

# Capacity to plead insanity: a question of fitness to stand trial?



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# Unfit to stand trial 2004-2014

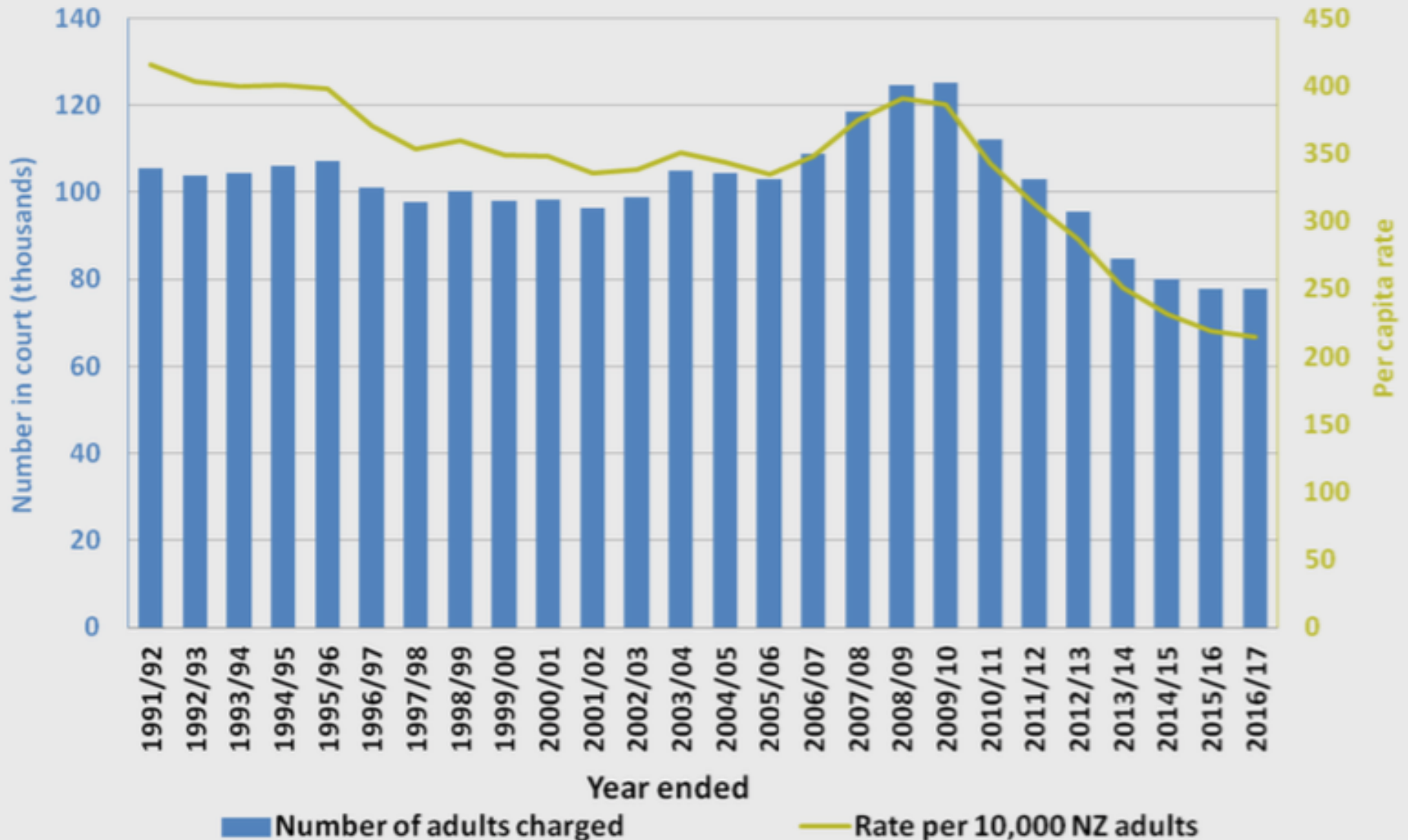


- 2004 7
- 2005 33
- 2006 36
- 2007 54
- 2008 67
- 2009 58
- 2010 59
- 2011 102
- 2012 96
- 2013 101

