**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA709/2015**
**[2017] NZCA 596**

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| BETWEEN | GRENVILLE HENARE FAHEY<br>Appellant |
| AND | THE QUEEN<br>Respondent |

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| Hearing: | 31 May and 1 June 2017 |
| Court: | Miller, Cooper and Clifford JJ |
| Counsel: | J A Kincade and J Oliver-Hood for Appellant<br>B J Horsley and A B Richards for Respondent<br>JHM Eaton QC for New Zealand Law Society and New Zealand Bar Association (intervening with leave)<br>K H Cook and F E Guy Kidd for New Zealand Criminal Bar Association (intervening with leave) |
| Judgment: | 14 December 2017 at 4.00 pm |

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**JUDGMENT OF THE COURT**

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**A The application for an extension of time to appeal is granted.**

**B The appeal is dismissed.**

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**REASONS OF THE COURT**

(Given by Miller J)

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[1] Mr Fahey appeals his conviction for the murder of Steven Harris at Auckland on 4 September 2013. He alleges that the trial judge forced counsel upon him although he had elected to represent himself and complains that counsel did not

advance his preferred defence, causation, instead urging lack of murderous intent upon the jury.

[2] The appeal raises important questions about the role of counsel appointed by courts to assist in criminal trials in which the defendant is self-represented. We heard from counsel for the New Zealand Law Society, the New Zealand Bar Association and the New Zealand Criminal Bar Association. All agree, as does the Crown, that the role of court-appointed counsel wants closer definition. This judgment is intended to guide trial judges in the exercise of their discretion to appoint counsel who serve as amicus curiae to assist the court, or as standby counsel to assist the self-represented defendant as and when the defendant requests.

[3] Mr Fahey's notice of appeal was filed out of time. We grant the necessary extension.

**The facts**

[4] Mr Fahey and Mr Harris were friends who were unemployed and frequently homeless, sometimes living on the streets of central Auckland. The two were seen arguing early on the evening of 4 September 2013. Later, shortly before 11pm, CCTV cameras captured them walking down Albert Street and into Victoria Street West. Mr Fahey procured a free meal from Domino's Pizza in Elliott Street and shared it with Mr Harris. They walked under the Mayoral Driver overpass and entered Myers Park. By this stage, Mr Fahey was walking ahead of Mr Harris, who was carrying the pizza box. The Crown case was that Mr Fahey stopped, removed his backpack and took a knife from it, and attacked Mr Harris, who fell to the ground. Mr Fahey left the scene. The incident was observed by eyewitnesses and captured in part on CCTV.

[5] Mr Harris was taken by ambulance to hospital but died from his injuries. He had been stabbed four times, once in the arm and thrice in the chest. A police officer who attended the scene formed the opinion that Mr Harris was already dead, as did the ambulance staff, who found no pulse and no breathing but detected some electrical activity. Medical intervention at the hospital included a thoracotomy and a thoracostomy, in which a large incision was made across the body to relieve pressure

from internal bleeding. The opinion of the Crown pathologist was that death resulted from multiple sharp force injuries.

[6] There was evidence that Mr Fahey changed his clothes before going to a relative's home in Avondale, where he disclosed that he had pulled out his knife and stabbed a man. On the following day he told an acquaintance that he had stabbed his friend three times.

[7] On 6 September 2013 Mr Fahey went to the police with his then lawyer, Mr Mansfield, and acknowledged that he had been in a fight with Mr Harris and it involved a knife. He took the police to areas where he had left the knife he apparently used and various discarded items of clothing.[1] He otherwise exercised his right to silence.

**The course of proceedings in the High Court**

*Pretrial proceedings*

[8] At a callover on 27 November 2013 Brewer J recorded that Mr Fahey had dispensed with the services of Mr Mansfield and elected to represent himself. Mr Fahey put his decision down to a conflict of personalities. The Judge encouraged him to seek alternative counsel but made case management directions that envisaged he would self-represent. Mr Fahey set about doing so, corresponding with the Crown and raising questions of admissibility and disclosure. An application for an order that propensity evidence was admissible was made by the Crown and set down for hearing in May 2014.

[9] At another callover, on 26 February 2014, Lang J raised the possibility of amicus being appointed "to assist the Court". Mr Fahey consented. The Judge thought counsel would assist in the pretrial process and directed that the Registrar inquire of Mr Dacre QC whether he would be willing to accept appointment.

[10] The appointment was made, and with Mr Dacre's assistance Mr Fahey was able to receive and view disclosed materials including the CCTV footage. He was

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1 He did not concede at trial that it was the same weapon. See [33] below.

also given stationery and Mr Dacre arranged for legal research that Mr Fahey wanted. In a minute of 12 March, the Judge recorded that Mr Dacre was also to assist Mr Fahey in making a decision about whether to challenge the admissibility of his own statement to the police.

[11] Admissibility of the Crown's propensity evidence was argued on 28 May before Venning J, who allowed evidence of Mr Fahey's behaviour on several occasions but excluded others as unduly prejudicial.[2]

[12] In a minute of 24 July Lang J expressed his wish that Mr Dacre continue to act as amicus for the trial, which was to begin on 29 September 2014. He asked that Mr Dacre consult Mr Fahey and file a memorandum recommending how his role ought to be defined, having regard to Mr Fahey's requirements and the likely complexity of the trial. Mr Dacre complied. His memorandum explained that while Mr Fahey had been conscientious in his preparation, he lacked resources and had "little in the way of forensic skills or legal insight". He had not established a clear theory of the case or given attention to the addresses, to cross-examination, or to defence evidence. Mr Dacre recommended that he assist Mr Fahey to establish a theory of the case, prepare a statement that would form the basis of cross-examination and a brief, should Mr Fahey give evidence, tabulate the disclosure and prepare statements for defence witnesses, prepare cross-examination, and draft addresses. There was also an urgent need to address issues that Mr Fahey had with the pathologist's report.

[13] In response the Judge authorised Mr Dacre to carry out the tasks he had nominated and asked that he then consult Mr Fahey to see how counsel could best assist the Court during the trial, filing a further memorandum so the Judge could make any directions thought appropriate. The Judge confirmed on 12 September that Mr Dacre would continue as counsel to assist the Court.

[14] Minutes of 12 and 19 September deal with numerous trial management issues, including for example a list of witnesses whom the Crown was to call at Mr Fahey's request, the content of the photo booklet, further disclosure, questions of

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2 *R v Fahey* [2014] NZHC 1274.

the ESR and the Crown pathologist, Dr Garavan, a memorandum of agreed facts, and access to a computer for Mr Fahey. It is apparent that Mr Fahey was self-representing but taking assistance and advice from Mr Dacre as he saw fit. Lang J recorded that he had encouraged Mr Fahey to get practical guidance from Mr Dacre about how he should present his case at trial.

[15] Mr Dacre wrote to Mr Fahey on 18 September. He recorded that Mr Fahey was conducting his own trial and explained certain matters, notably: the elements of the offence of murder, the defence of self-defence, witnesses, Mr Fahey's evidence should he choose to give it, and the trial process. Mr Dacre evidently envisaged that Mr Fahey would offer any challenges to jurors and make any opening address, but that he might deliver the closing address.

[16] Mr Dacre's letter included advice on a theory of the case, suggesting that on his understanding of Mr Fahey's position there were two obvious defences, self-defence and lack of murderous intent. He drew attention to s 166 of the Crimes Act 1961 and explained that it would be no defence if death resulted from good-faith medical treatment of Mr Harris's injuries. He attached a list of questions that could form the basis of a brief of evidence for Mr Fahey.

[17] The trial began on 29 September but it was aborted on 2 October for unavailability of a key witness. A voir dire was held on 5 November 2014 to hear the evidence of Dr Garavan about cause of death. Mr Fahey cross-examined him, apparently in an attempt to show that medical intervention may have caused Mr Harris's death.

*The trial*

[18] The second trial began on 24 November 2014. The Crown called 43 witnesses, including eyewitnesses and two people to whom Mr Fahey made admissions. Mr Fahey questioned some witnesses, Mr Dacre others. A few were questioned by both. The questions suggest the Crown was being put to proof and that Mr Fahey was exploring identity, causation and self-defence. With respect to causation, Mr Dacre questioned Dr Garavan about the effects of medical intervention.

[19] On the second day of trial, Mr Fahey complained in a chambers discussion that Mr Dacre had given bad advice, causing Mr Fahey to fail to put some questions to the ambulance officers who attended Mr Harris. It appears that Mr Fahey wanted to ask them about how many stab wounds Mr Harris suffered, presumably in an attempt to show that some of the four stab wounds seen by the pathologist were inflicted later. The Judge advised that "no doubt Mr Dacre has your best interests at heart, but at the end of the day, you do whatever you feel you have to do". He asked whether Mr Fahey had a clear vision of what his defence was. Mr Fahey responded that he had not explored it "definitely". Lang J reminded him that the Court had been trying for months to get him to focus on his defence and suggested that his choices were self-defence or lack of murderous intent.

[20] The chambers discussion followed Mr Fahey's unsuccessful cross-examination of one of the ambulance officers, a Mr MacCauley. It led the Judge to explore what Mr Fahey was trying to achieve with his cross-examination. Identity was not in issue, as Mr Fahey confirmed, and Mr Dacre suggested that "technical issues" with the medical evidence were "getting him nowhere in terms of a defence". Counsel explained that there were no questions he would have asked of the witness himself, and to do so could be "to see my neutrality wasted with the jury". He noted for Mr Fahey's benefit that the medical evidence did not exclude lack of murderous intent as an available defence.

[21] The Judge and Mr Dacre both expressed concern that Mr Fahey had to decide whether to admit possessing the knife because propensity evidence would be led if he did not. The Judge also invited Mr Fahey to consider having Mr Dacre cross-examine witnesses who talked about what Mr Fahey had said and also invited him to think twice about challenging the pathologist unless he had a realistic alternative explanation that could be backed by his own expert. He reminded Mr Fahey that while he could not give advice, Mr Dacre could do so to the extent he was able in his "limited retainer", and emphasised that Mr Fahey must make these decisions. To this Mr Fahey responded that he would do so.

[22] The Judge had the chambers discussion typed back and given to Mr Fahey. This brief interlude in the trial was plainly an attempt by the Judge and Mr Dacre to

encourage Mr Fahey to focus on his defence and to recognise risks inherent in some defences he might pursue.

