Commentary: UK Perspective on Competency to Stand Trial

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This commentary offers a perspective from another common law jurisdiction, specifically the law in England and Wales, where competency to stand trial on a criminal charge is known as fitness to plead. The commentary begins with a discussion on the principle of proportionality evident in health care decisions by way of comparison with the topic in the criminal arena. Fitness to plead is an historical legal concept and employs an intellectual test that has evolved very little since its appearance in case law. There have been amendments, through statute, to its procedure and outcomes following a determination of being unfit to plead. However, competency to stand trial in England and Wales remains a more marginal issue than in the United States. Recent developments in domestic and European jurisprudence have been related to consideration of the requirements for a fair trial, driven by the demands of the European Convention on Human Rights.

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From the perspective of the law in England and Wales, the principle of proportionality, requiring greater capacity for complex decisions when the consequences are more serious, can be observed more clearly in health care settings than in the courtroom.

The Court of Appeal case of *Re T*[1] concerned a woman who had been involved in a traffic accident and was advised by her doctors to have a blood transfusion to save her life. She refused and even signed a waiver to that effect. However, her partner challenged this through the civil courts. A particular contention was that the woman was subject to undue influence from her mother, who was a devout Jehovah's Witness and therefore against blood transfusions. The woman herself did not follow the same beliefs as her mother.

The judgment acknowledged that a capacitous adult was entitled to make a decision even to his own detriment, including risking

> . . .permanent injury to his health or even. . .premature death. Furthermore, it matters not whether the reasons for the refusal were rational or irrational, known or even non-existent. . . .However, the presumption of capacity to decide. . .is rebuttable. . . .[W]hat matters is whether at that time the *patient's capacity was reduced below the level needed in the case of a refusal of that importance* [emphasis added; Ref. 1, p 664].

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In other words, the rationality and the consequences of the decision taken are not determinative of capacity.

The later case of *Re C*[2] clarified the elements to determine a person's capacity. This case concerned a 68-year-old man with chronic paranoid schizophrenia who had gangrene of the foot and a "grossly infected" right leg. He was advised to have an amputation, as the chances of survival with conservative treatment were "no better than 15 percent." C refused the amputation and sought an undertaking that the (general) hospital would not amputate in any future circumstances. In that case, it was recognized that different levels of capacity exist for different situations—for example, it was not contested that C had sufficient capacity to initiate the legal proceedings. The court explicitly linked autonomy and capacity on a sliding scale, along the lines of Buchanan's risk/benefit version of proportionality[3]:

> [T] he ultimate conclusion should be reached by weighing in the scales the preservation of life against the autonomy of the patient. If the patient's capacity to decide is unimpaired, autonomy weighs heavier, but the further capacity is reduced, the lighter autonomy weighs [Ref. 2, p 822].

The judgment went on to conclude that:

> [A]lthough his general capacity is impaired by schizophrenia, it has not been established that he does not sufficiently understand the nature, purpose and the effects of the treatment he refuses. Indeed, I am satisfied that he has understood and retained the relevant treatment information, that in his own way he believes

> it, and that in the same fashion he has arrived at a clear choice [Ref. 2, p 824].

The Court of Appeal, in the case of *Re MB*,[4] was concerned with a pregnant woman advised to have her child delivered by Caesarean section to avoid the 50 percent risk of serious injury said to be associated with a vaginal delivery in her case. She initially consented to the operation but later withdrew at the sight of the needle required for anesthesia. In giving the judgment of the court, Lady Justice Butler-Sloss held:

> Irrationality is here used to connote a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. . . .Although it might be thought that irrationality sits uneasily with competence to decide, panic, indecisiveness and irrationality in themselves do not as such amount to incompetence, but they may be symptoms or evidence of incompetence. *The graver the consequences of the decision, the commensurately greater the level of competence is required to take the decision* [emphasis added; Ref. 4, p 553].

