:

Yes, I think the only difficulty is if in your hypothetical, where we have a pure – well, it's not, but if we have, say, very strong grounds for delay, if we had a *CT*, so complainant completely comes up with new charges and new incidents and there's missing documents and so forth, witnesses, the difficulty there is if in the hypothetical we reached the trigger as well, so there is a triggering of mental impairment as well, and then the scheme seems to be quite clear. You have to park your delay concerns until the mental impairment is investigated.

1235

MILLER J:

Because that might inform the Court's decision on the application?

MR LILLICO:

Yes, and so that we know about this person what kind of intervention is needed for them in a health sense and those other aspects, and also for practical reasons defence counsel are going to want to know exactly what the diagnosis is and will want to have an assessment of their client's capability before they embark on a delay application.

WILLIAMS J:

It does –

MR LILLICO:

And as I say – sorry, Sir – and in your case, you would – no, it's alright, I don't – sorry, Justice Williams?

WILLIAMS J:

You're making the "must" in section 10 do a lot of a work there. You say that means this is the compulsory path. Once you start you can't stop. Because "must" is often used in modern legislation now in a way that it didn't used to be used, it's become the way PCO sets out, you know, step A, step B, step C and so on, "must" consider the following matters, et cetera, in circumstances where the old legislation often said "may" and if it really meant "must" it said "shall".

In this case it's possible to read that "must" as meaning "only". If you're going to keep going you "must". In other words, if you are taking this to order, "you must", and if you read it that way then the references to section 147 and stay may count against you because they suggest that section 147 still has life and the concept of stay still has life despite this apparently hermetically sealed statutory regime, and the advantage of reading it that way would be it would give a little wriggle room in these really difficult cases, so that – I think you're right, what Mr McKillop was describing as a bug is a design feature, that doesn't mean there isn't still a bug in there.

MR LILLICO:

Well, I think people are of the view that there's quite a few bugs.

WILLIAMS J:

No, but this particular little bug, which is what happens in a jeopardising involvement hearing where the only person capable of responding in any useful way because of the particular facts of the case is the person who has dementia, it does seem to me that raises pretty fundamental fairness issues that would be highly residual without doing violence to the system.

MR LILLICO:

The difficulty is knowing when we're in the pathway and knowing when we're out of it.

WILLIAMS J:

Sure, but that's often the difficulty with law and particularly with criminal law.

MR LILLICO:

So there can't be a rule, can there, that with dementia, that we shouldn't go through involvement because we know where this is ending up? I'm not sure that this is the suggestion. Because the cases I was going to start to bring you to at the beginning of my presentation were going to show, demonstrate that the full range of things happens with dementia despite us knowing that it can't be reversed and why we're here, because in *R v I*, for instance, as my friend has said to you, the obvious position was that no order was going to be made, but it was in a criminal context and the Judge wanted to have some confidence that that was a good outcome for the defendant and the community before it left his jurisdiction, so he wanted to do something constructive and make an appropriate order and so in that case there were multiple adjournments so that things could be put in place, and they were things outside this quasi-criminal health jurisdiction. They were orders made in the Family Court under the PPPR Act. But the criminal Judge made people come back and report to him about this and once those things were in place then no order was made, and on the face of it no order is the prediction that the learned Judge made in this case except it had the value of the better information in front of the Court where the order was made with coherency, not like this, I would say with respect, incoherent section 147 implying an acquittal when you haven't heard the facts and no confidence about how this person was, how their future was looking in the community which is where they were going to because there was no criminal disposition and we're not in the territory for a coercive disposition.

1240

WILLIAMS J:

So how do you grapple within these? If this is the circumstance, how do you grapple with removing the ability of the person to say: "I was not involved"?

MR LILLICO:

Well, as I say, that's…

WILLIAMS J:

Tough?

MR LILLICO:

Lawyers for the Crown shouldn't go around saying: "Tough." But the Courts have said this is a feature of the system. We want to make a health outcome for you that acknowledges the criminal charge aspect and to do that we are going through involvement and disposition, and to do that in an informed and – in a way with integrity.

WILLIAMS J:

As you said, it's not actually a feature of the system. These are often done on the papers. Witnesses are called occasionally but, as you say, they're often done on the papers, and there is argument to be made as to whether it happened or not and that argument can be made off the papers, even with a mentally impaired or unwell person.