- **Source: Ministry of Justice Conviction and Sentencing Statistics 2013**

# Criminal charges

## Number and rate of adults charged, 1991/92-2016/17



# R v Filo 2016: NZHC 2730



- Tevita Filo killed Joanne Pert as she jogged along Shore Road, Remuera, in January 2016
- Stranger, unprovoked attack, single stab to throat
- Filo handed himself in to police 2 hours later, after committing 2 further sexual assaults
- Also handed police the knife used to kill Pert, and admitted what he had done



# Media frenzy



## THE REMUERA KILLING

# Rich-lister dad to slain mum's kids

» The father of Joanne Per's two young children is from one of New Zealand's wealthiest families

» As family rally around Molly and Harry, police probe private CCTV footage to piece together Joanne's last moments

Full story p6-7



# The accused

- Tevita Mafi Filo
- 25 years old
- Single
- Tongan



# R v Filo 2016: NZHC 2730



- The issue at trial was signaled by Justice Lang as follows:
  - “... it is distinctly possible that the only issue to be determined in this case will be whether Mr Filo was insane in the terms of s 23 of the Crimes Act 1961 when he committed the acts giving rise to the charges.”
- But was he fit to stand trial?

# CP(MIP) Act 2003 test



- Means a defendant who is unable, due to **mental impairment**, to **conduct a defence** or to **instruct counsel to do so**
- Included capacities...
  - To **plead**
  - To adequately **understand** the nature or purpose or possible consequences of the proceedings
  - To **communicate** adequately with counsel for the purpose of conducting a defence



# R v Filo 2016: NZHC 2730



- **Mental impairment**
  - 3 psychiatrists
  - All agreed that he had complex physical and mental health concerns:
    - ✦ End-stage renal failure, dialysis 3x per week
    - ✦ Substance abuse
    - ✦ Schizophrenia, previously undiagnosed
      - Thought disordered
      - Delusional belief system
      - Hallucinated

# R v Filo 2016: NZHC 2730



- **The delusional belief system**

- Believes he is God or King from another world he describes as the real world
- Believes he is currently living an artificial or “virtual” life in this world
- Everybody he interacts with in this world is also living in an artificial world (including his victim, his lawyer, the police and the judge)
- Machines or computer-aided programmes from the real world govern and control the actions of persons living in the artificial world
- Believes he was sent to the artificial world to suffer
- The computers controlling the artificial world have also required him to accomplish a number of tasks or missions in that world.
- He will only be permitted to return to the real world when he has accomplished those tasks
- Referential delusions: receiving messages from the television and radio
- Preoccupied by delusions

# R v Filo 2016: NZHC 2730



- **Hallucinations**

- Also hears voices that constantly command him to do things
- Voices provide a running commentary of his actions
- Believes the voices control his actions and those of the other “players” in the artificial world
- Visual hallucinations

# R v Filo 2016: NZHC 2730



- **Following arrest**
  - Admitted to Mason Clinic, acutely psychotic
  - Made serious suicide attempt
  - Treated with a range of antipsychotic medication
  - Delusional beliefs remained firmly in place
  - Fitness hearing September 2016 (8 months after the index offences)

# R v Filo 2016: NZHC 2730



- At the s14 fitness hearing ...
- Mental impairment
  - All psychiatrists agreed he suffered from schizophrenia and Justice Lang had “*no doubt that he falls within the description of being mentally impaired for the purposes of s 14 of the Act*”
- Does Filo’s mental impairment render him unfit to stand trial?
  - Psychiatrists disagreed: unfit x 2, fit x 1

# R v Filo 2016: NZHC 2730



- Does Filo's mental impairment render him unfit to stand trial? Justice Lang:
  - Must understand
    - ✦ The essence of the charges
    - ✦ The available plea options
    - ✦ The consequences of those plea options
  - Must be able to instruct counsel
    - ✦ Before the trial
    - ✦ During the trial
  - Must be able to follow the proceeding to the extent necessary
  - Must be able to make important decisions not able to be made by counsel alone
  - If necessary give evidence

# R v Filo 2016: NZHC 2730



- Indecent assaults not considered in relation to the fitness issue
  - Possibility of fitness to one charge and unfit for another?