The Mental Capacity Act 2005, due to be implemented in 2007, adopts a functional approach in determining a person's capacity to take a particular decision in a particular context (Ref. 5, ¶¶ 57–58). The Act, under section 5, offers protection against civil and criminal liability for certain acts connected with the care or treatment of the individual. This authority is assumed, without a particular procedure, by the person providing the care. However, the draft Code of Practice to the Act lists the "gravity of the decision and its consequences" as one of the factors likely to indicate the need for professional involvement in assessing capacity to take a serious decision.

Fitness to Plead

Returning to the criminal courts, in England and Wales, consideration of a defendant's ability to stand trial is known as fitness to plead. Fitness is concerned with mental state at the time of trial as opposed to what it may have been at the time of the alleged offense. The test evolved from common law but the criteria derive from case law, principally in *R v. Pritchard*, when the judge directed the jury that fitness to plead depended on

> . . .whether (the defendant) is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defense—to know that he might challenge [any jurors] to whom he may object—and to comprehend the details of the evidence. . . .If you think that there is no certain mode of communicating the details of the trial to the prisoner, so as he can clearly understand them, and be able properly to make his defense to the charge, you ought to find that he is not of sane mind. It is not enough that he may have a general capacity of communicating on ordinary matters [Ref. 6, p. 304].

Thus, the test is explicitly an intellectual one and the criteria assess the defendant's level of comprehension and communication. An additional criterion, that of being capable of instructing legal advisors, derives from the later case of *Davies.*[7] Although the quotation just given refers to being "not of sane mind" the case law dates back to an era when the term "insanity" would have included both what is known today as mental impairment and mental illness. (In addition, it is different from the legal concept of insanity, as set out later in the famous M'Naghten Rules.[8]) The criteria are anachronistic but, provided they are met, a mentally ill defendant can be both psychotic and fit to plead. In *Berry* it was said that "a high degree of (mental) abnormality does not mean that the man is incapable of following a trial or giving evidence or instructing counsel and so on" (Ref. 9, p 158). Conversely, an unfit person would not necessarily require admission to a psychiatric hospital. Mr. Pritchard's difficulties in following court proceedings were related to hearing and speech impairments, not to mental illness.

Practically speaking, the test has crystallized into four main areas: an appreciation of the charges and potential consequences (including the significance of the potential pleas), an ability to understand the trial process, a potential for the defendant to participate in that process, and the ability to work collaboratively with his lawyer on his defense. The effect a defendant's mental condition has on his ability to comprehend proceedings is the relevant factor rather than the mere existence of that condition. Amnesia for the alleged offense, for example, would not lead to a finding of being unfit, as it would not affect the defendant's ability to comprehend the course of the trial.[10] If the individual is of insufficient intellect to comprehend the court proceedings, he is said to be unfit to plead, or "under disability."

What remains unclear is the extent of the impact the mental condition has to have on the accused's ability to comprehend proceedings before the person is considered to be under a disability. The wording of the *Pritchard* criteria implies that a threshold exists for being of sufficient intellect, or making a proper defense. Moreover, the last sentence in the quotation

from *Pritchard*, given earlier, distinguishes the capacity required to be fit to plead from the "general capacity of communicating on ordinary matters." This emphasizes a different level of capacity and one that is specific to the relevant criteria.

In law, there is a presumption of fitness to plead, but the procedure to determine whether this is the case is laid out in statute.[11] The question of unfitness can be raised by the defense or prosecution (or the judge), and the burden of proof alights on whichever party raised the issue, albeit with differing standards of proof. The criminal standard (of beyond reasonable doubt) is set for the prosecution,[12] whereas the defense have to surmount the civil standard of proof (that is, on the balance of probabilities).[10]

Until very recently, fitness to plead was determined by a jury empaneled for that purpose. The Domestic Violence, Crime and Victims Act of 2004 amended the legislation, and now a judge sitting without a jury determines fitness. The hearing in this part of the proceedings is concerned only with whether the defendant is fit to plead and is directed at the *Pritchard* criteria. Written or oral evidence from two doctors is required but is not determinative. The medical evidence is directed solely at fitness to plead, although this may necessarily require reference to an underlying mental illness. If the defendant is considered fit to plead, then the court proceedings continue in the usual manner, either to sentencing or to a trial, depending on which plea is then entered.