MR LILLICO:

And we do discuss, in the submissions, situations where, as I say, the two first phases have been rolled into one.

WILLIAMS J:

Yes, the Court –

MR LILLICO:

You can't roll all three but…

WILLIAMS J:

But in those situations where there is nothing other than what's in the memory of the person, that's a particular situation that arises probably with historical sex cases and therefore perhaps dementia because the alleged perpetrator will be aged, but that system design covers a broad swathe of cases of which this is a very residual category –

MR LILLICO:

Yes.

WILLIAMS J:

– that if the facts all stack up needn't result in rendering this person unable to respond, needn't produce a result that comes at least partly from that person's inability to respond in any way, or their lawyer.

MR LILLICO:

I mean the responses are going to be limited because of the fitness but, as Justice Kós points out, not all of these things require a participation by the defendant, so if you have a reason for stay that's outside impairment and is, you know, in egregious cases, malicious prosecution, say, where you would be relying purely on what the prosecution did, then that is amenable to a proper participation and response by the defendant and that stands to be considered under section 27. You can look at it under section 27. It does require some delay because you must go through the business of getting health assessor reports which as we know can be lengthy, but that's where the discrimination lies.

MILLER J:

There's also in this process the law's dealing with a problem of agency, isn't it, because we're supposing here that a defendant is giving instructions. Very often the situation that arises that will come up for a trial judge often is defence counsel is saying: "I need help here," so that you can't get instructions from your client. So we are supposing, if you like, in these questions that we're putting to you that the defendant can choose to run an impairment argument or a malicious prosecution argument.

MR LILLICO:

Yes.

MILLER J:

But if they are impaired their lawyer may not be able to be in a position to tell the Court.

1245

MR LILLICO:

Yes, and I think I tried to make that argument in discussion with Justice Glazebrook.

MILLER J:

Right.

MR LILLICO:

I'd have to confess that there is a – there's a limit on that because some unfit defendants are more unfit than others.

MILLER J:

Yes.

KÓS J:

But I think we have to be awfully careful, as we are in relation to insanity, with compelling a defendant to go down the track of unfitness simply because they have raised a question that puts their capacity or memory in doubt. I agree with Justice Miller, at the end of the day it's the Court that decides it, but you've got to allow some measure of choice here, and if a person wants to run a stay argument based on the fact that a long time has passed, witnesses have died, and their capacity to respond to that is impaired by the passage of time and possibly some measure of inability, that's a typical stay application. It doesn't involve unfitness just because there's an element of their memory being impaired.

MR LILLICO:

No, and I – the only – so the Crown would have to acknowledge that that's a form of discrimination and if only, remembering we've got section 27 lurking down at the bottom of the process, if only a discrimination where the prejudice is delay. And the only other matter to raise there is really to – is to revisit the judicial comfort factor, if I can put it that way, where the presiding judge doesn't want to be of course presiding over a miscarriage and a situation where the mental impairment is properly triggered will, from defence counsel, from the

forensic liaison nurse, from the prosecutor, from whoever, will inevitably give rise to some judicial discomfort one would think, because, as *Balemi* says, we trust the officers of the court to only raise things which are truly concerns and not to waste the Court's time with things that are trivialities.

ELLEN FRANCE J:

The English language was similar, "shall be determined", but nonetheless the Court there said as long as you're not basing it solely on mental impairment, you could raise these other grounds outside of the equivalent of CP(MIP).

MR LILLICO:

Yes, well this is not – I mean it's not an argument we've spent any time on in our submissions, it's really – my concern with that way of looking at it is that stay is allowed for explicitly at the end of the process, so why not have that stay informed by the health aspect? If the health aspect is part of the amalgam of facts that go to disallowing any more steps in the proceedings, which is what a stay is, then the statute seems to be saying let's investigate those through – via the health assessors' reports before we make any decision about the future of the case.

KÓS J:

Yes, but that's in the event that the only basis for the application for stay is unfitness. If you've got a mixed model, as you do here in the application that was made, which is a mixture of unfitness and delay and prejudice, what do you do?

MR LILLICO:

You track through the points, is my answer.

KÓS J:

Yes, I mean you must have an opportunity to bring that stay application at the outset, as they did, and then for some reason the process flipped.

MR LILLICO:

Yes, and the Judge didn't understand it as a classic delay argument, did he?

KÓS J:

No.