# The nature of the charge



- Understands the charge - Murder of Ms Pert
  - Yes x 3



# The plea



- Understands the pleas (guilty, not guilty, NGRI)?
  - Yes x 3
- Understands the consequences of those pleas?
  - Yes x 3
- Preferred plea / defence: NGRI
  - Why? Because he wanted to return to Mason Clinic
  - Does not believe he was insane
  - Does not believe he has a mental illness
- “I do not consider great weight can be placed on that fact [that he does not believe he was insane]. Reasoning driven by a desire to achieve a particular outcome is not particularly unusual in the criminal justice process. A defendant who decides to plead guilty to a charge may do so to avoid the risk and stress of enduring a trial and being found guilty of a more serious offence. He may therefore plead guilty plea to a lesser charge even though there may be a viable defence to that charge.”
- Found: Mental impairment “has not prevented him from understanding the nature and consequences of the pleas that are available to him”.

# Ability to instruct counsel



- Filo can give a clear account of what occurred
  - Yes x 3
- Filo has a clear understanding of the evidence against him
  - Yes x 3
- Trial unlikely to be complicated as facts are not in dispute, so Filo unlikely to need to provide ongoing instructions during the trial
- Filo consistently unable to describe his motivation and his intention:
  - Not surprising given his illness
  - Not a problem to deduce this from circumstantial evidence
- Found: Mental impairment does not prevent Filo from instructing his counsel regarding the manner in which he wishes to advance his defence, or from allowing his counsel to run that defence.

# Understanding of the trial process



- Good basic understanding of the roles of the various officials in a court of law
- However he believes the Judge, lawyers and others in court are characters in the virtual world, programmed by computer and controlled by “the real characters from the real world”.
- Filo “not too concerned about this because the voices had recently told him not to think about it”.
- Believes the Judge’s decision will be the product of instructions given by controllers from the real world, as “part of an elaborate complex alternate reality set up principally in order to cause him suffering”.

# Filo: outcome



- **Psychiatrists: 2 x unfit, 1 x fit**
  - Unfit basis: he cannot meaningfully participate in the trial process because he does not consider it to be real, and expects to be removed from the virtual world at any time and returned to the real world. This explains his complete indifference to the outcome.
  - Fit basis: his delusions do not prevent him from knowing what the trial is about, and do not affect his functioning on a day to day basis.
- **Found: Sufficient understanding of the trial process to be aware of what is going to happen at trial, and understand what is happening as the trial progresses.**
- **Found: Fit to stand trial**

# R v Kingi 2017 NZHC 99



- Koroneria Kingi, 48.
- Charged with murdering his 61-year-old brother-in-law whose body was found on February 10, 2017.
- Paranoid schizophrenia >15 years
  - Persecutory delusions (believing he is to be harmed and killed)
  - Grandiose delusions (believing he is the owner of a large amount of money and a large business)
  - Auditory hallucinations
- No previous treatment
- Found: Mentally impaired

# R v Kingi 2017 NZHC 99



- Justice Fitzgerald: “It may not be a complicated case.”
- The Crown’s evidence includes:
  - Direct evidence that Mr Kingi attacked the victim at the time of the alleged murder
  - Physical and circumstantial evidence that Mr Kingi undertook the murderous act
  - Admissions by Mr Kingi that he killed the victim by cutting his throat; and
  - Medical evidence that the cause of death was a stab to the throat
- It is therefore possible that the key issue at trial will be whether the Crown can prove (beyond reasonable doubt) that Mr Kingi acted with the necessary intent to commit the offence with which he is charged.
- Kingi does not wish to advance a defence of insanity

# R v Kingi 2017 NZHC 99



- **Dr A: Fit**

- Knew he was charged with murder
- Able to outline the defences available to him
- Understood the distinction between pleas of guilty and not guilty
- Able to equate the concept of innocence with a plea of not guilty
- Able to outline his preferred plea and his reasoning behind that plea
- Clear understanding of the nature and possible consequences of proceedings
- Did not demonstrate any difficulties in communication
  
- One proviso: Lack of insight, will not avail himself of mitigation related to mental illness
- Understands concept of insanity, and consequences of not advancing that defence – does not believe he has an illness, and does not want to be in hospital