[23] As Ms Kincade (who appeared for Mr Fahey) observed before us, it is fair to say that Mr Fahey did not follow the advice he had been given. He persisted in his challenge to the medical evidence, focusing on the number of wounds seen when ambulance officers first arrived. He also cross-examined admission and propensity witnesses in an attempt to elicit evidence that he was not a violent person.

[24] The Crown called its propensity evidence, which addressed two incidents in which Mr Fahey was found to be carrying a knife, once threatening a person with whom he was having an argument, and a third incident in which he made threats of violence when his mother refused to give him money. Admissibility of this evidence is not in issue on appeal, but its presence is said to support the argument that Mr Fahey ought to have been permitted to call propensity evidence about Mr Harris.

[25] Mr Fahey elected not to give evidence, signing instructions to Mr Dacre to that effect. He does not complain on appeal that that was a mistake. And while it appears he had taken advice from a pathologist, none was called. He did seek to put Mr Harris's mental state and propensity for violence in issue, calling a psychiatrist who had reviewed Mr Harris's mental health history. The substance of that evidence was Mr Harris was bipolar, had antisocial personality traits and was impulsive, but the psychiatrist naturally could not say what was his mental state at the time of his death.

[26] Mr Fahey also sought to call two propensity witnesses, members of Mr Harris's family. The gist of their evidence was that Mr Harris had a history of violence and threats against family members. In a short ruling Lang J refused Mr Dacre's request to admit this evidence, reasoning that evidence of Mr Harris's prior relationship with Mr Fahey would be relevant to the circumstances of Mr Harris's death, but not so evidence of his relationship with other persons. This ruling is in issue on appeal.

[27] After the Crown closed its case Mr Dacre advised the Judge that he would deliver a defence closing address but would not say anything about causation. The Judge asked Mr Fahey whether he proposed to address the jury himself on the question whether fatal injuries may have been caused by medical intervention (presumably putting it in that way because no other alternative cause had been suggested). Mr Fahey said he would not do so and stated that he had never contended the injuries were caused through medical intervention. The Judge took an adjournment to allow Mr Fahey and Mr Dacre to confer about whether Mr Fahey wanted to say anything more to the jury in closing, and Mr Fahey duly confirmed that he did not.

*Closing addresses*

[28] The Crown's closing address focused on the CCTV footage. Crown counsel suggested that it showed the two men entering the park, with Mr Harris carrying the pizza box and Mr Fahey a backpack which he put down and took the knife from. He then attacked Mr Harris and left the scene, recovering his backpack as he did so. There was evidence that Mr Fahey tried to disguise his appearance by putting a hood on his head and that he swapped his shoes for another man's when he reached the house in Avondale, where he told a witness that he had hurt and stabbed a man who may not have survived. Another witness deposed that on the following day Mr Fahey admitted stabbing his friend three times. Mr Fahey had taken the police to the knife, and although the Crown could not prove that it was the murder weapon, it could have been. The medical evidence was unequivocal as to cause of death, and it was immaterial if medical staff had inflicted further injuries in treatment since Mr Harris was dying in any event.

[29] Crown counsel suggested that Mr Fahey was a man known to blow up at the slightest provocation, and the sort of man known to carry a knife. Mr Harris by contrast was someone who would harp on, who didn't know when to leave well enough alone, but was quirky, flamboyant and not "terribly aggressive".

[30] Mr Dacre began the defence closing by explaining that he was there to assist the jury and was not acting for Mr Fahey:

> [2] … My role is to assist you. I'm appointed by the Court to assist you. That is to assist you by bringing out issues which may be important to you and may be important to support the case for Mr Fahey. That is a different role from acting for Mr Fahey. If I acted for Mr Fahey, I would be doing what he instructed me to do and we would be discussing the tactics and the cross-examination and all those matters. He is in fact his own advocate, so he has been in charge of tactics, cross-examination and various issues. So, I for an example, can't bind him — I can't say well "put aside this issue because it doesn't matter" because I haven't got those sorts of instructions. I haven't got any instructions. I can simply sit here as an informed observer and then try to put together some issues for you to consider. So I want you to be clear about this.
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> [3] When I talk about issues which I think are important, which I think you will think are important, it doesn't necessarily mean Mr Fahey agrees with me, and when I say "Don't spend too much time on this issue", again that's not a reflection necessarily of what Mr Fahey says. It's a reflection of what I think is useful. So to that extent, we are in different situations.

[31] Mr Dacre emphasised the burden and standard of proof, and cautioned the jury against speculation and prejudice. He explained the difference between murder and manslaughter and suggested "on behalf of Mr Fahey" that the Crown had not proved murderous intent, focusing on absence of motive for attacking a friend, the very brief duration of the incident, and whether Mr Fahey was really the aggressor. The CCTV footage showed snippets only. He invited the jury to discount the propensity evidence and suggested that Mr Fahey had not tried to minimise his involvement at all but rather had gone to the police. He dealt with the medical evidence by noting that, surprisingly, it could not identify the knife used, by emphasising that the wounds did not necessarily prove murderous intent, because they would have required little force, and by pointing out that the wounds did not match cuts in the clothing. These points left the jury with the propositions that perhaps the Crown had not proved all of the wounds were inflicted by Mr Fahey and that the depth and severity of the wounds did not necessarily signify murderous intent. Counsel took what he could from the admissions, suggesting that one of the witnesses was unreliable and neither established murderous intent.

*The summing-up*

[32] Summing up, Lang J reminded the jury that Mr Fahey was self-representing:

> [15] The second is that Mr Fahey has exercised his right to represent himself. Every citizen in New Zealand has that right to represent him or herself. A lot of people get lawyers because they feel it meets their best

> interests, but Mr Fahey has not chosen to do that. You take no adverse inference whatsoever from that. You will see, and have seen, that Mr Dacre has been appointed to assist you and to assist the Court to ensure that there is a fair trial, but please draw no adverse inference from the fact that Mr Fahey has chosen to represent himself.

[33] He directed the jury that Mr Fahey had not conceded causation, or admitted it in his police interview:

> [27] I need to spend a little bit of time on this issue. Mr Fahey does not appear to have contested the issue, namely that he was the person that inflicted the stab wounds, but neither has he conceded it, so you must determine that issue based on the evidence. And I say he hasn't conceded it, because when you read the written statement that he gave at the police station on the 6th September 2013, you will see that he accepts that he was involved in a fight in which the deceased was injured, and that he removed from the scene a knife and that he told the police he would show them where he had put it. Now that doesn't go as far as a concession that he inflicted the stab wounds that caused Mr Harris' death, so the Crown needs to satisfy you beyond reasonable doubt regarding that issue.

[34] He summarised the medical evidence about Mr Harris's condition on arrival at the hospital:

> [28] Perhaps if I just take a moment to go over the medical evidence that really, I don't think at the end of the day, is largely in dispute. You heard from two sources about the injuries, or three really including the ambulance officers, but the important evidence about the injuries that caused Mr Harris' death came from the intensivist, Dr Nicholls, and from the pathologist, Dr Garavan. And Dr Nicholls' evidence matching that of the ambulance officers is that when Mr Harris arrived at the hospital he was in a state of pulseless electrical activity. This meant that although there was electrical activity around the heart, there was no pulse. Although the heart was pumping, no blood was being pumped around the body, and as you heard from both Dr Nicholls and Dr Garavan, that is a very serious state of affairs from which, unless there is immediate intervention, and even then, the chance of survival is slim.

[35] He addressed the evidence about medical intervention, which essentially showed that Mr Harris bled out internally from stab wounds to the heart and lung. The evidence identified four stab wounds. The Judge summarised the evidence about whether Mr Fahey inflicted these wounds, drawing attention to uncertainty about the knife. He gave an orthodox propensity direction, explaining that the evidence went to the questions whether Mr Fahey brought the knife to the scene and used violence there. He recorded fairly and at some length what counsel had to say about intent.

**The grounds of appeal**

[36] Mr Fahey advanced the following principal grounds of appeal:

(a) when he elected to represent himself the Court ought to have obtained a psychological report to ensure that he was capable of doing so;

(b) amicus was briefed to assist him, but he did not want help; and

(c) in the resulting confusion he did not adequately present his own case.

The second of these grounds raises issues of general application which were addressed by the interveners and the Crown.

[37] Mr Fahey also contended that he was denied the opportunity to call propensity evidence about Mr Harris, although the prosecutor was allowed to suggest in closing that he was not an aggressive man and evidence of Mr Fahey's own propensity for violence was led as part of the Crown case.

[38] Ms Kincade abandoned a further ground of appeal: namely, that the Court ought to have ordered an inquiry under the Criminal Procedure (Mentally Impaired Persons) Act 2003 into Mr Fahey's fitness to stand trial. There was no evidence that he was unfit, and none has been adduced on appeal. It is not Mr Fahey's case that he was unfit, merely that an inquiry ought to have been held. We recognise that before withdrawing Mr Mansfield suggested that reports be obtained, but nothing was done to pursue that suggestion, and while Lang J was clearly concerned that Mr Fahey was representing himself badly, nothing in the record suggests that the Judge had concerns about fitness.

[39] It is convenient to address the issues in the following way:

(a) we review existing law and practice on the rights to fair trial and to self-representation;

(b) we identify an increase in the numbers of court-appointed counsel;

(c) we examine the bar's calls for change and briefly survey practice in other jurisdictions;

(d) we confirm trial courts' jurisdiction to appoint counsel to assist the defendant as and when required, and we offer guidance about such appointments and the role of counsel;

(e) we examine a submission that trial courts may appoint counsel to conduct the defence where a defendant is fit to stand trial but incapable of self-representation;

(f) in light of our conclusions about the proper role of court-appointed counsel, we assess Mr Fahey's complaint that he was denied the right to self-represent;

(g) we examine Mr Fahey's alternative argument that he ought to have been assessed for capacity to conduct his own defence; and

(h) we address the propensity issue, which stands apart from the other grounds of appeal.

**The rights to fair trial and self-representation**

[40] We preface our survey of existing law by observing that New Zealand authorities normally use the term amicus curiae for counsel appointed by the court whether counsel is to assist the court independently of any party or to present the case for an unrepresented defendant, or both. When discussing existing law and practice we follow the same approach. Because we consider that there are important differences between the two roles, we adopt different terminology at [64] below, when addressing future practice.