ELLEN FRANCE J:

If – so you are saying that if you have evidence, let's say it emerges after the finding of unfitness, you have evidence of oppressive police conduct, you're saying, well, that's – you've got to wait until after involvement or you've got to deal with that at involvement, you can't use the usual safeguard that would apply to a non-mentally impaired person?

1250

MR LILLICO:

Yes, because otherwise you are then going to park the investigation and entertain an application for say from someone who is unfit?

GLAZEBROOK J:

Well, the difficulty with unfit in that context is, as you say, there's degradations of unfit and the unfitness to stand trial might be unfitness to stand trial with a multi-defendant three-week trial in a case of fraud, but fitness to instruct your counsel to say: "Please apply for a stay on the grounds of delay," is very different. That might be more akin to a shoplifting charge.

MR LILLICO:

Yes, so –

GLAZEBROOK J:

So your unfitness is unfitness to stand trial which is much broader than unfitness to give instructions in relation to something like a section 147 or a stay application, isn't it?

MR LILLICO:

Yes, and so you could have someone who understands that they've been pursued unfairly by the local police officer and they can get that out. They can communicate that to their counsel. So I suppose the question is why not pursue that? They are unfit but they are able to give instructions to counsel that there's this vendetta for them, their word. Why not allow that to be pursued outside the CP(MIP) tracks, I suppose, is the question? And the answer is probably that impairment still remains in the mix. There's been a finding of that, and so the statute charges the Court with making, Justice Kós' word was "appropriate", make an appropriate order. The statute still charges the Court with making that appropriate order because of that overlapping health and forensic need, and that requires, I think in the hypothetical we'd already past involvement, would require then a disposition hearing where stay is considered anyway, so there's not necessarily, as I was suggesting to Justice Kós before, a prejudice because of delay. A malicious prosecution after we've had in a finding of involvement, that then goes to disposition, stay can be considered anyway. There would be the inconvenience, I suppose, of waiting for the health assessor's reports, but as I say, it's a purposeful delay because undeniably the person still has a health need.

WILLIAMS J:

Well, do the – the prejudice is you've got a finding of involvement –

MR LILLICO:

Yes.

WILLIAMS J:

– which you can't respond to, you cannot effectively participate in, either as a case or as an individual.

MR LILLICO:

Yes, and the only submission I really have to make to that is that it is –

WILLIAMS J:

It's design.

MR LILLICO:

It becomes a feature of the design and it's an investigation into the facts by an unfit, for an unfit defendant, and so inevitably there is some discomfort in that.

ELLEN FRANCE J:

If you look at it in terms of Justice Kós' question to Mr McKillop in terms of the Bill of Rights, why is that not discriminatory on the basis of disability?

MR LILLICO:

Again, like Mr McKillop, I can only – well, I haven't dealt with that in my submissions at all and can only offer a pretty impoverished analysis of a complicated area. Discrimination is extremely complicated, is my brief observation. But there are safeguards built in, of course, and the discrimination is only of delay as far as I can see it because the safeguard, the important safeguard which I say is provided by section 147 or stay, is allowed for in the process. In the hypotheticals we were discussing, you could ameliorate some of that prejudice, that delay, and you could – there's a power to excuse the defendant so wouldn't need to come to court. You could, as I said earlier, roll the hearings into one. It could be – it might be a matter that is dealt with purely on the formal statements. In the end though you will face delay inevitably because of the demands that are placed on the forensic services, because you do need health assessors' reports if you track the CP(MIP) process to the end. So it is delay and on the face of it discrimination because that delay is faced by someone with mental impairment and a disability, but it is purposeful. I don't know how that fits into the discrimination case law, but it's purposeful delay in that you're gaining information about that person's health needs.

1255

KÓS J:

Can I just understand the practicalities of your argument for a moment and just take you back to the application that was filed in this case, which is at page 13

of the Court of Appeal additional materials. You remember that's the one with the four or several paragraphs?

MR LILLICO:

Oh, yes.

KÓS J:

Have you got that, Mr Lillico?

MR LILLICO:

Yes, 93 of the case, yes.

KÓS J:

It may well be. This is page 13 of the Court of Appeal additional materials, which has the application that was filed.

MR LILLICO:

Oh, the application? Sorry.

KÓS J:

Yes.

ELLEN FRANCE J:

And could we put that back up on the screen? Thanks.