# R v Kingi 2017 NZHC 99



- **Dr B:**
  - Fit apart from the fact that his lack of insight means he does not wish to avail himself of a potential defence of NGRI.
  - Understands the concept of insanity
  - Accepts that others have differing views
- **Fitzgerald J:**
  - “While I do see some merit in the view that decisional competence ought to form part of the fitness test, the Court of Appeal’s decision in *Solicitor-General v Dougherty* is clear. I also see force in the Court of Appeal’s concerns in relation to the practicalities of implementing a best interests test”
  - “The basis upon which Mr Kingi presently intends to defend the charge may not be considered to be rational or in his “best interests”, but he is nevertheless clear as to the defence he intends to advance. That is Mr Kingi’s right.”
  - Found: Fit to stand trial.



# Update ...



- Clinical update to court questioned fitness again
- Fitness hearing scheduled for 10am 2 November 2017

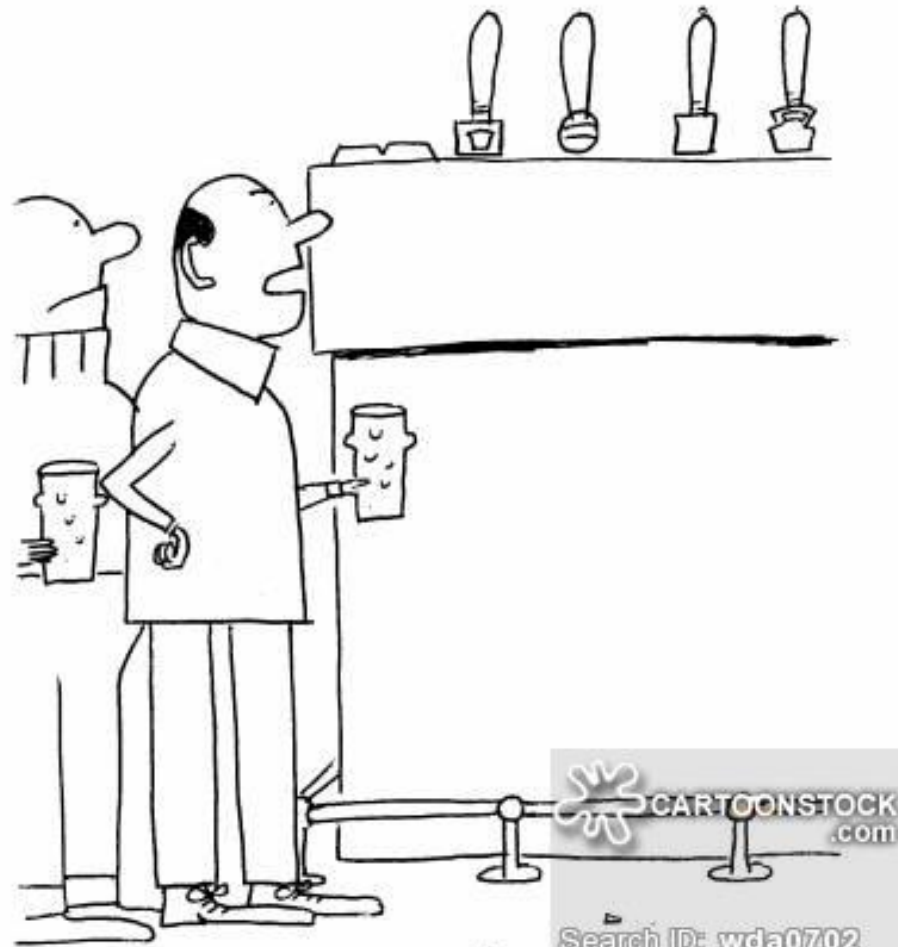
# Fit?



# Unfit?



# Questions



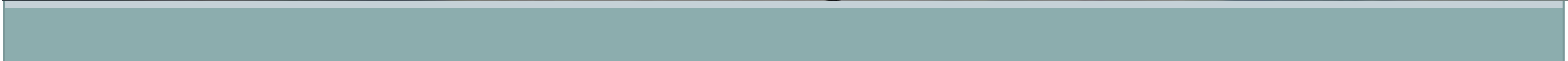
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*Walter*

THEY'VE SET THE BAR TOO HIGH!