If the court determines that the accused is unfit to plead then a "trial of the facts" takes place before a jury. This was introduced by the 1991 Act[11] and ensures that the evidence against the defendant is tested to some degree. Under the predecessor Act[11] a finding of unfitness to plead led to automatic admission to the hospital, and the accused was assumed to have committed the act, although the prosecution was not called upon to produce evidence of the person's involvement. These two factors helped ensure that the number of defendants who raised the issue of fitness to plead remained very low. In the years 1983 through 1988, there was an average of 16 findings of unfitness each year.[13]

The jury now has to be "satisfied. . .the accused . . .did the act or made the omission charged against him as the offense" before the matter can proceed to disposal. The criminal standard of beyond reasonable doubt is used. If the jury is not so satisfied, they must acquit the defendant. The accompanying Government Circular to the 1991 Act states that the trial of the facts should not dwell on the defendant's intent (*mens rea*).[14] Difficulties have arisen because to concentrate solely on the *actus reus* eliminates possible defenses such as self-defense yet to examine both the *actus reus* and *mens rea* makes the trial of the facts indistinguishable from a criminal trial, in which the defendant is unfit to participate.

In *Egan* the Court of Appeal held that "the act" required "proof of all the ingredients of what otherwise would be an offense" (Ref. 15, p 106). This seems to incorporate *mens rea*, because the same physical act can be charged as different offenses depending on the person's intent. The same court later decided that *Egan* had been decided incorrectly and only the *actus reus* need be proved.[16] The House of Lords, in *Antoine*, effectively overruled *Egan* and held that the jury "need only be satisfied. . .(of) the *actus reus* of the offense, not the *mens rea*" (Ref. 17, p 208) but added a compromise that the defenses of mistake, accident, self-defense or involuntariness could be raised.[18] This itself was restricted to the use of objective evidence, thus ensuring that the defendant could not participate in the process when adjudged to be unfit.

In *Antoine*, Lord Hutton quoted, with approval, from judgment in the *Attorney General's*[16] case, that it is not necessary to prove *mens rea* because "in an insanity case the issue of *mens rea* ceases to be relevant" (Ref. 17, p 216).

European Convention on Human Rights and the Right to a Fair Trial

Article 6 of the European Convention on Human Rights (ECHR) provides that "in determination . . .of any criminal charge against him, everyone is entitled to a fair and public hearing. . .by an independent and impartial tribunal. . . ." In the court of first instance, *H* had been found unfit to plead to two counts of indecent assault. It was said he did "not understand the concept of guilt and could not comprehend the evidence, so he would be unable properly to defend himself."[19] In the absence of independent evidence and with the inability to defend himself, it was contended that H could not have a fair hearing on the trial of the facts. The case followed the criminal appeals process ultimately to the House of Lords where it was held that the trial of facts procedure is compatible with the European Convention's

Article 6 right to a fair trial.[20] This was on the basis that the trial of the facts halts the criminal trial process and even a positive finding is not regarded as evidence of guilt, nor is it a conviction or a prelude to punishment. Moreover, should the person recover his fitness to plead, then a return to court to resume the criminal trial is possible.

Other cases have adopted a broader focus of the concept of a fair trial. The cases of *V v. UK*,[21] and *T v. UK*,[22] in which young boys had been convicted of the murder of a toddler, highlighted the need to ensure the effective participation of young people in criminal proceedings against them. Darren Cash's appeal[23] against conviction for rape and kidnapping was successful because he was able to adduce fresh psychological evidence of intellectual difficulties. He had an IQ of 53, would have been unable to comprehend fully the court proceedings, and would also have been vulnerable under cross-examination. Neither these deficits nor his fitness to plead was raised at the original trial, in part because his level of effective social functioning served to obscure his intellectual deficiency.