KÓS J:

Could we just reduce that in size? I just want to look at (a) through to (d). So that's what was filed –

GLAZEBROOK J:

I'm not sure that's the application, is it? That's the submissions.

WILLIAMS J:

No, the submissions.

KÓS J:

Was the submissions, sorry.

GLAZEBROOK J:

Because the application was just on the basis of delay.

WILLIAMS J:

The application only – of fairness, yes.

ELLEN FRANCE J:

Fairness.

KÓS J:

Oh, I'm sorry, you're quite right. Okay.

GLAZEBROOK J:

But then again –

MR LILLICO:

It's in the –

KÓS J:

Well can we have a hypothetical imagination then that this is the application? I just want to test what would happen if this was the application, at paragraph 18.

GLAZEBROOK J:

Sure.

MR LILLICO:

It's in this Court's case I think, isn't it, tab 29?

KÓS J:

Yes – well, no, let's – just the one that's been brought up on screen is fine, paragraph 18 of what was the submissions. Let's imagine the application was in that form. These are the particulars of the prejudice. (a) period of time,

failure to investigate, and then two paragraphs that related to frailty and the fact that his "lack of fitness is not in dispute". If that's what had been filed as an application for a stay, is the Crown's position that that would've required you to go immediately down the CP(MIP) track because it relied on (d) lack of fitness not being in dispute?

MR LILLICO:

Yes, you'd have to track to the end of the line.

KÓS J:

Okay, all right. So the alternative then would be for the applicant to say: "Well actually, just put aside please (d) and (e), I want my application for stay to be considered purely in terms of a conventional stay application based on delay and prosecutorial misconduct." That would be – that too would be possible on your argument, I think, as long as they effectively said: "Suspend that part of the application that relates to mental infirmity"?

GLAZEBROOK J:

Well, no. As I understood Mr Lillico, no, that's not the case.

MR LILLICO:

No, I –

KÓS J:

No?

GLAZEBROOK J:

Because as soon as you are unfit, you go under CP(MIP) and that's it.

MR LILLICO:

I think the confusion has stemmed because I haven't dealt with that in my submissions.

KÓS J:

Yes.

MR LILLICO:

But what I've seized on is the ability to deal with stay at the end of the process, and so my question is why –

KÓS J:

Yes, no, I understand that, but the way in which section 10 works is that it only applies if the defendant has been found unfit to stand trial. Now that hasn't occurred at this stage. At the time of the filing of this application it was in this form.

MR LILLICO:

Yes.

KÓS J:

So the defendant is then being told by the Crown: "Aha, you've triggered CP(MIP)." The defendant should be able to say: "Well actually, I don't want to trigger CP(MIP), I don't want to go down that route. Surely I can advance on a non-discriminatory basis an application for stay in a conventional sense. Subdivide my application, please." What's wrong with that?

MR LILLICO:

It seems similar, doesn't it, to the situation in *R v Soles* [2014] NZHC 2114.

KÓS J:

Right.

MR LILLICO:

So in – I believe in *Soles* the defendant raised fitness, and I can't remember how far down the track we got, but we proceeded down the fitness route and then the defendant thought better of it and tried to withdraw the trigger, and the Court said: "Well, we're going to have to follow the train to the last stop."

1300

KÓS J:

I'm just not sure I understand why that's necessarily the case. That seems to me where you really do start to get into discriminatory treatment of disabled persons, unnecessarily. They haven't been found to be unfit. They have simply raised the prospect that they might be.

MR LILLICO:

Even though in that case, Sir, the person who wants to carve off the unfitness and rely on orthodox grounds for the stay, even though that could be argued after, at the disposition stage. The only answer I have for that is that the delay serves a purpose, given the health outcome.

MILLER J:

We're talking about a threshold here which the Court says: "No, we're going to take charge of this and insist you follow this process." Ordinarily, if counsel is saying: "There is an issue about impairment but my client's able to give me instructions for these purposes and I want to run these grounds separately and park the question of impairment," what's wrong with that, so long as the Court is not being asked to take impairment into account when deciding the stay or section 147? Don't you just trust to counsel?

MR LILLICO:

That…

MILLER J:

You presume competence until it's shown otherwise, if you like, in the Court process.

MR LILLICO:

Only the difficulties that I raised earlier in terms of judicial confidence and the fact that the statute charges, or "comfort" I think was the word I used, but aside from the judicial comfort, the fact that you have someone who is presenting with, it is said, a health need and the Court has a fairly prescribed track about addressing those health needs with orders that can be made either under the

disability legislation or the mental impairment legislation, mental health legislation.