Have we set  
the bar too low?



# Beauchamp and Childress 2009



- **Standards of competence** (page 114)
  - 1 Inability to express or communicate a preference or choice
  - 2 Inability to understand one's situation and its consequences
  - 3 Inability to understand relevant information
  - 4 Inability to give a reason
  - 5 Inability to give a rational reason
  - 6 Inability to give risk/benefit-related reasons
  - 7 Inability to reach a reasonable decision

# Mental capacity



- **Functional domains (MacArthur Foundation)**
  - Ability to **understand** the relevant information
  - Ability to **manipulate** information rationally (**reason**)
  - Ability to **appreciate** the nature of the situation and its likely consequences
  - **Communicate** choice
- **UK Mental Capacity Act 2005**
  - **Understand** relevant information
  - **Retain** relevant information long enough to make a decision
  - **Weigh** the information available to make a decision
  - **Communicate** choice
- **All domains equally important**

# Clinical assessment process



- Assess clinical condition or mental impairment
- Ascertain the demand of the task (how high is the bar)
- Apply the clinical findings to the specific demands
- Consider contextual matters to optimise performance
- Assist the court to determine the ultimate issue



# Beauchamp and Childress 2009



- **Testing for incompetence** (p.115)
  - 1 Choosing the relevant abilities for competence
  - 2 Choosing a threshold level of the abilities
  - 3 Choosing an empirical test
- **Structured tools**
  - MacCAT-CA
  - Fitness Interview Test
- **“In the final analysis, the assessment of decisional competence remains heavily a matter of clinical judgement.”** B&C, p.115

# Assessing mental capacity



- The MacCAT-CA is a 22-item structured interview for the pretrial assessment of adjudicative competence, incorporating the *Dusky* criteria.
  - “whether he [had] sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he [had] a rational as well as factual understanding of the proceedings against him”
- Uses a vignette format and objectively scored questions to standardize the measurement of three competence-related abilities:
  - **Understanding** (ability to understand general information about the legal system and the process of adjudication)
  - **Reasoning** (ability to discern the legal relevance of information and their capacity to reason about specific choices that confront defendants during the course of a typical criminal proceeding)
  - **Appreciation** (ability to appreciate the meaning and consequences of their own legal circumstances) scored on the basis of whether the answers are plausible (i.e., grounded in reality or influenced by delusional beliefs).

# Hon. Justice Collins on delusional defendants



- “Unfortunately, while the law and medicine interact when decisions about a defendant’s mental capacity arise, the two disciplines are not always synchronized. As a consequence, judges applying statutory and common law concepts when determining if a defendant has the mental capacity to stand trial can reach conclusions that do not fit comfortably with medical views. The reason for this paradox is understandable. Medical science continues to develop at a pace which vastly exceeds the development of legislation and common law principles. As a result, the understanding that psychiatrists and psychologists have about an individual’s mental capacity is often difficult to reconcile with statutory and common law concepts which ultimately determine if a defendant is fit to stand trial.”
- (2015) 46 VULR



# R v Power: Court of Appeal 1996



- Power was manic, with delusions of grandeur at the time of the offending, and according to Dr Brinded (at the time of appeal) Power had an insanity defence.
- Regarding the fitness issue:
  - “That test [CJA 1985] does not require that the appellant actually give instructions which are in his or her best interests. 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.”

# Dougherty v The Solicitor General 2012 NZCA 405



- 74 counts of filing false GST returns
- Persecutory delusional disorder centering on IRD
- Mentally impaired
- But was he unable to conduct a defence or to instruct counsel?
  - Understands the charges ✓
  - Is able to plead ✓
  - Can follow court proceedings ✓
  - Appreciates the jeopardy he is in ✓
  - Instruct counsel and conduct a defence ?

# Dougherty v The Solicitor General 2012 NZCA 405



- Is decisional competence now (post 2003 Act) part of the test?
  - Decisional competence is the ability to rationally assess what defence is in his or her best interests, and choose that defence
  - Glazebrook, Arnold, France: No
  - R v Power 1996 (CJA 1985)
    - ✦ “... accused persons are entitled to choose their own defences and to present them as they choose...”