*The right to fair trial*

[41] Under s 25 of the New Zealand Bill of Rights Act 1990 (BORA) everyone charged with an offence possesses certain rights to minimum standards of process in

connection with its determination. They include, relevantly, the rights to be present, to challenge prosecution witnesses, to present a defence, to call evidence, and to be proved guilty according to law. We make several points about these protected rights:

(a) They confer on the defendant a power of decision over central rights: how to plead, what defence to present, how to challenge the prosecution witnesses, and what evidence to call.

(b) The right to a fair trial is often described as absolute or inalienable, such that if it is so compromised that the trial as a whole is adjudged unfair the conviction cannot stand.[3] To describe the right as absolute is to say that there exists no interest that justifies the state in overriding it. While this proposition is undoubtedly true of the trial as a whole, it must be borne in mind that the fair trial right comprises a number of distinct rights,[4] that to compromise one is not always to make the entire trial unfair,[5] and that all BORA-protected rights are subject to such limitations as are demonstrably justified in a free and democratic society.[6]

(c) Although it is not listed among the s 25 rights, the right to appear at trial by counsel is undoubtedly a protected right; it is recognised in s 11(a) of the Criminal Procedure Act 2011, s 30(2) of the Sentencing Act 2002, the express BORA rights to counsel on arrest and when charged,[7] and art 14 of the International Covenant on Civil and Political Rights, which states that the defendant "may defend himself in person or through legal assistance of his own choosing".[8]

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3 *Brown v Stott (Procurator Fiscal, Dunfermline)* [2003] 1 AC 681 (HL) at 704 per Lord Bingham. In that case there was no question of an informed waiver of rights. Compare *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [80]: even where there is an informed waiver "the right to a fair trial cannot be compromised — an accused is not validly convicted if the trial is for any reason unfair".

4 *Brown v Stott (Procurator Fiscal, Dunfermline)*, above n 3, at 704 per Lord Bingham.

5 *R v Howse* [2005] UKPC 30, [2006] 1 NZLR 433 at [33]–[36] per Lord Hutton, Lord Caswell and Sir Swinton Thomas; and *Randall v R* [2002] UKPC 19, [2002] 1 WLR 2237 at [28].

6 New Zealand Bill of Rights Act 1990, s 5.

7 Sections 23(1)(b) and 24(c).

8 International Covenant on Civil and Political Rights 999 UNTS 14668 (opened for signature 16 December 1966, entered into force 11 November 1976), art 14(3)(b).

> It is considered fundamental because it allows a defendant to make informed decisions about the exercise of other rights.[9]

*The right to self-represent*

[42] New Zealand law permits defendants to represent themselves. The right to do so is found in s 11 of the Criminal Procedure Act, which provides that the defendant's case may be conducted by a lawyer or by the defendant personally. The right can be traced to the Criminal Code 1893, s 391 of which was headed "right to be defended".[10] The right to advance a defence is absolute but the right to do so in person may yield to the interests of justice in several ways. For example, a court may proceed in the absence of a defendant who has absconded[11] or is disruptive,[12] whether or not self-represented, and it may prohibit a defendant from personally cross-examining any witness in the interests of justice.[13] As a matter of trial process, courts also insist that self-representation be preceded by an informed waiver of the BORA-protected right to counsel.[14]

[43] Although long recognised in legislation the concept of a right to represent oneself has shallow roots in the common law, which originally denied defendants the right to appear by counsel and so left them no choice in the matter.[15] English courts seemingly did not articulate a clear right to self-representation until 1944,[16] and then without examining its origins and justification.[17] The search for a normative foundation leads to the 1975 judgment of the United States Supreme Court in *Faretta v California*, in which the majority surveyed English common law tradition,

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9 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 279–280 per Richardson J; and *R v Barlow* (1995) 14 CRNZ 9 (CA) at 38 per Richardson J. For completeness, we note Richardson J's point in *Barlow* that BORA is not an exhaustive list of the fundamental rights a defendant has in a criminal trial: at 32.

10 See also Crimes Act 1908, s 415; and Crimes Act 1961, s 354.

11 Criminal Procedure Act 2011, s 124(1).

12 Sections 117(2) and 118(2)(b).

13 Evidence Act 2006, s 95(2).

14 See Sentencing Act 2002, s 30; and *R v Condon*, above n 3, at [79]–[80].

15 William Blackstone *Commentaries on the Laws of England* (A Strahan, London, 1809) vol 4 at 355–356; and William Holdsworth *A History of English Law* (3rd ed, Sweet & Maxwell, London, 1945) vol 5 at 192.

16 Rabeeba Assy *Injustice in Person: The Right to Self-Representation* (Oxford University Press, Oxford, 2015) at 28–29 and 32–33.

17 In *R v Woodward* [1944] KB 118 (CA) at 119 the Court allowed an appeal on the ground that "no person charged with a criminal offence can have counsel forced upon him against his will".

concluding that only in the Star Chamber was counsel forced upon the defendant.[18] The majority held that on its true construction the Sixth Amendment to the United States Constitution, which guarantees the right to counsel, includes a correlative right to self-represent.[19] Three members of the Court dissented, emphasising the absence of any express right of self-representation and the harm that self-representation can do to the defendant, and finding English legal history inconclusive.[20] The rationale appearing from *Faretta* and subsequent cases is that the right protects personal dignity and autonomy, that self-representation allows defendants to present their cases in their own way, and that defendants alone experience the consequences of conviction.[21]

[44] This Court adopted this rationale, citing *Faretta*, in *R v Cumming*:[22]

> [42] The right to be self-represented when defending charges at a criminal trial reflects the principle that accused persons are entitled to choose their defences to the charges that they face, to determine the content of those defences and to present them in the manner they choose to the Court determining the charges. The purpose of the right to self-representation has been described by the Supreme Court of the United States as being "to affirm the dignity and autonomy" of the accused person in addressing criminal charges (*McKaskle v Wiggins* 456 US 168 (1984) per O'Connor J). In delivering the majority opinion of the Supreme Court in its leading decision on the right to self-representation in *Faretta* — an opinion which Douglas, Brennan, White, Marshall and Powell JJ all joined — Stewart J at p820 said that the right is:
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> > "… given directly to the accused; for it is he that suffers the consequences if the defence fails."
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> Later, at p834, citing Brennan J in a concurring judgment in *Illinois v Allen* 397 US 337 (1970) at pp 350–351, Stewart J added:
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> > "The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own ultimately

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18 *Faretta v California* (1975) 422 US 806 at 821–824 per Douglas, Brennan, Stewart, White, Marshall and Powell JJ.

19 At 819–821 per Douglas, Brennan, Stewart, White, Marshall and Powell JJ.

20 At 838–840 and 843–845 per Burger CJ and Blackmun and Rehnquist JJ (dissenting). We note that *Faretta* remains controversial in the United States. See for example John F Decker "The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After *Faretta*" (1996) 6 Constitutional Law Journal 484.

21 *Faretta v California*, above n 18, at 834–835; and *McKaskle v Wiggins* 465 US 176 (1984) at 173–176 per Burger CJ, Powell, Rehnquist, Stevens and O'Connor JJ.

22 *R v Cumming* [2006] 2 NZLR 597 (CA).

> to his own detriment, his choice must be honored out of 'that respect of the individual which is the lifeblood of the law'."
>
> The decision of the Supreme Court of Canada in *R v Swain* (1991) 63 CCC (3d) 481 at p504 per Lamer CJC is to the same effect.

[45] As that passage suggests, self-representation is usually associated with an increased risk of conviction, for the right is not limited to defendants who are well equipped by ability, education and temperament, nor is it denied to those whose trials are serious or complex. This does not of itself make the trial unfair, as the Court went on to hold in *Cumming*:[23]

> [43] The exercise by accused persons of their right to conduct the defence personally accordingly is not premised on an expectation that they will do so in a skilful or effective manner. The context of intended self-representation does not permit the Court, when considering if ss 24 and 25 rights are infringed, to take into account whether the decision to dispense with counsel is in accordance with the accused's best interests.
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> [44] A self-represented lay defendant lacks the knowledge of rules of procedure and evidence, and experience and skill in their application in the trial context. Litigants in person do not often give evidence or cross-examine in an orderly way that focuses on what is relevant and avoids repetition. Nor do they generally have the advantage of the detachment of counsel in conducting the defence. The right to self-representation exists despite these features, and they cannot be advanced to gainsay it. As Richardson P said in *R v Power* (Court of Appeal, CA 187/96, 22 October 1996) at pp7–8:
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> > "A high threshold of fitness, including a best interests component, would derogate from the fundamental principle that accused persons are entitled to choose their own defences and to present them as they choose."
>
> [45] The right to self-representation is upheld when the trial process allows accused persons a fair chance to present the defence case in their own way, with a Court respecting their strategic choices and avoiding misplaced solicitude over whether what is advanced to the jury is in the best interests of the accused.

*Waiver of counsel affects but does not preclude appeal*

[46] A first appeal court must allow an appeal against conviction if satisfied that there has been a miscarriage of justice, which means "any error, irregularity, or occurrence" in or affecting the trial that created a "real risk" that the outcome was

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23 *R v Cumming*, above n 22.

affected or resulted in an unfair trial or a trial that was a nullity.[24] Although defendants must ordinarily live with decisions made at trial — the decisions to plead and to give evidence are the paradigm examples — an appeal will be allowed if the appellate court is persuaded that there has been a miscarriage, however occasioned.[25]

[47] Accordingly, a defendant who made an informed decision to self-represent is permitted to establish on appeal that (a) the defence could not have been put adequately without counsel's assistance and (b) in consequence, a real possibility of acquittal was lost.[26] If the trial was unfair in this substantive sense, the appellate court will find that there was a miscarriage of justice and order a retrial. The question whether the defence could not have been put without counsel is answered by carefully considering the seriousness and complexity of the case and the circumstances of the defendant.[27]

[48] This Court's approach to appellate review accommodates in several ways an informed decision to self-represent:[28]

(a) The onus is on the appellant to show that the trial was unfair:[29]

> As Mr Chatha chose to represent himself, the onus was on him to show that his defence could not, in the particular case, have been adequately conducted without the assistance of counsel.