MILLER J:

It seems to me the discrimination argument arises at the point where we assume that a person who is under a disability of some kind is disabled for all purposes. They may well be in a position where they couldn't cope with the trial but have sufficient understanding and capacity to instruct counsel for a section 147, so…

MR LILLICO:

Yes, and in the end no order might be made and no health order might be made and a stay might be issued.

MILLER J:

Might be the outcome, yes.

MR LILLICO:

I think we've –

GLAZEBROOK J:

Is that a convenient point?

MR LILLICO:

Yes.

GLAZEBROOK J:

Have you finished your submissions or…

WILLIAMS J:

Have you started?

GLAZEBROOK J:

Well, carry on after lunch obviously for a reply.

MR LILLICO:

Yes.

GLAZEBROOK J:

Have you finished your submissions or have you not? That's absolutely fine either way.

MR LILLICO:

I did think it was useful to take the Court through the four cases where dementia had been found –

GLAZEBROOK J:

Well, why don't we do that after the break?

MR LILLICO:

– and Mr Harvey was going to address you about –

GLAZEBROOK J:

We'll do that after the luncheon adjournment.

MR LILLICO:

Thank you. We won't be long.

GLAZEBROOK J:

So 2.15.

COURT ADJOURNS: 1.03 PM

COURT RESUMES: 2.17 PM

GLAZEBROOK J:

Mr Lillico.

MR LILLICO:

May it please the Court, I was just going to take the Court briefly to a couple of cases that are illustrations of how disposition is used and the information is used and the information is used that comes from disposition to inform orders and then Mr Harvey is going to address you briefly about the Australian case law.

So the reason I wish to take you to these two cases very briefly is because of the submission to you, the overarching submission perhaps, that no purpose is served by a CP(MIP) process here which goes to the end of the line and there was a concentration by my friend on the compulsive end of the spectrum of orders that were available and I wanted to take you to two cases, *R v I* and *R v Kalolo* [2017] NZHC 518, to illustrate that in fact sometimes the Courts will take in the information that's available from disposition to make no order at all but they will reassure themselves before they do so.

So the first case I would like to take you to briefly is *R v I* which is at, we'll bring it up on the screen, but it's at tab 45 of the respondent's bundle, and the reason that some instruction can be drawn from this case is that it was a case of dementia. That's at 10 of the judgment. But the part perhaps of interest is paragraph 21 and following because the Judge was concerned that there was no power to impose conditions if he simply released Mr I, and the Judge canvasses at 21 some options that might have been available to the Court. The last option he averted to was at (d). The Judge thought that perhaps counsel could consult with community providers and come up with a plan for Mr I, and so that's what was done. Counsel worked together, consulted the health providers and at 24 and following the plan is described. It revolved around the clinician, Dr Todd, going to the Family Court and getting orders under the PPPR Act. That's at paragraph 24. It also involved identifying a facility, Karetu House, that's at paragraph 28, and informing the staff at Karetu House about Mr I's background and happily the House had already had patients there who had similar needs and backgrounds. And so after the Judge had the parties bring that plan together, at paragraph 42, the Judge then had the confidence to make, at paragraph 42, an order for immediate release of Mr I.

GLAZEBROOK J:

What do you say the alternative was in that case under the statute?

MR LILLICO:

Well, you could've not – alternative. The…

GLAZEBROOK J:

Well, this relied on other people making applications totally outside of the provisions and obviously was a very sensible thing to do, but what was the alternative?

MR LILLICO:

Simply to make the release without any information coming in.

GLAZEBROOK J:

So are you now saying that the *Mulholland* solution isn't a solution?

MR LILLICO:

What I'm saying is that there are a range of solutions, I think, and we don't know which one is suitable until we get the appropriate information.

GLAZEBROOK J:

Well, do you accept that the sort of things that were said in *Mulholland* are actually not the right – well, one, that it doesn't seem as though it actually resulted in secure care and, secondly, it seems to have been done on grounds that have nothing to do with health grounds?

MR LILLICO:

Mulholland seems to me to deal with the tension between public interests and private ones. Public interests have to acknowledge that they're – although the orders are centred on health, they are against a criminal background, so there have been charges although they will come to an end, perhaps. So when –

GLAZEBROOK J:

But the things that are said there are things like the victims all feel better, so it's nothing to do with public safety going forward.