# Dougherty on decisional competence



- In Dougherty, CA quote the Brookbanks view:
- “... allowing people to make irrational decisions, where that irrationality is sourced in mental impairment, impugns the integrity of the criminal justice process. Further, [Brookbanks] queries the validity of the personal autonomy viewpoint where there is an underlying incapacity to know what is best, and therefore meaningfully to exercise the autonomy.”



# Dougherty on decisional competence



- And then ...
  - “There is obviously substance in that viewpoint, but so too is there merit in the competing view that one should not make decisions for people just because the immediate wisdom of their choices is not apparent”



# I'm sorry, but ...



- Delusionally driven choices are:
  - not wise choices
  - not autonomous choices
  - **not competent choices**
- You will not reveal the validity or competency of a choice solely by examining whether it appears to be in the best interests of the person.

# Adjusting the height of the bar



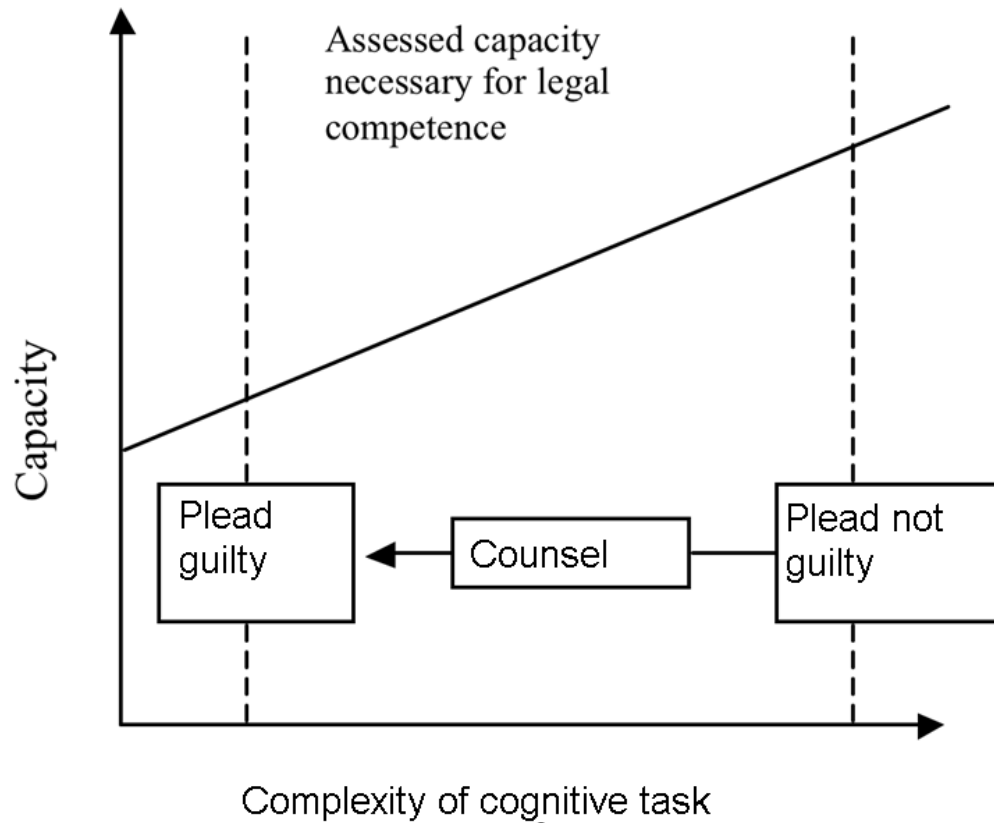
- Barton v R 2012: “Some charges are more easily understood than others”
  - Where charges involve the issue of consent the bar is set higher
  - More complex charges → the bar is set higher.
- R v Cumming 2006: “The accused must have the capacity, albeit at a basic level, to participate directly in the trial through questioning witnesses and communication of the defence to the court.”
  - To self-represent → the bar is set higher.
- R v Komene 2013: “To conduct a defence, additional skills are required.”
  - To plead not guilty → the bar is set higher.