(b) The trial is not unfair merely because counsel would have conducted the defence more skilfully:[30]

> Where an accused has chosen to represent him or herself, it is not enough to show that he or she was defended with less skill than a professional lawyer would have shown …
>
> Whether an appellant has [shown on appeal that the defence could not be presented without counsel] must be examined

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24 Criminal Procedure Act, s 232(4).
25 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [67].
26 *R v Condon*, above n 3, at [80]; *R v Sungsuwan*, above n 25, at [58]; *R v Scurrah* CA159/06, 7 August 2006 at [17]; and *McKay v R* [2009] NZCA 378, [2009] 1 NZLR 441 at [80]–[82].
27 *R v Condon*, above n 3, at [82].
28 Sentencing Act, s 30(2). If the waiver of counsel was not informed, the onus is on the Crown to show that the trial was fair: *R v Condon*, above n 3, at [81].
29 *R v Chatha* [2008] NZCA 547 at [123].
30 At [123]–[124].

> against the background of an accused's right to represent him or herself (even badly). This right must be respected.

(c) The circumstances in which the appellant came to be self-represented may affect the assessment of fairness:[31]

> [26] Mr Cant's own evidence satisfies us that he made an informed choice to go to trial without a lawyer. A deliberate election to be self-represented is to be respected. There must be a realistic limit to the extent to which Courts are required to protect defendants from the consequences of their own decisions. Judicial resources are finite. So is the capacity of the legal system to make continual allowances for a party whose determination to conduct his defence according to his own dictates inevitably excludes the responsible participation of counsel.
>
> (Footnote omitted.)

(d) Cases in which an appellant can discharge the burden of showing that the trial was unfair are likely to be rare:

> If, having been appropriately advised and given sufficient time (so that the decision is informed and deliberate), an accused chooses self-representation, that choice must be respected, and the accused must live with its consequences. Cases of the type discussed by the Court in *Condon* at [80] are an exception to this, but they will be rare.[32]
>
> In *Condon* the Court presumably had in mind the rare type of case where a defendant's personal circumstances, such as an intellectual disability, leading to the election of self-representation, deprived him or her of the ability to take fundamental steps like conducting cross-examination or making submissions. And the Court's statement does not appear to require a detailed investigation into whether the actual conduct of the defence was adequate; rather the inquiry is into whether in the particular circumstances the defence could have been adequately conducted without counsel.[33]

[49] *Cant v R* is an example of the New Zealand approach. The defendant dismissed successive counsel and the trial court appointed counsel to assist him. He complained on appeal that his defence could not be conducted without counsel of his own. This Court reviewed the overall fairness of the trial and held that against the backdrop of a decision to self-represent no miscarriage had resulted. The defence

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31 *Cant v R* [2013] NZCA 513.
32 *R v McFarland* [2007] NZCA 449 at [54].
33 *Cant v R*, above n 31, at [31].

had been identified and put; perhaps not very well, but with the assistance of amicus, well enough.[34] *McKay v R* is another example.[35] The defendant dismissed counsel and elected self-representation. This Court held that the defendant was reasonably capable and the trial judge very helpful, the case was not difficult, and the slender defence had been explained adequately in the summing-up.[36]

*What should a trial court do to ensure a self-represented defendant's trial is fair?*

[50] A trial court owes a number of obligations to a self-represented defendant. It must:

(a) Explain the rights to legal representation and to legal aid, satisfy itself that the defendant fully understands them, and provide an opportunity to exercise those rights.[37]

(b) Explain the trial process and the rights that it affords the defendant.[38]

(c) Explain the rules of evidence as necessary.

(d) Intervene as necessary to ensure overall fairness to each side.[39] This may include offering the defendant a degree of guidance in, for example, articulating what the defence is or putting questions to witnesses.[40]

(e) Put to the jury in detail appropriate to the circumstances any defence available in law, whether or not the defendant has advanced it.[41]

[51] Of course the court's power to assist is limited, for it must always be and appear impartial. As it was put in *R v Jaser*:[42]

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34 At [32]–[46].
35 *McKay v R*, above n 26.
36 At [80]–[82].
37 Sentencing Act, s 30; and *R v Condon*, above n 3, at [23].
38 We note that the former s 364 of the Crimes Act 1961 has not been carried into the Criminal Procedure Act, perhaps because it was not a complete statement of the court's obligations.
39 *R v Cumming*, above n 22, at [51].
40 *R v Brown (Milton)* [1998] 2 Cr App R 364 (CA) at 369–370.
41 *R v Tavete* [1988] 1 NZLR 428 (CA) at 431. See also *Christian v R* [2017] NZSC 145 at [34]–[36].

> [32] The practical difficulty that emerges … is that the trial judge has a duty to assist the self-represented accused, in order to ensure a fair trial, but the trial judge must also remain neutral and cannot intervene in the active ways that defence counsel can intervene, such as by taking over cross-examinations and by providing strategic advice.

[52] In *Condon* the Supreme Court recognised that legal assistance at or before trial may help secure a fair trial.[43] This brings us to the practice of appointing counsel to assist the defendant.

**Court-appointed counsel: existing practice**

*A court may appoint counsel to assist the defendant, in its discretion*

[53] In *R v Hill* this Court held that in criminal proceedings the trial court may appoint amicus curiae. The decision is discretionary, and it may be made whenever the court considers that counsel will assist significantly.[44] In *R v McFarland* the Court added that amicus may be appointed to act "in a partisan way", to present the case by leading and cross-examining witnesses, to conduct legal argument, and to deliver an address:[45]

> The role of an amicus varies with context. Where an amicus is appointed in a criminal case it is accepted that he or she may act in a partisan way, in the sense that he or she may present the arguments that a party would normally present.

[54] Further, counsel's role may evolve during the trial if the defendant so requests:[46]

> [Counsel's] role as amicus seems to have expanded during the course of the trial, at the request of Mr McFarland. [Counsel] conducted much of the case on Mr McFarland's behalf, including dealing with jury selection, cross-examining Crown witnesses, leading evidence from defence witnesses, and delivering the opening and closing addresses … In principle, there can be no objection to an amicus acting in this way if that is what the accused wants and no issue of conflict of interest arises … We accept that there was some lack of clarity at the outset of the trial about the role that [counsel]

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42 *R v Jaser* 2014 ONSC 2277.

43 *R v Condon*, above n 3, at [82]. See also, for example, *Goolsbee v R* [2014] NZCA 148 at [69]–[70]; *Cant v R*, above n 31, at [32]–[35]; *Dunn v Police* [2014] NZHC 3334 at [19]–[20]; and *Brown v Police* [2016] NZHC 374 at [22].

44 *R v Hill* [2004] 2 NZLR 145 (CA) at [57], citing *Levy v Victoria* (1997) 189 CLR 579 at 604–605 per Brennan J.

45 *R v McFarland*, above n 32, at [55].

46 At [58]–[60].

> would perform. While that is undesirable, it may be inevitable in this type of case where the role may develop over time.

*Appointments ought to be rare*

[55] This Court has insisted that appointments to assist the defendant ought to be rare, for several reasons:

(a) Conflicts of duty may arise:[47]

> If appointed as amicus, [counsel's] responsibility would have been to assist the Court and not to represent or to speak on behalf of Mr Hill. In that role, [counsel's] duty to the Court may well have conflicted with advice he might have given Mr Hill if he were acting on his behalf as counsel in the ordinary way.

(b) There are risks of confusion:[48]

> There may be some role confusion — is the primary role of the amicus to assist the court or to assist the accused? If in a particular case an amicus attempts to fulfil both roles, there may be potential for conflict or, at least, misunderstanding and confusion, particularly in relation to issues such as legal professional privilege. Further, a self-represented accused may regard the amicus with suspicion and see the amicus as interfering with the way he or she wishes to run the case.

(c) Standby counsel appointments may undermine the legal aid system.[49]

**The pattern of recent appointments**

*Appointments are increasing in number*

[56] Mr Horsley, who appeared for the Crown, helpfully provided the Court with data about the numbers of appointments in recent years:

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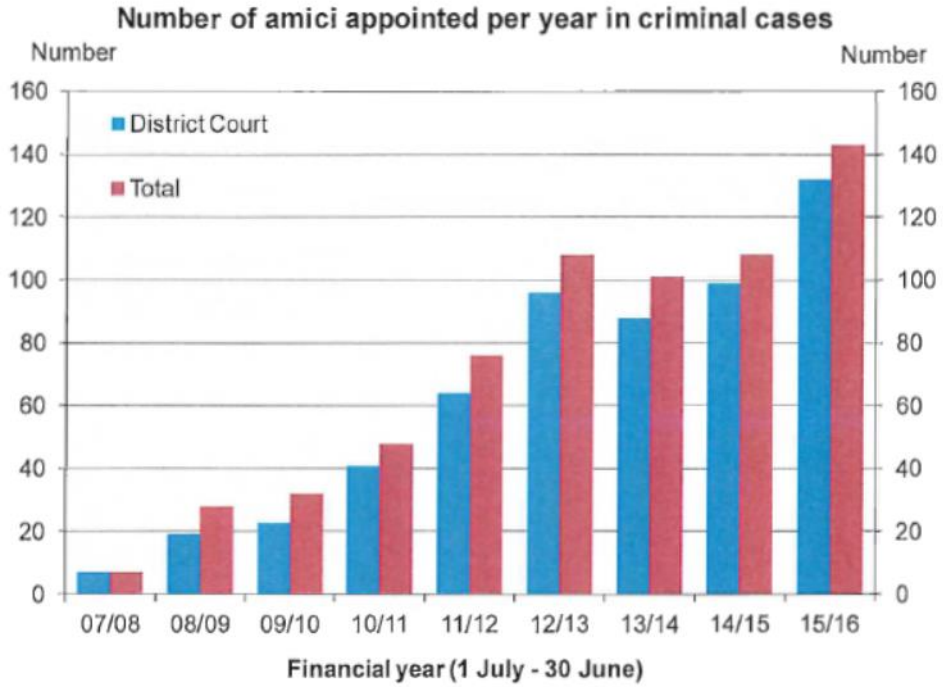
47 *R v Hill*, above n 44, at [59].
48 *R v McFarland*, above n 32, at [52].
49 At [52].




Because the courts' case management system does not always record appointments, these statistics are likely to understate the numbers.

