AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial: An English Legal Perspective

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This brief commentary compares the law relating unfitness to plead in England and Wales with that of competency to stand trial, as reflected in the AAPL Practice Guideline. In so doing, it presents the argument that English law, with its adherence to a test of unfitness that goes back to the first half of the 19th century, may no longer be fit for the purpose. Unlike the test for incompetency to stand trial adopted by most of the United States, English law fails to incorporate decisional competence and consequently may be failing to protect vulnerable defendants. The commentary concludes that, despite the differences in law and practice between our respective countries, the AAPL Guideline contains much of value for psychiatrists and lawyers who have to deal with unfitness to plead, an area of the law that surely ought to be the subject of consideration for reform.

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Competence to stand trial, or unfitness to plead, as it is commonly referred to in English law, is a legal doctrine of fundamental importance from both a theoretical and a practical perspective. In relation to the former, most criminal justice systems have accepted an overriding fairness principle that those accused of crimes who are clearly incapable of understanding or answering the allegations against them should not be tried in the ordinary way. Thus, the law, in the light of how best to implement this fairness principle, has developed a practice-based approach. The *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*,[1] is clear evidence of this, containing as it does not only a raft of detailed practical guidance but also some discussion of both the theory and law behind the practice. In the discussion that follows, this commentary will attempt to assess the value and importance of the AAPL Guideline with particular reference to English law.

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The English Legal Position

English law has no statutory definition of unfitness to plead; the definition is instead common law based. As the AAPL Guideline states, one of the most authoritative definitions is that contained in *King v. Pritchard*,[2] summarized in 2003 by Lord Justice Keene and approved by the English Court of Appeal in *Regina v. M*, as follows:

> The original formulation of the appropriate test is that set out in *Pritchard* (1836) [173 Eng. Rep. 135] where in the case of a deaf-mute it was said at p 304: "There are three points to be inquired into—first, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he 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 of you to whom he may object—and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation. Upon this issue, therefore, if you think that there is no certain mode of communicating the details of the trial to the pris-

> oner, so that 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."
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> That passage from the address to the jury by Baron Alderson in *Pritchard* has been endorsed subsequently in a number of authorities. In *Podola* [1960] 1 Q.B. 325, [1959] 3 All E.R. 418 that passage was expressly approved by the Court of Criminal Appeal presided over by the Lord Chief Justice, Lord Parker. In that case it was held that a loss of memory would not necessarily render an accused unfit to plead if he was able to do the various things described in *Pritchard.*
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> In *Robertson* [1968] 3 All E.R. 557, [1968] 52 Crim. App. 690 the *Pritchard* test was said to be one which had been confirmed and followed "over and over again." Those authorities clearly establish the law on this topic in this jurisdiction:. . . "Indeed, this Court regards them as admirable directions. They do not set the test of fitness to plead at too low a level" [Ref. 3, ¶¶ 28–31].

In essence, therefore, in English law there seem to be five basic criteria to be satisfied where fitness to plead is at issue, all of which concern the accused's intellectual abilities. First is the ability to plead to the indictment, second the ability to understand the course of the proceedings, third the ability to instruct a lawyer, fourth the ability to challenge a juror, and fifth the ability to understand the evidence. An appropriate deficit in any one or more of these criteria will render a defendant legally unfit to plead.

With regard to the use of these criteria, research has revealed that the second and third are used most frequently in psychiatric reports addressing the issue of unfitness to plead, followed by the first. There is then a decrease in the use of the fourth and fifth criteria, the frequency of which are almost identical.[4] Further, it is clear that, in their reports, psychiatrists do not restrict themselves to the so-called *Pritchard* criteria but will frequently use "other criteria" including, *inter alia*, whether the defendant had the ability to give evidence or whether he could understand the charges.[1] As the AAPL Guideline makes clear, what is required of psychiatrists is an assessment of the defendant's functional status which requires a wide range of specific questions in order fully to "explore the defendant's general knowledge about criminal proceedings, his understanding of matters specific to his own legal case, and his ability to relate to defense counsel" (Ref. 1, p S34).