# Variable fitness thresholds

(Q v Komene Auckland HC 2013, Court of Appeal in Britz v R 2012)

- **To plead guilty a defendant must:**
  - Understand the plea and sentencing process
  - Be aware of the nature of the charge and the facts that support the charge
  - Understand what defence could be run
  - The difference between pleas of guilty and not guilty
- **To conduct a defence a defendant must:**
  - Have additional skills (ie higher threshold)
  - Follow events as they arise through the trial
  - Deal with the unexpected
  - Instruct counsel and make choices in response to developments in the trial
- **Fit to plead guilty, not fit to plead not guilty**

# Good judgement of counsel



# Back to Filo



# R v Komene: 2013 NZHC 1347



- Filo: “Significantly different” capacity thresholds for different pleas
- “A defendant who wishes to plead guilty must be able to understand the implications of such a plea and the sentencing process. More specifically, that defendant must be aware of the nature of the charge and the facts that support the charge. The defendant must understand what defence, if any, could be run and crucially must understand the difference between pleas of guilty and not guilty. That defendant must understand the sentencing options that will arise following the plea of guilty and what they mean in practical terms. Without that level of understanding, it would be unfair on for a Court to accept the plea and convict that defendant and impose a sentence.”

# Implied capacities for fitness to plead insanity



- Aware of the nature of the charge and the facts that support the charge.
- Understand the defence of insanity
- Understand the implications of pleading NGRI
- Understand the disposition process
- Understand the difference between pleas of guilty and not guilty.
- Understand the disposition options and what they mean in practical terms.
  
- All focused on understanding. What about reasoning and appreciation?

# R v Filo 2016: NZHC 2730



- Different height of bar for agreed v contested?
- Filo:
  - Understands the charges ✓
  - Is able to plead ✓
  - Can follow court proceedings ✓
  - Appreciates the jeopardy he is in ✓
  - The consequences of those plea options ✓
  - Instruct counsel and conduct a defence ?



# Was Filo competent to plead insanity?



- Didn't believe he had committed any crime in the real world
- Didn't believe he had a mental illness
- Didn't believe he was insane
- But:
  - He had an understanding of the relevant issues
  - His expressed preference to be at Mason Clinic rather than prison appeared to be an intelligent, authentic, autonomous choice, and pleading NGRI was a means to that end.
- Remember: sexual assaults not considered in any detail. Could he have been fit in relation to the murder charge, and unfit in relation to the indecent assaults?

# Back to Kingi



# Fit to waive insanity?



- **Frendak v United States 1979**
  - A defendant may reject an insanity defence if they do so on an intelligent and voluntary basis
  - “respect for a defendant’s freedom as a person mandates that he or she be permitted to make fundamental decisions about the course of proceedings”.
  - Why might a defendant choose to refuse an insanity defence?
    - ✦ Longer period of confinement in hospital
    - ✦ Better treatment in prison
    - ✦ A genuine belief they are not insane
    - ✦ Fear that raising the defence is an admission of guilt
    - ✦ Avoid stigma associated with mental illness and insanity
    - ✦ Loss of rights in Mental Health system

# Hendricks v People 2000



- Charged with murder of husband
- Denied crime despite overwhelming evidence
- Mentally disordered & experts agreed insane
- She was declared fit to stand trial
- She refused the insanity defence, and was convicted
- Colorado Supreme Court reversed:
  - There were significant questions as to Hendricks' sanity and the rationality of the reasons for her refusing an insanity plea.
  - **Just determination of charges > voluntary and intelligent waiver**
  - But had concerns as to whether her decision was in fact rational
  - Reverted the case for these issues to be considered

# The Section 20(4) issue



- *“In a case where it appears from the evidence that the defendant may have been insane at the time of the commission of the offence, the Judge may ask the jury to find whether the defendant was insane within the meaning of [section 23](#) of the Crimes Act 1961, even though the defendant has not given evidence as to his or her insanity or put the question of his or her sanity in issue.”*
- Are we, in effect, saying that a defendant who has been found fit to stand trial is not competent to choose his/her plea?
- Or are we saying a just determination of charges > voluntary and intelligent waiver?