[57] It will be seen that contrary to this Court's expectation, expressed most recently in 2007, appointments are not rare. The number of self-represented defendants is on the increase.[50] The Court has recognised that appointments have become more common following *R v Condon*, in which the Supreme Court held that a defendant who made an informed decision to waive counsel may nonetheless show that the trial was unfair because the defence could not be presented without counsel.[51] Trial judges may be adopting a precautionary approach by making appointments to ensure the trial is not later found to be unfair for reasons they may not have been able to foresee or manage.[52] To appoint counsel may also be prudent in complex, long or multi-defendant trials, or those in which, as counsel for the interveners highlighted, defendants were fit to stand trial but suffered from some

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50 Reliable statistics are not available, but this is the view of the Crown, the New Zealand Law Society, the New Zealand Bar Association and the New Zealand Criminal Bar Association.

51 *R v McFarland*, above n 32, at [49], referring to *R v Condon*, above n 3, at [82].

52 *R v McFarland*, above n 32, at [51].

mental impairment that compromised their ability to conduct the defence,[53] or otherwise demonstrated incompetence at self-representation.[54]

*Former counsel may be appointed*

[58] This Court recognised in *R v Lee* that former counsel may be appointed as amicus, while doubting whether it was wise to do so in that case, as counsel's duties to the court might have conflicted with those she still owed to the defendant.[55] In *Solicitor-General v Miss Alice* the Court held that amicus may also be permitted to accept appointment for the defendant so long as no change in function is involved:[56]

> [18] It is common in criminal cases for former counsel for an accused to be appointed as an amicus where the accused chooses to represent himself or herself, a practice approved by this Court in *R v Lee* … There could well be instances where, for example, an accused may wish to re-instruct the former counsel who has been acting as amicus. It would in our view be both wasteful of resources and unfair to an accused to require him or her to instruct totally new counsel if the amicus was prepared to act. The same situation might arise in other situations where the amicus had effectively been taking a partisan role. Where, as here, a change from a role as amicus to one acting for a party involves no change in function, then we cannot see any reason in principle why this should be proscribed.
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> (Footnotes omitted.)

[59] The data do not assist, but counsel appearing before us gave us to understand that the practice of appointing the defendant's former counsel as amicus in a partisan role at trial is not uncommon.[57] This Court has recognised that such appointments are not appropriate where the relationship has broken down or where counsel has an ethical reason to withdraw.[58] In other cases counsel may have withdrawn because he or she was not being paid.[59] Courts are sometimes motivated by efficiency considerations or a desire not to adjourn the trial while new counsel is briefed and

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53 *Hemopo v R* [2016] NZCA 398 is such a case. There the need was met by appointing amicus.

54 Counsel cited *Watene v R* [2014] NZCA 357, where the defendant insisted on pursuing a sovereignty defence that was unavailable in law, and the Canadian case *R v Mastronasrdi* 2015 BCCA 338, in which the defendant insisted on referring to prejudicial information, refused to cross-examine the complainants although their credibility was the trial issue, did not know that items he relied upon had to be put into evidence, and failed to present a coherent closing address.

55 *R v Lee* [2006] 3 NZLR 42 (CA) at [111].

56 *Solicitor-General v Miss Alice* [2007] 1 NZLR 655 (CA).

57 In *R v Tully* HC Christchurch CRI-2014-009-8232, 16 February 2016 at [11], Mander J observed that "it is now common practice in criminal trials for former counsel for a defendant to be appointed as counsel to assist where the defendant will be unrepresented at trial".

58 *Cant v R*, above n 31, at [14].

59 *Mount v R* [2015] NZCA 489 at [46]–[51].

gets to grips with the case.[60] They may think that the defendant is acting strategically, dismissing counsel at the last moment in hope of an adjournment.

*The terms of appointment*

[60] It appears that counsel is typically appointed as amicus but relieved to some extent of the traditional duty to lend neutral assistance to the court itself. Rather, counsel is expected to assist the defendant and authorised to act in a partisan way. By so doing counsel may assist the court, but that is a consequence of the appointment rather than its object.

[61] The important distinction between the objectives of assisting the court and assisting the defendant is not always observed in the appointments. Our attention was drawn to examples in which the brief was both to assist the court in a neutral capacity and to assist the defendant in a partisan way, with no further detail being given about, for example, counsel's duties to advise the defendant freely and follow instructions whether or not helpful to the court.

[62] A self-represented defendant often calls increasingly on appointed counsel's assistance as the trial goes on. Counsel have conducted jury selection and plea negotiations, argued admissibility issues, dealt with challenges to sensitive evidence and advised on lines of cross-examination, and counsel may eventually assume conduct of the defence. The Court found this evolutionary tendency unobjectionable in *McFarland*, as noted above, but we were told that in practice the change in counsel's role may not be made clear to the jury.

[63] Appeals are now brought from time to time on the ground of error by court-appointed counsel. This Court has accepted that a miscarriage may result from something done, or not done, by counsel so appointed.[61]

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60 *Solicitor-General v Miss Alice*, above n 56, at [18].

61 *Robertson v R* [2016] NZCA 99 at [67]. This Court allowed appeals against conviction on this basis in *Wise v R* [2016] NZCA 327.

## Terminology

[64] Having concluded our survey of existing law and practice, we now return to terminology. A distinction should be drawn between the roles of court-appointed counsel. We use the term "amicus curiae" (or its modern equivalent, counsel assisting the court) for counsel appointed by the court to help the court itself. We adopt the apt American term "standby counsel" to describe counsel appointed by the court to assist a self-represented defendant if and to the extent the defendant is willing to accept it, and to assume the conduct of the defence should the defendant decide to abandon self-representation.[62]

## Surveying the options

*The views of the Bar and the Crown*

[65] Mr Horsley reviewed the practice in other jurisdictions and the history of amicus appointments in New Zealand. So far as current practice is concerned, he highlighted a number of problems: counsel's role is unclear and can change during trial without any formal direction, the right to self-represent may be undermined, the defendant and the jury may be confused about counsel's role, and the practice undermines the legal aid regime. Further, a trial is not unfair merely because the defendant, having made an actual or constructive election to self-represent, turns out to be a poor advocate. For these reasons he invited us to discourage actively the routine appointment of standby counsel for self-represented defendants. Only where the defendant, while fit to stand trial, suffers some form of mental impairment should a court intervene by appointing standby counsel, and in that case counsel may advance such defence as he or she thinks best.

[66] Ms Kincade was content to adopt the submissions of other counsel. Mr Eaton QC, for the New Zealand Law Society and the New Zealand Bar Association, argued that it is generally inappropriate to appoint counsel to act in a standby role. The existing practice causes intractable problems: the right to self-represent may be compromised, as may appeal rights, and confusion is inherent when amicus is also expected to serve as standby counsel. The terms of appointment

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62 *Frantz v Hazey* 533 F 3d 724 (9th Cir 2008) at 739–740.

may result in counsel acting without instructions, presenting an inconsistent defence case, feeling restrained in his or her ability to give advice, being at risk of violating legal professional privilege where counsel must report to the judge, and at risk of not getting disclosure and of undermining legal aid. Mr Eaton identified three exceptional circumstances in which a defendant's self-representation undermines his or her fair trial so as to justify appointing standby counsel. They are: where the defendant has mental health problems, where the defendant has demonstrated incompetence at self-representation, and where counsel has been dismissed on the eve of trial but can accept appointment to assist. This last option should be available only where the defendant and counsel retain mutual confidence and counsel is not expected to assist the court too.

[67] Mr Cook, for the New Zealand Criminal Bar Association, also found conflict inherent in the roles of standby counsel and amicus. He submitted, though, that standby counsel appointments should be made whenever necessary to ensure a fair trial. There should be a process for such appointments, involving consultation with the defendant, to engender confidence. The right to self-represent must be qualified to this extent: the defendant should not be permitted to do it so badly as to cause a miscarriage of justice. When that appears likely a court should be prepared to appoint standby counsel who may advance such defence as counsel thinks best. For this last proposition he cited *Indiana v Edwards*, in which a majority in the United States Supreme Court held that the US Constitution permits a state to limit a defendant's right to self-represent by insisting on trial counsel whether the defendant is fit to stand trial but lacks the mental competence to conduct his or her own defence.[63] Because the New Zealand standard for fitness to stand trial is low, there exists a class of persons who can stand trial without being competent to conduct the defence.

[68] Counsel agreed that an appointment as both amicus and standby counsel creates a risk that mistrust will arise as between the defendant and counsel, a result of counsel's obligation to assist the court. The jury may also be left uncertain about counsel's authority. This may benefit the defendant, since amicus may advance the defence from a position of ostensible independence. By way of illustration, we note

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63 *Indiana v Edwards* 544 US 164 (2008).

that Mr Dacre did so in this case (properly so, given the terms of his appointment), telling the jury that he was there not as an advocate but to assist them.[64]

*Practice in other jurisdictions*

[69] Counsel reviewed practice in the England and Wales, Canada, and the USA, jurisdictions which traditionally appointed amicus curiae to assist a self-represented defendant.[65]

[70] In 2001 English courts put an end to the practice of amicus being appointed as an advocate for a self-represented defendant. Amicus, now called an advocate to the court, represents no one, is appointed to give the court such assistance as counsel is able on the relevant law and its application to the facts of the case, and is not normally expected to lead evidence, cross-examine witnesses or investigate the facts.[66] It does not appear that there is a practice of appointing standby counsel. In *R v Holloway* the Court of Appeal held that the trial Judge lacked power to force representation on a defendant who had a long history of mental health problems but had been certified fit to plead.[67] Nor is incompetent self-representation in and of itself a ground of appeal:[68]

> A defendant who is fit to stand trial cannot dismiss his legal representatives, insist on representing himself and then come to this Court claiming that he should not have been allowed to represent himself.

[71] Canadian courts traditionally recognised that amicus might be appointed to act as standby counsel for a defendant who refuses to participate.[69] But in *Ontario v Criminal Lawyers' Association of Ontario*, the Supreme Court curtailed that practice.[70] The appeal involved three cases in which trial judges had appointed amicus to assist defendants who had discharged counsel. The narrow question was whether the trial court had jurisdiction to determine counsel's remuneration, setting it at rates exceeding those legal aid would pay. The Supreme Court held that amicus

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64 See [30] above.
65 Counsel did not examine Australian practice, considering it too complex for ready comparison.
66 The Law Society Gazette "Advocate to the Court", 1 February 2002.
67 *R v Holloway (Adrian)* [2016] EWCA Crim 2175, [2017] 1 WLR 1660.
68 At [15]. The Court later, for completeness, considered whether a miscarriage arose in the circumstances of the case: at [39]–[42]. Compare *Cant v R*, above n 31, at [28] and [45]–[46].
69 *R v Le Page* (2006) 214 CCC (3d) 105 (ONCA).
70 *Ontario v Criminal Lawyers' Association of Ontario* 2013 SCC 43, [2013] 3 SCR 3.

and defence counsel play very different roles and the two should not be combined. Appointments to assist the defence may conflict with the accused's right to self-representation, put counsel under conflicting obligations to the defendant and the court, affect the privilege that would ordinarily attach to lawyer-defendant communications, and undermine the legal aid scheme.[71] The Court held that amicus cannot do more to assist a defendant than the court itself can do.[72] The judgment accordingly appears to leave no or little role for standby counsel.