MR LILLICO:

Yes, I don't think, I'm not holding up *Mulholland* as a rigorously argued or reasoned in particular, with respect, decision but it does show that the Judge used information from the involvement hearing and from disposition to make an order which was appropriate in terms of the Act. I'm not urging at any particular – I'm not saying that, promoting any of the particular outcomes in these cases as ones that might be suitable for Mr Bailey who, after all, has family. He has a wife who it seems is involved in his care. So going off and getting orders under the PPPR Act might not be appropriate. My point is that the idea that the Judge could say, without health assessors' reports, without inquiring into the circumstances of the offending, without any of this information, simply jump to the conclusion that no orders are necessary, is pre-emptory. That is my point.

KÓS J:

I mean your problem here is that section 25(1) has another one of those attractive little words called "must" and it says the Court "must deal with the defendant" and they give us only four options.

MR LILLICO:

Yes.

KÓS J:

And Justice Moore had to fashion a new one.

MR LILLICO:

Well, it wasn't what he was doing was making, he was following the "must", but you could never go to a court and just presume that the order would be made because that was the received wisdom or that seemed obvious. The Court has to make the order, and in the words of the statute, has to make the order when it is the most suitable method under section 23(1) and the Judge here, even

though there's some creativity involved and some co-operation from counsel, another thing, people have gone to considerable lengths, all that is happening is that the Judge has been prevailed upon to make the most suitable order and he has some confidence in doing so, even though it's no order, because he's been reassured by the information that's come to him.

1425

KÓS J:

Right.

MR LILLICO:

So the short answer I suppose is that the Judge has made one of the mandated orders, but only after adjournments and so forth, and that's not unusual in criminal proceedings.

GLAZEBROOK J:

It's just if somebody hadn't made those, what order would've been made then?

MR LILLICO:

Another judge might have just simply made the release order, I think, your Honour.

GLAZEBROOK J:

Well I'm just really asking you what the alternative was?

MR LILLICO:

In this case? In I's case?

GLAZEBROOK J:

Well, no, in Mr I's case?

MR LILLICO:

I don't think there was any other –

GLAZEBROOK J:

I mean there (inaudible 14:25:58) be an alternative that has him in secure care, is there?

MR LILLICO:

For Mr I?

GLAZEBROOK J:

That's legitimately made under the disposition possibilities?

MR LILLICO:

If – well, yes, if he had presented a higher degree of risk then secure care means that he's detained and if he presented a high enough risk then that might've been appropriate, but it wasn't for him. It was historic sex abuse of his daughter and stepdaughter and presumably it was thought that that risk didn't present itself anymore, but in other cases like – I'm not going to take you to it – but *Garibovic*, which was mentioned by my friend, that wasn't historical sex abuse – oh, sorry, it was violence, he had murdered a friend, and it was recent, it wasn't historic. And it was thought that – that was a dementia case as well and although he couldn't be treated he was thought to present a considerable risk, and so he was – there was a secure care order in relation to him.

And then in relation to *Kalolo*, again that's a case that's –

KÓS J:

So which one is this?

MR LILLICO:

Oh, *Kalolo* is tab 47, your Honour, of the respondent's bundle. I'll bring it up now.

So the operative part of the judgment or the part of interest to us perhaps is 26, paragraph 25 to 26. So again, Mr Kalolo had dementia. It was in combination for him with a low assessed IQ and a head injury, but the important thing for our

purposes I suppose is that there was no prospect of him recovering, and a similar solution, although perhaps less formality and work involved to *R v I*, where Dr Gardiner who was the health assessor outlined for the Court Mr Kalolo's living circumstances. There was some reassurance to the Court because he was being cared for by his son and daughter-in-law. They were aware of his offending and they could get respite care via a nursing home who were also aware of his offending and could guard against the risk he presented to young people.

And so again an example of the Court furnishing itself with information via the CP(MIP) process, and although the least restrictive order is made, the Court nevertheless reassure themselves about the suitability of that by gathering the information and in the end making no order, but only because they had got some confidence about the ability of the son and the daughter-in-law to guard against risk and assure themselves about Mr Kalolo's living circumstances.

WILLIAMS J:
The key information in these cases is the risk information, not the involvement information.