# Is Kingi fit to waive insanity?



- Was he trying to avoid longer confinement?
- Was he trying to avoid stigma
- Was he trying to avoid loss of civil rights
- Was he trying to avoid poor medical treatment
- Was he trying to avoid a protest being undermined
- Was he trying to avoid admitting guilt
  
- Is any of that relevant in NZ?
  
- S20(4) is both concerning and reassuring

# Would he change his mind once recovered?



- We can't be sure
  - We don't have an advance directive of any sort
  - We know some defendants refuse an insanity defence for understandable reasons
- ... but I think it is more likely than not that once recovered he would choose to advance an insanity defence ...

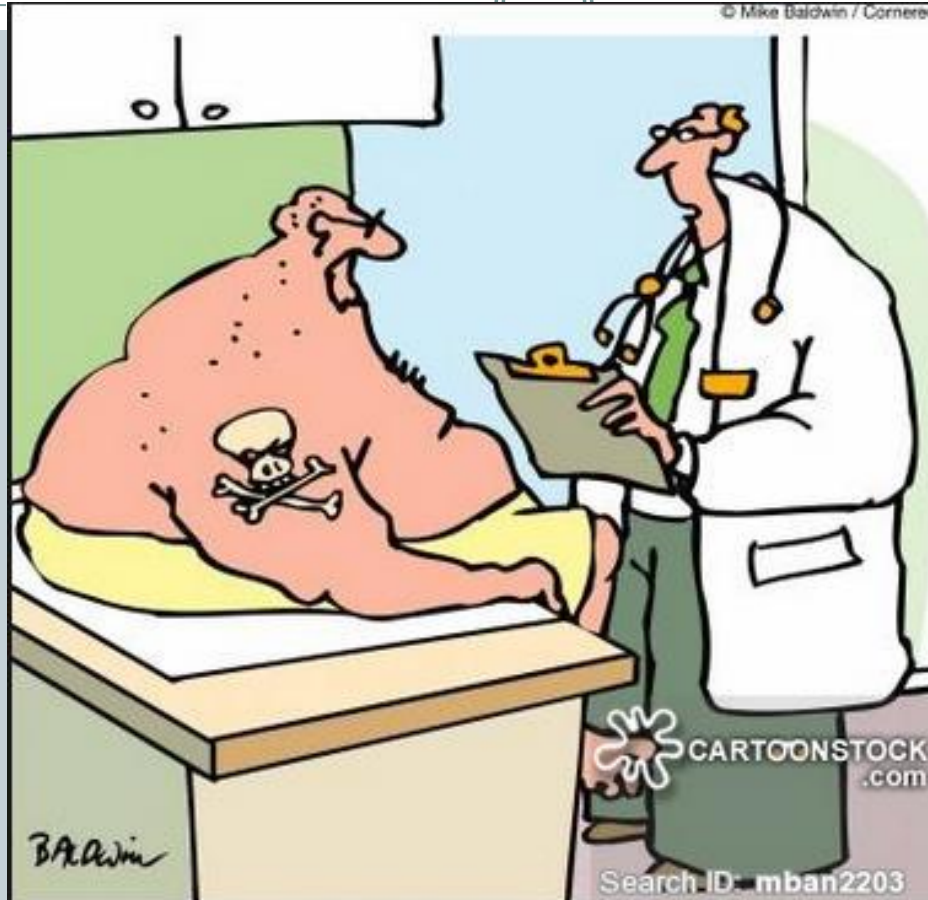
# Discussion



- Significant variation in the practice of courts and clinicians
- Fitness test in NZ is principally a test of understanding
- Largely ignores reasoning
- Completely ignores appreciation
- But that doesn't stop clinicians raising these issues: The test based on *Power* is simply not consistent with modern clinical approach to assess capacity
- Clinicians struggle with *Power*, but maybe it is balanced by s20(4) in insanity cases
- Complex interplay between fitness and insanity
- Is the bar set too low to plead not guilty, on basis of defence of insanity, or to waive an available insanity defence?



# Questions



“You’ve got to eat less, exercise more and try to stay out of trouble. You’re not fit to stand trial.”