[72] The *Ontario* judgment has been at once commended for its doctrinal coherence and lamented for its failure to address the problem that led trial judges to appoint standby counsel in the first place; namely, the risk that a defendant will conduct the defence so incompetently as to cause what Canadian law recognises as a miscarriage of justice.[73] The Supreme Court evidently did not hear argument directed to the latter problem. Some lower courts have since held that amicus may be appointed to act "for the benefit of" the defendant where the absence of counsel would otherwise result in a miscarriage of justice.[74]

[73] US courts have developed the concept of standby counsel to ensure a fair trial for self-represented defendants. The Federal Court of Appeals for the Ninth Circuit explained in *Frantz v Hazey* that standby counsel have two purposes:[75]

> One is to "stand by" and be ready to proceed if the defendant should choose to cease self-representation, or if there is any other reason why self-representation cannot continue. The second purpose of a standby counsel is to help a self-representing defendant if, and to the extent, assistance is requested.

The right to represent oneself is not violated when standby counsel is appointed to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or assist the defendant in overcoming routine obstacles.[76] It is essential, though, that the defendant's "actual control over the case he chooses to present to the jury" be

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71 At [51]–[53] per McLachlin CJ, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

72 At [54] per McLachlin CJ, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

73 *R v Jaser*, above n 42, at [37]; and *R v Mastronardi*, above n 54, at [44]–[55].

74 *R v Mastronardi*, above n 54, at [23]. See also *R v Jaser*, above n 42, at [38]–[39]; *R v Sutherland* [2016] BCPC 45 at [5]; and *R v Panagos* [2014] ONSC 4580 at [23]–[24].

75 *Frantz v Hazey*, above n 62, at 753 per Gould, O'Scannlain, Rymer, Silverman, Callahan and Ikuta JJ.

76 *McKaskle v Wiggins*, above n 21, at 176–177 per Burger CJ, Powell, Rehnquist, Stevens and O'Connor JJ.

preserved, meaning that standby counsel cannot substantially interfere in significant tactical decisions, or control the questioning of witnesses, or speak instead of the defendant on any matter of importance.[77] Standby counsel's participation also should not be allowed to destroy the jury's perception that the defendant is self-represented.[78]

[74] US courts may also impose defence counsel upon a defendant who is fit to stand trial but mentally incapable of conducting his or her own case, and may confer control of the defence case upon counsel. The defendant in *Indiana v Edwards* faced charges of violence and wanted to plead self-defence.[79] He was schizophrenic and it was apparent that he would defend himself incompetently. The state court denied him self-representation and appointed defence counsel, who opted to advance lack of intent. The Supreme Court recognised that there exists a class of defendants who are fit to instruct counsel and stand trial but by reason of mental illness incompetent to conduct the defence themselves. A majority held that self-representation would not affirm the dignity of such a defendant but rather would undercut the most basic objective of the criminal law, a fair trial.[80] In vigorous dissent, Justice Scalia agreed that the right to self-representation protects individual dignity, but held that the dignity in question is that of individual choice, which should be respected even if the defendant makes a fool of himself.[81]

**Trial courts' power to appoint standby counsel**

*The power exists*

[75] We are satisfied that New Zealand trial courts possess the power to appoint standby counsel in criminal proceedings when they think it necessary to ensure a fair trial.[82] No counsel, including Mr Horsley for the Crown, suggested otherwise. The

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77 At 178 per Burger CJ, Powell, Rehnquist, Stevens and O'Connor JJ.

78 At 177–179 per Burger CJ, Powell, Rehnquist, Stevens and O'Connor JJ. The Court divided on the facts, the minority concluding that standby counsel intervened excessively, disrupting the defence and reducing the defendant's credibility in the eyes of the jury: at 195–196 per White, Brennan and Marshall JJ.

79 *Indiana v Edwards*, above n 63.

80 At 176–177 per Roberts CJ, Stevens, Kennedy, Souter, Ginsburg and Breyer JJ.

81 At 186–188 per Scalia and Thomas JJ (dissenting).

82 For the avoidance of doubt, this rationale is particular to criminal proceedings. We note the judgment in *Erwood v Holmes (Amicus Curiae)* [2017] NZHC 1278, [2017] NZAR 971 but express no view about courts' power to appoint standby counsel in the civil jurisdiction.

power is grounded in a trial court's public duty to ensure that criminal trials are fair and its implied power to control its own processes to that end.[83] It exists from necessity, since a court ordinarily cannot refuse to hold a trial where a defendant's incompetence in advocacy brings the rights to fair trial and to self-representation into conflict.[84] It is consistent with what we have said at [47] above about appellate courts' approach to fair trial rights.

[76] We observe that the role of standby counsel is compatible with statutory processes under which courts must appoint counsel to cross-examine certain witnesses whom the defendant is prohibited from questioning,[85] or may order that witnesses give evidence in such a way that the defendant cannot see or hear them.[86]

[77] We agree with counsel that a defendant for whom such appointment is made is likely to exhibit mental illness or disability, but we think it unwise to make that a requirement of appointment. Incompetence in advocacy may have a number of causes. We also agree with Mr Eaton, as we explain below, that the defendant's actual or anticipated misconduct may supply justification for appointment.

[78] The decision about whether, and who, to appoint is entirely in the court's discretion, although it is prudent to consult.[87] The defendant cannot veto an appointment or dismiss standby counsel. Nor, having elected self-representation, can the defendant insist on an appointment or exercise choice of counsel.

*Difficulties addressed by better role definition*

[79] In our opinion, the problems identified by counsel (at [65]–[68] above) can be managed, if not always eliminated, by separating the functions of amicus curiae and standby counsel and better defining that of standby counsel.

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83 *Ontario v Criminal Lawyers' Association of Ontario*, above n 70, at [111]–[112]; *Millar v Dickson* [2001] UKPC 24, [2002] 1 WLR 1615 at [52] per Lord Hope; and *Hinds v Attorney-General of Barbados* [2001] UKPC 56, [2002] 1 AC 854 at [17]–[18]. The jurisdiction is implied rather than inherent, and it is possessed by all courts: see Rosara Joseph "Inherent Jurisdiction and Inherent Powers in New Zealand" (2005) 11 Cant L Rev 220.

84 *Ipo v R* [2012] NZCA 178 at [52] and [58]. Ultimately a court might stay a prosecution where it is satisfied that a fair trial cannot be had: *McKay v R*, above n 26, at [69]; and *R v Duval* [1995] 3 NZLR 202 (HC) at 205.

85 Evidence Act, s 95(5)(b).

86 Section 105.

87 *R v Hill*, above n 44, at [56]: "any such appointment is entirely at the discretion of the Court".

[80] We agree with counsel that courts must distinguish between appointments as amicus curiae and as standby counsel if they are to avoid potentially serious conflicts of duty for counsel and eliminate confusion about confidentiality and privilege of communications.[88] Amicus briefs should be confined to the traditional function of assisting the court, usually on points of law, when it appears that the parties may not do so.[89] By way of illustration, we note that in *Cumming*, which was ultimately decided by finding the appellant unfit to stand trial, the Supreme Court appointed amicus because the appellant and the Crown agreed that he was fit and counsel was needed to argue the contrary position.[90] In a trial setting amicus should not ordinarily need to address the jury or adduce evidence.

[81] By contrast, a court appoints standby counsel to assist a self-represented defendant to the extent he or she is willing to accept it, and to stand by to assume conduct of the defence if the defendant so decides. The role is that of an advocate for the defence and counsel accordingly takes instructions from the defendant. Counsel's role should be recorded in a minute and explained to the defendant and the jury. The term amicus curiae should no longer be used to describe counsel appointed to assist the defendant in a standby role.

[82] A standby counsel brief is necessarily flexible, depending on the circumstances of the case and the defendant, but general guidance may be given:

(a) Counsel should advise the defendant on the relevant law, trial process and courtroom etiquette.

(b) Counsel should assist the defendant, especially one who is in custody, with resources and access to witnesses.

(c) Counsel should assist as and when the defendant requests by conducting any trial processes from plea to verdict.[91]

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88 *R v McFarland*, above n 32, at [52]–[59].

89 We do not need to catalogue all the tasks that may be assigned to amicus. For a convenient list, see *Erwood v Holmes (Amicus Curiae)*, above n 82, at [39].

90 *Cumming v R* [2008] NZSC 39, [2010] 2 NZLR 433 at [20].

91 *R v McFarland*, above n 32, at [59]–[60].

(d) Counsel should be prepared to act as defence counsel, assuming the conduct of the defence in the ordinary way, if the defendant so decides.

(e) So long as the defendant remains self-represented the appearance of self-representation should be maintained for the jury.

(f) The role of standby counsel permits co-representation but the court may insist in the interests of fairness and economy that either the defendant or counsel, but not both, perform any specific task, such as questioning a given witness or presenting an address.[92]

[83] The role of standby counsel undoubtedly can be difficult, but the duties owed are not in principle different from those of defence counsel, who must also elicit decisions and follow instructions, with one exception: counsel is accountable to the court for expenditure. It is not inconsistent with the fair trial right to require that costs be reasonable and expenditure authorised. In this case, for example, Mr Dacre sought Lang J's approval, in general terms, of the work he proposed to undertake.[93]

[84] Once the role is distinguished from that of amicus most of the other difficulties identified in argument should fall away. For example, standby counsel should not feel constrained by duty to the court when giving advice or presenting a defence, except to the extent that he or she would be constrained by ethical considerations or duty to the court if acting as defence counsel. Privilege should attach to communications between counsel and defendant when and to the extent that it would do had counsel been appointed by the defendant, subject to counsel's obligation to make such disclosure as needed to seek the Court's approval for expenditure. The prosecution's disclosure should be made available to counsel. There is no reason why an appeal cannot be brought on the ground of counsel error, although a question may arise whether counsel or the self-represented defendant was responsible for any failings in the defence case.