In 2005, the High Court dismissed a judicial review application relating to whether the defendant's low intellectual capabilities denied him effective participation in criminal proceedings and hence a fair trial.[24] The claimant was a 15-year-old boy who had the mental age of an 8-year-old but was technically fit to plead. The court recognized the potential for less than effective participation by the boy but held that the youth court was able to make the necessary adjustments to court procedures and routine to maximize his involvement. That case was distinguished from the European case of *SC v. UK*,[25] which concerned an 11-year-old boy who argued successfully that his youth and impaired intellectual capacity rendered his Crown Court trial unfair. The European Court of Human Rights linked his participation with legal representation and considered that

> . . .effective participation. . .presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she. . .should be able to understand the general thrust of what is said in court [Ref. 25, ¶ 29].

The Court also held that when there was a risk of a defendant's being unable to participate effectively in criminal proceedings because of youth or "limited intellectual capacity" it was "essential" that the courts "give full consideration to, and make proper allowance for, the handicaps under which he labors, and adapt its procedure accordingly" (Ref. 25, ¶ 35).

The High Court has approved the minimum requirements for a fair trial as being:

> (i) he had to understand what he is said to have done wrong,
>
> (ii) the court had to be satisfied that the claimant when he had done wrong by act or omission had the means of knowing that he was wrong,
>
> (iii) he had to understand what, if any, defenses were available to him,
>
> (iv) he had to have a reasonable opportunity to make the relevant representations if he wished,
>
> (v) he had to have the opportunity to consider what representations he wished to make once he had understood the issues involved [Ref. 24, ¶ 7].

While these requirements have some similarities to aspects of fitness to plead, they encompass a broader range of issues going to the heart of mounting an effective defense.

Dispositions After a Trial of the Facts

As referred to earlier, under the 1964 Act being unfit to plead led to the mandatory and indefinite committal of the accused to a psychiatric hospital. Such an outcome might be wholly out of proportion to the seriousness of the alleged offense, and it may also be wholly inappropriate on diagnostic grounds. Defendants found unfit to plead may have conditions other than a mental illness. The 1991 Act amended the 1964 Act and provided for a range of dispositions to be available that could better reflect the clinical and social care needs of the individual concerned. The Domestic Violence, Crime and Victims Act 2004 introduced a further change, and now three disposition options are available: admission to hospital, a supervision order providing a framework for community interventions, or an absolute discharge from court.

Under the 1991 Act the admission order to hospital was founded on the medical evidence offered in court. However, this related solely to the question of fitness to plead, rather than appropriateness and necessity for detention in a psychiatric hospital. Such a procedure is incompatible with the European Convention on Human Rights. Article 5 of the Convention relates to the right to security and liberty of the individual, but this right is limited on certain grounds, including being of "unsound mind." European case law has established that deprivation of

liberty is permitted if it can be "reliably shown . . .(through) objective medical expertise" that the individual suffers from "a true mental disorder. . .of a kind or nature warranting compulsory confinement" (Ref. 26, ¶ 39). To avoid potential violation of Article 5, the 2004 Act now requires the court, having established that the accused is unfit to plead, to hear medical evidence enabling it to pass a hospital order, on the grounds of mental disorder, under the Mental Health Act 1983. In addition, the court may also make a restriction order, under section 41 of that Act, restricting authorization of the person's discharge from hospital to either a Mental Health Review Tribunal or to the Home Secretary, the government minister with political responsibility for such detained patients. The restriction order is a judicial decision, after hearing medical evidence that explicitly addresses the need to protect the public from serious harm.

Unfitness to Plead in the Lower Criminal Courts

The procedures for determining fitness to plead described herein relate only to the Crown Courts, the higher criminal court dealing with more serious offenses. The overwhelming majority of criminal offenses are dealt with in the lower, magistrates courts. There is no procedure set out in statute whereby a person's fitness to plead may be determined in these courts. However, various mechanisms are available to resolve such a situation. If the court's jurisdiction encompasses the alleged offense, the Crown Prosecution Service (CPS) may discontinue legal proceedings when consideration of the person's mental health outweighs the "interests of justice" (Ref. 27, ¶ 6; Ref. 28, ¶¶ 12–16). Such an outcome can be combined with the civil admission of the person to hospital under the Mental Health Act.