MR LILLICO:
Yes, but the risk information comes via disposition, which happens after involvement.

WILLIAMS J:
I understand that, but you're relying then on the formality of that process rather than the efficacy of the involvement hearing.

MR LILLICO:
And I –

WILLIAMS J:
In terms of the outcome that's required.

MR LILLICO:

Perhaps that's true of *R v I* and *Kalolo*. It might not be true of the other cases. *Garibovic* is seen to be – to draw some information about the involvement hearing itself where the Judge talked about the actual attack.

1430

WILLIAMS J:

But the more recent it is, the more relevant that's going to be.

MR LILLICO:

Yes.

WILLIAMS J:

But historic sex charges where the defendant's got dementia –

MR LILLICO:

Maybe not. No, it's not going to come out –

WILLIAMS J:

– it's not going to count for anything really.

MR LILLICO:

No, unless one of the witnesses says: "And he did something strange recently. It wasn't as bad but –

WILLIAMS J:

That's right.

MR LILLICO:

– I had a bad feeling," or something. It's going to come out of the – for historic cases, it's going to come out of the health assessor's reports, one would think.

WILLIAMS J:

Exactly.

MR LILLICO:

Unless the Court has any questions of me about those matters or any others, just ask Mr Harvey to address you briefly about the Australian cases.

GLAZEBROOK J:

Sure.

MR HARVEY:

Tēnā koutou katoa. May it please the Court. I'd like to briefly address you on the Australian situation, namely the High Court of Australia's development of a common humanity test, and I'd like to explain that that evolved from quite a different legislative context than what we have here. So I'll be building on our submissions and making some points that aren't within our written submissions.

So I'll start by taking you to *Subramaniam v R* [2004] HCA 51, (2004) 79 ALJR 116 which is the High Court of Australia case that we refer to at tab 62 of our bundle. But what I want to refer to you there is essentially just the test that the High Court came up with which is at paragraph 35, which Mr Lillico will be able to refer us to.

So what the Court said here was: "This is not to say that notwithstanding the manifest purposes of the Act, there may not still be cases of mental infirmity calling for the grant of a stay even of the special hearing for which it provides although instances of them are likely to be rare. This is so for two reasons: the Act does not, expressly or by implication, forbid their application; and, common humanity would argue in favour of a stay if the risk were a real one, and the likely exacerbation grave."

In this case, the High Court of Australia was considering a now repealed statute, specifically the Mental Health (Criminal Procedure) Act 1990 (NSW). There are real differences between that legislation, which has largely been carried over into the new statute, and what we have before us in the CP(MIP), and I'd like to take you to those differences just to illustrate that.

The first difference is that under that statute in New South Wales criminal penalties can ensure. So under section 22(3) of the Act it provides that a positive finding in a special hearing "constitutes a qualified finding of guilt", and section 19(1) provides that the criminal standard of proof applies. But the most important section for present purposes is section 23. What that provides is that penalties may be imposed. So I'll take you to the wording in that provision. Subsection (4) provides that: "In nominating a limiting term in respect of a person or imposing any other penalty or making any other order," so what this makes quite clear is that criminal penalties still apply under this statute, and that's very much not the case for CP(MIP), and one of those penalties can be imprisonment.

1435

So the submission for the Crown is this. Because there are criminal consequences, it makes sense that there is a broader scope for charges to be stayed under that statute, hence the common humanity test, whereas here, as Mr Lillico has described, the orders are geared towards treatment as opposed to punishment.

GLAZEBROOK J:

Well except that doesn't quite fit because Mr Lillico accepts that you can have stays or section 147 discharges, just not at the pre-involvement hearing stage.

MR HARVEY:

Yes, and I will come onto that. There is a statute within the Act which provides for a stay before fitness has been determined, but it refers explicitly to grounds of mental impairment. So I'll come to that shortly, but the first –

KÓS J:

Could you just tell us what that provision is?

MR HARVEY:

Yes, of course. So that's section 10(4). If it would assist, I can refer to that right now. So that section –

KÓS J:

Oh, sorry, of the Australian Act? Okay, right.

MR HARVEY:

Yes, yes, of the Australian Act. So under that section: "If, in respect of a person charged with an offence, the Court is of the opinion that it is inappropriate, having regard to the trivial nature of the charge or offence, the nature of the person's disability or any other matter which the Court thinks proper to consider, to inflict any punishment, the Court may determine not to conduct an inquiry" – that is to determine whether someone is unfit – "and may dismiss the charge and order that the person be released." So what we say –

GLAZEBROOK J:

But the High Court wasn't – I don't understand the High Court to be operating under that section, was it?