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92 *R v Wati* [1993] 3 NZLR 475 (HC) at 480.

93 See [12]–[13] above.

*Appointments ought to be exceptional*

[85] We expect that appointments should be exceptional. There are several reasons why this ought to be so:

(a) The right to self-represent must be respected, meaning that defendants must be given leeway to exercise it badly.[94]

(b) Standby counsel does not relieve the trial court of its own obligations to a self-represented defendant, though counsel may be relied upon to help the defendant with legal advice, the demands of protocol and access to resources.

(c) In many cases the defence can be identified and fairly put with such assistance as the court (and the prosecutor) may properly give.[95]

(d) The question whether the trial was fair is ultimately answered by an appellate court under its processes. As we have explained at [48] above, the appellate standard in New Zealand takes account of an informed decision to self-represent.

(e) Routine appointments tend to undermine the legal aid regime, for Parliament has chosen not to insist that all defendants be represented or to provide counsel for them. In *Hinds v Attorney-General of Barbados* this was characterised as a prerogative of democratic government.[96] It would also be inappropriate to appoint counsel where the defendant can pay for legal services, or where preferred counsel wants to be paid at more than legal aid rates.

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94 See [55] above.

95 The prosecutor must protect the right to a fair trial as well, including by complying with disclosure obligations and assisting the trial Judge on their summing up. See Crown Law *Solicitor-General's Prosecution Guidelines* (1 July 2013) at [16] and [19].

96 *Hinds v Attorney-General of Barbados*, above n 83, at [16]. See also *R v Condon*, above n 3, at [76].

*Constructive waiver of counsel*

[86] As the Supreme Court recognised in *Condon*, the defendant must sometimes take responsibility for ending up unrepresented.[97] The issue does not arise in this case, but we record for completeness that the jurisdiction to appoint standby counsel extends to such cases.

[87] Counsel appearing before us acknowledged that occasionally a defendant dismisses counsel at a very late stage, acting not from any genuine loss of confidence but in the hope that dismissal will secure an adjournment while new counsel is briefed. To dismiss counsel for that purpose is a species of obstruction which a trial court need not abide, though it must be both careful to balance the various interests, public and private, affected by adjournment and conscious of the limits to its knowledge about dealings between client and counsel.[98]

[88] If satisfied that the defendant has a genuine difficulty with counsel and wants legal representation, the court will ordinarily find it necessary to adjourn so that new counsel can be briefed. The court may proceed even in that case, but if the charge is serious and the circumstances are not exceptional, the defendant will establish on appeal that the trial was presumptively unfair, with the result that the conviction will be quashed unless the Crown can rebut that presumption.[99]

[89] If satisfied that the defendant is claiming problems with counsel as a pretext for adjournment, the court may proceed, reasoning that the defendant has constructively waived the right to counsel. Standby counsel may be appointed if thought appropriate. Such a defendant may have dismissed, or lost to withdrawal, more than one counsel, as happened in *Cant* and also in *Ipo v R*.[100] In New Zealand procedure, protection against error is afforded the defendant by this Court's

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97 *R v Condon*, above n 3, at [80].
98 At [79].
99 At [79].
100 *Cant v R*, above n 31; and *Ipo v R*, above n 84.

willingness on appeal to hear evidence about the trial and what passed between the defendant and former counsel.[101]

*Former counsel should not ordinarily be appointed standby counsel, or amicus*

[90] As noted at [59] above, it appears that it is not uncommon for trial courts to appoint former counsel to act in a standby role. Counsel appearing before us deprecated this practice. Mr Eaton submitted that it causes difficulties that outweigh any benefits, Mr Cook that it is unlikely ever to be appropriate, and Mr Horsley that it is wholly inappropriate. The difficulties identified were that:

(a) Such appointments usually follow a loss of confidence between counsel and defendant.

(b) The court likely does not know why counsel ceased to act, and without that knowledge it should not lightly conclude that the trial process is being gamed and that counsel and the defendant can work together if forced to carry on. Counsel and the defendant should not be forced to explain why confidence has been lost.

(c) The court must be mindful of the professional rules governing counsel's conduct. Counsel must complete a retainer unless discharged by the client or unless counsel terminates it for good cause and on reasonable notice. If counsel seeks to withdraw the court should usually assume without further inquiry that good cause exists. Good cause includes instructions that breach a professional obligation, material deception of counsel by the client, and the client's inability to pay counsel's reasonable fee.[102]

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101 Counsel drew our attention to Anne Bowen Poulin "The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System" (2000) 75 NYU L Rev 676, in which the risk of trial court error is forcefully emphasised, but it appears that the legal standard for justifying a change of counsel and for showing that the right to counsel was not waived is less flexible in US law than it is in New Zealand: see at 686–691.

102 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 4.2. 4.2.1, 4.2.2, 4.2.3 and 4.2.4.

(d) Privilege of past communications may be breached if counsel is then appointed as amicus, so acquiring a duty to assist the court.

(e) Pragmatism or efficiency should not be permitted to prevail over fair trial rights.

[91] In further submissions advanced in response to questions from the Court, Mr Cook accepted that where counsel seeks to withdraw at a late stage the court may inquire as to the reasons. He invited us to follow the Canadian Supreme Court in *R v Cunningham*:[103]

> [47] If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, then the court should allow the withdrawal. In this situation, there is no need for the court to enquire into counsel's reasons for seeking to withdraw or require counsel to continue to act.
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> [48] Assuming that timing is an issue, the court is entitled to enquire further. Counsel may reveal that he or she seeks to withdraw for ethical reasons, non-payment of fees, or another specific reason (e.g. workload of counsel) if solicitor-client privilege is not engaged. Counsel seeking to withdraw for ethical reasons means that an issue has arisen in the solicitor-client relationship where it is now impossible for counsel to continue in good conscience to represent the accused. Counsel may cite "ethical reasons" as the reason for withdrawal if, for example, the accused is requesting that counsel act in violation of his or her professional obligations … If the real reason for withdrawal is non-payment of legal fees, then counsel cannot represent to the court that he or she seeks to withdraw for "ethical reasons". However, in either the case of ethical reasons or non-payment of fees, the court must accept counsel's answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege.

[92] The views of the interveners must be given weight. We agree that former counsel should not be appointed as amicus where there is an actual or reasonably perceived conflict of duty. Such conflict will arise where counsel may be put in a position where duty to the court could require disclosure of privileged information. Rarely if ever should a court find it necessary to appoint former counsel given the limited and traditional role that we envisage for amicus.

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[103] *R v Cunningham* [2010] SCC 10, [2010] 1 SCR 331.

[93] We also accept that courts should exercise caution before appointing former counsel in a standby capacity. We are not prepared to rule the practice out — as noted at [58] above, this Court has previously recognised that such an appointment ought not cause a conflict of duty — but we accept that it carries risk. The court must be satisfied that counsel it appoints in a standby capacity can discharge the responsibility. For former counsel, that decision depends in part on why counsel withdrew or was dismissed. There is also no good reason to resist withdrawal so long as it will not disrupt the court's business.

[94] Where withdrawal may necessitate an adjournment, the court may properly seek justification for withdrawal, though it must be appropriately circumspect, and evaluate the reasons given.[104] We accept Mr Cook's submission that where counsel cites ethical reasons, so signifying that he or she cannot in good conscience continue to represent the defendant, the court should not ordinarily inquire further, but should give leave to withdraw.

[95] The decision is more complex where the defendant dismisses counsel, alleging that confidence has been lost. The court may inquire further, without requiring disclosure of privileged information.[105] If satisfied that the relationship has broken down, the court should accept that counsel cannot discharge the responsibilities of standby counsel. If the court should find that the dismissal is a pretext for adjournment it may decide to press on, as noted at [59] above. In that case the defendant may choose to retain existing counsel, but if he or she elects to proceed unrepresented the court should hesitate before appointing former counsel in a standby role, the success of which rests on the defendant's co-operation.

[96] It is sometimes apparent before trial that a defendant will likely behave disruptively. Standby counsel can be appointed pre-trial, as happened in *R v Tully*, against the possibility that at trial the defendant will dismiss his or her own counsel.[106] This may be a sensible precaution in a long or multi-defendant trial.

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104 At [48].
105 At [48].
106 See *R v Tully*, above n 57, at [11]–[13].

**May a court assign control of the defence to court-appointed defence counsel?**

[97] When standby counsel is appointed the defendant retains control of the defence, including such essential decisions as whether to plead, whether to give evidence, and whether to advance a positive defence, and counsel's role is to offer such assistance as the defendant requires. This preserves the defendant's right of self-representation and provides counsel with a familiar standard — the defendant's instructions — to guide their conduct.

[98] As noted at [67] above, Mr Cook invited us to follow *Indiana v Edwards* by holding that defence counsel may be appointed and authorised to advance such defence as counsel thinks best.[107] When this is done the defendant is silenced, unless called as a witness. Mr Cook argued that the right to a fair trial ultimately trumps that of self-representation because it is fundamental, not only to the defendant but also to the community and to the moral authority of the court.[108] He drew attention to statutory incursions upon self-representation and emphasised a need for such appointments, observing that under the current New Zealand standard a competent defendant need only have a basic capacity to participate by communicating the defence and questioning witnesses and need not be competent to conduct the trial in his or her best interests.[109] Mr Horsley agreed that there exists a class of defendants who are fit to stand trial but unable by reason of some mental impairment to represent themselves competently, and Mr Eaton recognised that there are also defendants who, while not mentally impaired, have demonstrated their incompetence.

[99] We recognise that there exists such a class of defendants, and so long as they are required to stand trial provision must be made for them.[110] That was recognised in *Cumming*, in which this Court suggested that a defendant who is incapable of self-representation might be denied that right if that were the only way to secure a

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107 *Indiana v Edwards*, above n 63.

108 Citing the judgment of the Constitutional Court of South Africa in *The State v Mamabolo* (2001) (3) SA 409 (ZACC).

109 *R v Cumming*, above n 22, at [50].