The Guideline proceeds by helpfully listing the areas that U.S. psychiatrists might typically assess during an interview. While such an *aide-mémoire* will clearly be of use to English psychiatrists, it is important at this stage to realize that the *Pritchard* criteria in England are narrower than those endorsed by the U.S. Supreme Court in *Dusky v. U.S.*[5] Although it is true that the term unfit to plead is more commonly used in England, strictly speaking, the law requires that the defendant be "under any disability such that. . .it would constitute a bar to his being tried."[6] While it is also true that this will include those who are physically rather than mentally disabled, such as those with extreme communication difficulties, the *Pritchard* criteria are restricted to an assessment of the intellectual ability of the accused and do not encompass "rational understanding," as specified in *Dusky*.[5] Indeed, it is clear that a defendant is not required to make decisions relating to the trial process that are in his best interests.[7]

Although more recently it has been suggested that whether the defendant "can understand and reply *rationally* to the indictment is obviously a relevant factor" (emphasis added) (Ref. 8, p 1018), this notion has not led to any further judicial analysis as to the meaning of the word "rationally." More particularly, the *Pritchard* test of unfitness to plead has recently been criticized itself as being unfit for the 21st century.[4] Much of the criticism revolves around the fact that the test does not encompass "decisional competence" and, unlike that in *Dusky*, sets the fitness threshold at too low a level, in the sense that it is too easily met.

In this context, it is of note that one of the Channel Islands, namely Jersey (a British Crown dependency), which has an independent legal jurisdiction despite its close proximity to England, has refused to apply *Pritchard*. Instead, it has adopted a wider test, the threshold for which is that if the defendant "lacks the capacity to participate effectively in the proceedings" then he may be found unfit to plead and that in determining this issue the court "shall have regard to the ability of the defendant to, *inter alia*, make rational decisions in relation to his participation in the proceedings (including whether or not to plead guilty), which reflect true and informed choices on his part" (Ref. 9, pp 402–3). Although English Law has not yet followed such an approach, other developments discussed in the next section have, over time, led to an increase in the use of unfitness to plead.

The Utilization of Unfitness to Plead in England: Recent Developments

The 1991 Act

Until some 15 years ago, English law had only one form of disposal for those found unfit to plead: indeterminate hospitalization. Further, at this time the law had no mechanism in place that required the prosecution to establish any factual case against the unfit defendant. Taken together, these were major disincentives to the utilization of unfitness to plead, so much so that its use had declined in the previous five years (1987–1991) of the mandatory hospitalization regime to a mere 63 cases. To halt this decline, the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 came into operation at the start of 1992. It introduced flexibility of disposal by giving the court the option (except where the charge was murder) to make:

> a hospital admission order (with or without a restriction order),
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> a guardianship order (in the community),
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> a supervision and treatment order (in the community),
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> an order for an absolute discharge.

In addition, the 1991 Act introduced a requirement that, before a jury could make a finding of unfitness to plead, the evidence of two or more psychiatrists was required. Finally, the Act mandated that after every such finding the prosecution must prove the factual basis of the charge before the unfit defendant can be the subject of any disposal power. This mandate has become known as the trial of the facts and has led to several acquittals. More important, however, with the introduction of this disposal flexibility has come a marked increase in the use of unfitness to plead. Thus, in the 10 years from 1992 to 2001, the number of unfitness findings has risen to 452, giving an annual average of 45.2 findings. It also seems likely that this number has continued to rise since 2001. Despite this increase, however, there is the argument, mentioned earlier, that English Law continues to set the fitness threshold at too low a level. Certainly, none of the changes contained in the 1991 Act, or the more recent changes mentioned later, alter the *Pritchard* criteria in any way. Although it is difficult to make any real comparisons about the number of unfitness findings, the Guideline estimates that "around 12,000 U.S. defendants are found incompetent to stand trial each year" (Ref. 1, p S55). Accordingly, as a matter of pure speculation, with its population of around 300 million, this estimated 12,000 U.S. findings would mean 40 such findings per million of the U.S. population per year. Thus, even in the unlikely event that the annual number of unfitness findings in England and Wales was currently 100, it would mean that, with a population of some 54 million, this rate in turn would result in only 2 such findings per million of the population, which is less than five percent of the rough U.S. population average. In short, until the *Pritchard* criteria are revised to incorporate "decisional competence," there is a likelihood that some vulnerable defendants will not fall within the protective "unfitness net" as a result of the threshold's being set at too low a level.