However, if the public interest demands that a prosecution be pursued but concerns exist over an individual's fitness to plead, these matters can be addressed through the provisions of the Mental Health Act that allow the admission to hospital for a finite period while criminal proceedings continue (Ref. 29, Part III). Taking this course of action assumes that the person's mental disorder and his unfitness to plead are linked and that treating the former will reverse the latter. The need to determine fitness to plead is thus circumvented rather than addressed.

However, it may be that the person's mental disorder proves to be resistant to the treatment and a return to fitness is not anticipated. In these circumstances, the court, when satisfied "the accused did the act or made the omission charged" has the power to make a hospital order without recording a conviction (Ref. 29, § 37(3)). This provision makes no reference to fitness to plead but repeats the relevant phrase in the 1991 Act, and the power has been considered suitable for the scenario of a defendant's being unfit. Lord Lane, as a former Lord Chief Justice, termed this an "unusual power" that "would usually require- . . .the consent of those acting for the accused if he is under a disability so that he cannot be tried" (Ref. 30, p 338). In that case, the person's mental disorder prevented him from understanding what it meant to consent to trial. This suggests the defense lawyer has to adopt a pragmatic but nonetheless paternalistic approach and decide to accept the facts of the prosecution case without acting on formal instructions from his client to do so. There is no doubt that to escape a conviction can be considered to be in the client's interests (and using this route, there is no possibility of a return to court should the person subsequently become fit to plead again). However, there are consequences, specifically, admission to a hospital.

The Mental Health Act contains an additional power relating specifically to unsentenced prisoners transferred to the hospital for treatment of their mental illness. If it "appears. . .impracticable or inappropriate to bring the detainee before the court" a hospital order, with or without an additional restriction order, may be passed on the basis of written or oral medical evidence from two practitioners that the person has a mental illness of the requisite severity, so as to make hospital detention appropriate (Ref. 29, § 51(5)). The wording of the provision makes no explicit reference to fitness to plead and the court has only to be "of the opinion, after considering any depositions or other documents. . .that it is proper to make such an order." There is no requirement to test the strength of evidence against the defendant and this could lead to the hospitalization of someone who might have been acquitted had the matter proceeded to trial. Many would argue this power has become increasingly outdated since the amendments to the 1964 Act. *Kenneally*[31] is the leading authority on this provision. The agreed medical evidence before the court was that Mr. Kenneally, who had schizophre-

nia, was fit to plead at the time of interview, but his mental state was liable to deteriorate, and his behavior become disturbed in the courtroom setting. Then, he would be unfit to appear in court. The medical opinions seemed to consider fitness to plead literally and distinguished the ability to enter a plea from the other legal criteria relating to fitness to plead, such as the ability to follow and participate in the trial process. Today, *Keneally* seems to have a greater resonance with the fair trial issues discussed herein, although to date case law has been slow to bring the difficulties caused by mental illnesses within the fair trial arena.

Conclusion

The principle of proportionality is now firmly embedded in case law concerning the level of capacity required for health care decisions, and this general approach can also be discerned in the procedures scheduled to arrive in 2007 with the implementation of the Mental Capacity Act. However, in the criminal courtroom a similar principle relating to the level of capacity demanded before standing trial on serious charges has received little judicial debate.

The concept of fitness to plead has been explored herein, as well as its anachronistic criteria with their focus on an intellectual test shown to have limited utility in trials involving mentally ill defendants. More recent case law has shown an increasing divergence emerging between the concept of fitness to plead and the requirements for effective participation of defendants in their criminal trials. This has been driven, in no small measure, by the greater prominence afforded in UK law to the European Convention on Human Rights since the latter's incorporation in domestic law with the passage of the Human Rights Act 1998. The requirements for effective participation and a fair trial have been derived from cases involving children or the mentally impaired, but the principles have equal validity when applied to the mentally ill and an extension of the jurisprudence in this direction can be only a matter of time.

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