110 For purposes of this judgment we take as given the test set by the courts, with reference to longstanding authority, under s 14 of the Criminal Procedure (Mentally Impaired Persons) Act 2003. See *R v Power* CA187/96, 22 October 1996; and *Solicitor-General v Dougherty* [2012] NZCA 405, [2012] 3 NZLR 586 at [40].

fair trial.[111] In *McKay v R* the Court also held that in an extreme case a trial judge has power to appoint counsel "to conduct the defence", citing *Cumming*.[112]

[100] However, the Court also held in *Cumming* that such appointment could not be entertained without first considering alternatives, such as the appointment of standby counsel.[113] In practice trial courts usually manage to deliver fair trials for self-represented defendants. That being so, it is not yet evident that there exists a real need for the extraordinary role envisaged in *Indiana v Edwards*.

[101] This is not to preclude further movement, where necessity compels it, along what is sensibly seen as a continuum of intervention. It is possible to think of options other than that of appointing defence counsel with control of the defence. Take for example the possibility of appointing defence counsel and denying the defendant the ability to co-represent. This might prove a justifiable limitation upon the right to self-represent, since the court would be compelling the defendant to exercise one protected fair trial right — the right to counsel — with the aim of making sufficient use of the others to avoid what would otherwise be an unfair trial and the defendant would retain the power to decide on the defence. The defendant would lose the right to plead his or her own case to the trier of fact, suffering a loss of autonomy to that extent. Appointed counsel could be expected competently to advance the defendant's chosen defence so far as it is available in law and open on the facts and put the Crown to proof to the extent that the defendant does not concede its case.

[102] Because it removes the defendant's control of his or her defence, an appointment of the kind approved in *Indiana v Edwards* would require close analysis of rights jurisprudence and a range of policy considerations, and that in turn would necessitate further assistance from the intervenors and the Crown. The inquiry would extend to the test of fitness to stand trial, because the leading authority, *Solicitor-General v Dougherty*, confirmed that the test does not extend to decisional competence — the ability rationally to assess and choose the best defence — and attributed this to the value the law places placed on autonomy, citing the passage

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111 *R v Cumming*, above n 22, at [50].
112 *McKay v R*, above n 26, at [69].
113 *R v Cumming*, above n 22, at [50].

from *Cumming* that we have set out at [44] above.[114] For these reasons, and because this case does not require that we go so far — as explained below, Mr Fahey co-operated with counsel and did not refuse to allow him to advance the best defence available — we think the decision is best left for another day.

[103] However, some general observations about such appointment may be made now, to guide counsel should the issue need to be revisited. We accept that, the court having appointed defence counsel, there may remain cases in which counsel's instructions create a risk of substantive unfairness, as where a delusional defendant refuses for no rational reason to allow counsel to advance a viable defence, and this might supply justification for such an appointment. We observe that by authorising counsel to advance such defence as he or she thinks fit a court might deny the defendant the opportunity to make decisions about a number of protected fair trial rights, circumscribing autonomy in a way that the appointment of defence counsel alone does not. We question whether full control could be vested in counsel, since the defendant could not be forced into the witness box or easily dissuaded from speaking his or her mind there. Finally, we note that the facts of *Fawcett v R*, the judgment in which is being delivered with this one, demonstrate that a court making such appointment would be expecting much of counsel.[115] In that case the defendant, a man with some mental disabilities, represented himself but standby counsel was permitted to act in what he saw as the defendant's best interests. A conflict resulted between the defendant's chosen defence and that advanced by counsel. On appeal we were satisfied that the defendant's defence was viable, with the result that the appeal had to be allowed.

[104] For these reasons, we decline Mr Cook's invitation to follow *Indiana v Edwards* at this time. The issue may be revisited if the need arises.

**Summary**

[105] We summarise our principal conclusions:

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114 See *Solicitor-General v Dougherty*, above n 110, at [51]–[55].
115 *Fawcett v R* [2017] NZCA 597.

(a) Trial courts possess an implied power to appoint standby counsel for a self-represented defendant where necessary to ensure a fair trial. The power is discretionary.[116]

(b) The roles of amicus curiae and standby counsel must be distinguished, and that of standby counsel adequately defined, to avoid conflicts of duty and risk of confusion at trial. Amicus is appointed to assist the court itself, usually on questions of law, when it appears the parties may not do so. Standby counsel is appointed to assist a self-represented defendant to the extent he or she is willing to accept help, and only as an incident of appointment does counsel assist the court itself.

(c) We expect that standby counsel appointments should be exceptional.[117] A defendant's decision to self-represent must be respected and in ordinary cases a fair trial should be possible without standby counsel.

(d) The role of standby counsel is necessarily flexible and case-dependent, and it may evolve during the trial. We have provided some general guidance.[118] Counsel's role should be recorded and clearly explained to the defendant and the jury.

(e) Although appointed by the court, standby counsel takes instructions from the defendant.[119] The duties that counsel owes the court do not differ in principle from those owed by defence counsel, except that standby counsel must obtain the court's approval for costs and expenses.[120]

(f) The power to appoint standby counsel extends to cases in which the defendant dismisses his or her own counsel to secure an adjournment

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116 See [75] and [78] above.
117 See [85] above.
118 See [82] above.
119 See [81] above.
120 See [83]–[84] above.

or is thought likely to cause disruption by dismissing counsel at trial.[121] Care should be taken to balance the various interests affected when deciding whether to adjourn, so the defendant may brief new counsel of his or her own, or to press on with or without standby counsel.[122]

(g) Rarely if ever should a defendant's former counsel be appointed amicus.

(h) Former counsel should not normally be appointed standby counsel either.[123] If withdrawal or dismissal as defence counsel disrupts the court's business, the court may inquire about the reasons for withdrawal, without requiring disclosure of privileged information. If counsel cites ethical reasons the court should not inquire further. Former counsel should not be appointed in a standby role if the court accepts that counsel's relationship with the defendant has broken down. Only if satisfied that there is no conflict of duty and counsel can satisfactorily discharge the responsibilities of standby counsel should the court contemplate appointing former counsel.

**Was Mr Fahey denied the right to represent himself?**

[106] We now revert to the question of whether Mr Dacre's appointment denied Mr Fahey his right to waive counsel and represent himself. We are satisfied, for reasons that may be stated shortly, that it did not have that effect:

(a) Mr Dacre served as standby counsel, and we have explained that the role is compatible with self-representation.

(b) Mr Dacre questioned witnesses, advanced argument and delivered addresses, but he did all of this with Mr Fahey's approval.

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121 See [86] above.
122 See [87]–[88] above.
123 See [93]–[94] above.

(c) The record shows that Mr Fahey understood that he was in charge of his defence and free to conduct it. He pursued his theory of the case in his questions of witnesses, for example.

(d) Mr Fahey did not take issue with Mr Dacre's prepared closing address when it was discussed in chambers, and he chose not to add anything of his own.

**Should the Court have inquired into Mr Fahey's capacity to represent himself?**

[107] Ms Kincade's argument that although Mr Fahey was fit to stand trial the Court should have inquired into his capacity to conduct his defence rests on the assumption that the Court might have done something about it if satisfied that he would not represent himself competently. This is difficult to reconcile with his leading ground of appeal, that he did not want the help of counsel even on a standby basis. In any event we have concluded, for reasons we next go on to summarise, that the necessity did not arise, for a fair trial was delivered with the assistance of the Court and standby counsel.

**Did counsel's intervention compromise Mr Fahey's defence?**

[108] We have noted that while he served as standby counsel Mr Dacre was also appointed amicus. In that capacity he advanced a defence, lack of murderous intent, that differed from Mr Fahey's chosen defence, causation.

[109] It follows from what we have said that counsel should not have been appointed in a dual capacity. However, we are not persuaded that Mr Fahey's defence was compromised. Mr Dacre diligently advanced Mr Fahey's case during the trial, putting the Crown to proof on all issues including causation. His closing address might suggest that he put lack of intent without Mr Fahey's consent, because he explained that he spoke as amicus and made it clear that Mr Fahey was advancing a different defence. However, that would be misleading. In separating his address from Mr Fahey's defence, counsel was properly maintaining the appearance of self-representation. It appears from the chambers discussion discussed at [27] above that Mr Fahey did not take issue with counsel's decision to advance lack of intent

and leave it to Mr Fahey to address causation. The two defences were not inconsistent. Finally, Mr Fahey's defence was in fact left to the jury, the Judge summing up on it.

[110] The ultimate question is whether there was a miscarriage of justice. We are satisfied that there was not. It may be that Mr Dacre's approach detracted somewhat from Mr Fahey's defence. The jury may have been left with the impression that counsel did not think much of it. But the defence was hopeless; if medical intervention contributed, it is no defence in law and anyway it came too late, for Mr Harris was already dead or dying.[124]

**Should Mr Fahey have been permitted to lead propensity evidence about Mr Harris?**

[111] Ms Kincade submitted that the jury were misled about Mr Harris's temper, for the Judge had ruled inadmissible the propensity evidence that the defence wanted to call about Mr Harris and the prosecutor closed by suggesting he was not an aggressive person. Counsel submitted that the prosecutor thereby misled the jury, but there was evidence to support what was said. The argument is we think better interpreted as a challenge to the Judge's ruling on admissibility, advanced in light of the Crown's closing address.

[112] The defence did not need leave to adduce propensity evidence about Mr Harris, but it must show that if accepted the evidence was relevant; that is, probative of something of consequence to the determination of the proceeding.[125] As noted at [26] above, the Judge found the evidence irrelevant because it concerned Mr Harris's relationship with other persons who were members of his extended family.

[113] We accept that the evidence is consistent with a more general propensity for violence, and as such it may have been admissible. But we are not persuaded that Lang J was wrong to find it irrelevant here. The parties agreed that the two men argued at Myers Park and Crown counsel acknowledged that Mr Harris had

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124 Crimes Act 1961, s 166.
125 Evidence Act, s 7.

something of a propensity to argue when he ought to have left well enough alone. Evidence of a propensity for violence would have been relevant had self-defence been in issue, or had there been a narrative suggesting that because Mr Harris was the aggressor Mr Fahey may have lacked murderous intent. There was and still is nothing of the sort. The Crown case, based on the CCTV footage and eyewitness accounts, was that Mr Fahey put down his backpack, took out the knife and attacked without warning while Mr Harris was carrying the pizza box. Mr Fahey put the Crown to proof, but he did not offer any alternative account. We observe that he had already decided not to give evidence when the Judge made his ruling. To this day he has not put self-defence in issue or offered any narrative in which Mr Harris's propensity for violence might found a defence.

**Result**

[114] The application for an extension of time to bring the appeal is granted. The appeal is dismissed.

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