MR HARVEY:

It wasn't – it didn't explicitly refer to that provision, but what it did say is: "The Act does not, expressly or by implication, forbid" a category where mental infirmity calls for the grant of a stay. So what we are saying is that we acknowledge that section 10(4) was not expressly included in the judgment, but what the High Court is saying that the language of the statute as a whole does not forbid the common humanity test, and what I would say is we could go one step further than this and say the language of the statute implicitly permits it, but that's not the case here.

So the two differences are those, that criminal penalties can ensue and there is, so to speak, an offramp already provided within the legislation on the grounds of mental incapacity, and for that reason we say in our submission the common humanity test evolved in response to that, and there is therefore not a principled basis on which to follow the common humanity test here because our legislation is so different.

ELLEN FRANCE J:

Do you know the background to the use of that terminology, "common humanity"?

MR HARVEY:

Yes, it was in a case called *Hakim* (1989) 41 A Crim R 372 at 377, I believe, and it developed – I'll just take you to – it's just footnoted at footnote 17 of the judgment and at that point the Court said: "A relevant test that has been applied and which we would adopt" is the common humanity test, and that was in the context of special hearings, and that developed as I understand it in line with Australian jurisprudence around stays themselves, which were to be exceptional, and so what the High Court is emphasising in this case is that a stay is to be exceptional and couched in this common humanity language.

The problem with common humanity –

GLAZEBROOK J:

Let me have a look at footnote 17, if that's what you're relying on.

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MR HARVEY:

Of course, yes. So that's at –

GLAZEBROOK J:

Oh, so it doesn't say anything?

MR HARVEY:

No, that's just where it – it refers to it, but that's essentially where the High Court got that test from, and that was – that had been developed in the context of special hearings.

ELLEN FRANCE J:

Yes, the – I suppose a potential contrast with your position is you're allowing – well you're not allowing for that notion of common humanity to come into play

until later in the process, even though in a general sense outside of CP(MIP) that would be permissible.

MR HARVEY:

That's correct, yes. So we're saying that a stay, the place of a stay is enshrined within the statute at section 27 and at that stage factors bearing on a stay application may be considered. For example, if something amounts to an abuse of process such that common humanity is breached then that might provide the foundation for a successful stay application, but only after the involvement hearing. But I would also submit that the language of common humanity has been described by the New South Wales Court of Criminal Appeal as not providing any criteria and an evaluative – and requiring an evaluative judgement, so it has the potential to import uncertainty into quite a defined statutory process.

Unless the Court has any further questions for me or Mr Lillico, those are the submissions for the respondent.

GLAZEBROOK J:

Thank you very much.

MR HARVEY:

May it please the Court.

GLAZEBROOK J:

In reply.

MR McKILLOP:

Yes, I only have a few points. Oh, we won't need the ClickShare, but thank you. The – I do take – just to put beyond any doubt, I do take you "must" in the CP(MIP) Act process to mean what Justice Williams was suggesting it means, that it's a stepwise process and it is simply an explanation of what follows. It's not, though, an intention to exclude these other processes.

And in terms of the Australian case points, I take a bit of a different point from them, which is grounded in the fundamentals of why courts recognise that they have inherent powers, like the power to order a stay, and "inherent" is often said to be the wrong word for this, it should be "implied" but "inherent" is the one that we use, but the idea is that these powers are implied from the Court's jurisdiction to which – and the need to discharge that fairly, and the point of the power of stay is to provide that safety valve to permit there to be a way to deal with unfairness. Australia has developed a test in particular language. We have a general approach in New Zealand which is grounded in the – it's typically called "stay for abuse of process" or something of that nature. It's not always that someone is abusing the Court's process, but sometimes the Court's process may be so oppressive that a stay is justified. I say that these are really all – these are really just different ways of expressing the same point, and that's everything I wanted to say.

GLAZEBROOK J:

Thank you very much. We'll reserve our decision in this matter. It will be delivered when it's – when we've completed our deliberations and written the judgment. So thank you very much, counsel. Very helpful.

MR McKILLOP:

As the Court pleases.

COURT ADJOURNS: 2.45 PM