The 2004 Act

Further changes to unfitness to plead have recently been made in the Domestic Violence, Crime and Victims Act of 2004. First, findings of unfitness to plead are no longer made by a jury but by a judge alone.[10] Second, the four disposals created by the 1991 Act are reduced to three by virtue of the abolition of guardianship as an option. Accordingly, the court is now permitted to make:

> a hospital order (with or without a restriction order),
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> a supervision order,
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> an order for an absolute discharge.[11]

The hospital order is now identical to one made under the Mental Health Act 1983, although where the unfit to plead accused is charged with murder and the court has the power to make such an order, it must impose restrictions. A major reason that prompted this particular change was the need for alignment of hospital-based disposals with the regime of the Mental Health Act, for those found unfit to plead. This need arose because the original "admission orders" under the 1991 Act permitted, and indeed mandated in relation to those charged with murder but found unfit to plead, the hospitalization of those who were not necessarily mentally disordered, thus breaching Article 5(1)(e) of the European Convention on Human Rights. To remedy this problem, the 2004 Act makes it clear that there must be medical evidence that justifies detention in a hos-

pital on grounds of the defendant's mental state, namely a mental disorder within the Mental Health Act, which in turn requires specialist treatment. This requirement applies equally to murder charges. So if the conditions for making a hospital order within the Mental Health Act are not met, then neither a restriction order nor a hospital order can be made. The government circular dealing with these provisions confirms this requirement, stating:

> . . .[T]he court is only obliged to make a hospital order with a restriction order on a charge of murder if the conditions for making a hospital order are met. If the conditions are not met, for example if the reason for the finding of unfitness to plead relates to a physical disorder, the court's options are limited to a supervision order or absolute discharge [Ref. 12, ¶ 12].

Further, although the conditions for the imposition of a supervision order expressly take account of those who are likely to pose a risk to others, the compulsory hospitalization of persons who are found unfit to plead purely as a result of a physical disorder is no longer an option.

Regaining Fitness

English law has a mechanism in place whereby the Justice Secretary (a politician) may remit the unfit person for trial, provided he is satisfied, after consultation with the treating psychiatrist, that "the person can properly be tried."[13] However, this applies only when the finding of unfitness to plead has resulted in the imposition of a hospital order with a restriction order (i.e., the equivalent of indeterminate hospitalization). In the case of all other unfitness to plead disposals, it is left to the Crown Prosecution Service (CPS) to decide, in any case in which fitness has been regained, whether it is in the public interest to mount a prosecution. In the absence of any formal mechanism similar to that given to the Justice Secretary, it seems that the CPS rarely, if ever, mounts such prosecutions. Whether this will remain true in light of the 2004 Act changes, with the future possibility of some physically disabled defendants who are unfit to plead no longer being the subject of indeterminate hospitalization, irrespective of the gravity of the offense charged, remains to be seen.

Conclusion

The AAPL Guideline is thorough, detailed, and informative. Perhaps because of the paucity of findings, together with the fact that unfitness to plead has received comparatively little critical analysis, in England there is no equivalent guideline. In addition, perhaps for much the same reasons, there has been little interest in designing instruments for the purpose of assessing unfitness to plead. A rare exception has been the attempt to adapt the MacArthur Competence Assessment Tool-Criminal Adjudication (The MacCAT-CA) to deal with unfitness to plead in England and Wales.[14]

Despite the differences between the law and its application relating the competency to stand trial/adjudicative competence in the U.S. and that of unfitness to plead in England and Wales, there should be sufficient symmetry and points of reference between both systems to mean that the AAPL Guideline will be not only relevant but of much use to English psychiatrists and lawyers alike. It is long overdue for unfitness to plead in England and Wales to be subjected to serious scrutiny by both professions with a view to re-evaluating the *Pritchard* criteria, thus bringing both law and practice into the 21st century. A wide readership of the AAPL Guideline in both England and Wales may help to further this debate, and for that reason alone, it is to be commended to all English mental health practitioners both medical and legal who have any involvement with those vulnerable defendants who are or may be adjudged unfit to plead.

References

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