

YAWNING GAP

There is a chasm between the outdated criminal test for unfitness and current medical understanding and legal practice in the field of incapacity. The criminal law position is unsustainable, say [Lucy Scott-Moncrieff](#) and [Guy Vassall-Adams](#)

In April 2007 the Mental Capacity Act (MCA) will come into force, bringing into UK law a new statutory framework for persons lacking capacity to take decisions that affect their lives.

The new law establishes a clear definition of capacity. It sets out the factors that are relevant to deciding whether a person has capacity. Where such a finding of incapacity has been made, it provides a range of remedies, allowing a court or a third party to take decisions in that person's best interests.

The Act builds upon a well established body of civil case law. It is accompanied by a Code of Practice (currently in draft form) providing detailed practical guidance on how the Act should be implemented and how the balance should be struck between protecting vulnerable persons and respecting their individual autonomy.

Fitness to plead

These developments throw into sharp relief the law in relation to "fitness to plead", where the issue in practice is whether a defendant has sufficient capacity properly to participate in a criminal trial (although it is not usually cast in these terms).

While there have been important reforms to the procedure whereby decisions on fitness to plead are made, the actual test for fitness to plead comes from outdated 19th century case law, there is no statutory framework setting out the factors which should be taken into account in making this determination and there is no guidance as to best prac-

tice. There has been trenchant academic criticism of the current law, both in terms of the test for unfitness¹ and the apparent ignorance and confusion that surrounds its application.²

Contradictory tests

It is astonishing, and possibly unlawful, that the civil law test for capacity and the criminal law test for unfitness to plead are contradictory. A person who would not have capacity, under the MCA, to take relatively trivial decisions about his life might be found fit to plead in the criminal law context and be expected to make such important decisions as to whether to plead guilty or not guilty or whether to give evidence in his own defence.

The effect of these differences is to discriminate against the criminal defendant and raises serious questions about the fairness of the current process and of those trials where borderline decisions in favour of fitness to plead have been made. The inadequacy of the current position is clearly shown where a seriously mentally disordered person charged with murder is offered an opportunity to plead to manslaughter by way of diminished responsibility, and has to take that decision, perhaps the most important in his life, even though, by the MCA test, he clearly lacks the capacity to do so.

The test for fitness to plead remains that established by Pritchard³ and subsequent case law, where the questions which the court must ask are whether the defendant is "of sufficient intellect" to instruct his solicitor and counsel, to plead to the in-

dictment, to challenge a juror, to comprehend the details of the evidence and to give evidence. However, the focus of this test on a person's intellectual ability has been criticised on the basis that many defendants suffering from mental illness have the intellectual ability to participate in a trial, but may be suffering from delusions or other disorders of mind that make it impossible for them to take proper decisions in their own best interests.

The case of Robertson⁴ illustrates the problem very well. Mr Robertson was prosecuted for murder after having stabbed to death a crew member on the ship that he was travelling on. Mr Robertson suffered from persecution mania and believed that some of the members of the ship's crew were trying to poison him. The Prosecution in that case applied for a finding of unfitness and he was found unfit to plead after the Prosecution's psychiatrists gave evidence that he could not "properly" instruct counsel, "properly" challenge jurors and give "proper" evidence. The Court of Appeal, in allowing his appeal against the finding of unfitness, held:

"This court has come to a conclusion that this trial was unsatisfactory The jury may have thought that the mere fact that he was not capable of doing things which were in his best interests was sufficient to enable them to return that finding of disability."

Fossilisation

Fitness to plead case law thus restricts unfitness to those who lack the necessary intellectual abilities or ability to communicate – the fact that a reasonably intelligent and articulate

defendant is so deluded that he or she is unable to do himself justice is neither here nor there.

This fossilisation of what is, simply, a capacity test, is particularly worthy of criticism as the law has made no attempt to keep up with the changing role of the defendant: it was not until the Criminal Evidence Act of 1898 that defendants in criminal trials were allowed to give evidence, so at the time of the Pritchard case in 1837, Mr Pritchard could not have given evidence on his own behalf, although he would have been expected to conduct his own defence if he had been found fit to plead and could not afford a lawyer. These major changes are nowhere reflected in the subsequent case law on fitness to plead.

Skewed case law

One of the probable reasons why the case law has become so skewed is that until the reforms brought about by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 the effect of a finding of unfitness was indefinite detention under the Mental Health Act. This meant, naturally, that both defendants and their lawyers were very keen for their clients to be found fit to plead, even at the expense of a trial that was something of a charade, as this was seen as the lesser injustice.

The 1991 Act provides a range of disposals including a supervision order in the event of a finding of unfitness, but the legacy of earlier decisions like Robertson continues to cast its shadow over the law, which has completely failed to revisit and reconsider the purpose of the fitness to plead provision and to keep it in tune with the times.

Common law in civil cases, however, has long accepted that intelligent and articulate people can have an impairment or disorder of mind or brain that will incapacitate them from making certain decisions and, conversely, that people who may have very substantial mental impairments or disorders are likely still to be capable of making certain decisions for themselves.

The MCA, building on this case law, has set out a two stage process of establishing whether or not some-

body has the capacity to make a particular decision. First, it has to be established whether the person has an impairment of, or a disturbance in the functioning of, the mind or brain. If this “diagnostic threshold” is reached, it is then necessary to apply the “functional test” to establish whether the impairment or disturbance causes the person to be unable to make the decision in question. Importantly, the ability to make a capacitous decision includes the ability to use or weigh the information as part of the process of making the decision.

If the person’s impairment or disturbance causes them to ignore or distort some of the relevant information, this may prevent the individual from making a capacitous decision.

The civil case law also establishes that, when considering a person’s capacity to make a particular decision, it is necessary to have regard to the complexity and importance of that decision. In the criminal context, this would mean that a mentally ill person with insistent delusions and hallucinations could perhaps be fit to plead in a short shop-lifting case with overwhelming evidence, but could be very unfit to plead to a charge of murder or manslaughter where the evidence is complex and circumstantial.

Could the MCA apply in the criminal law context? Apparently it was not Parliament’s intention that the MCA capacity test should apply to fitness to plead decisions; the test on incapacity in section 2 is limited to the MCA alone. There is no reference to fitness to plead in the Act and no amendments are made to the existing criminal legislation on this topic.

Parliament did intend that the MCA should comply with the HRA, and must therefore be compatible with the ECHR. It is difficult to see any justification for the discrimination between civil and criminal cases that would satisfy the combined requirements of Articles 6 and 14.

Furthermore, parts of the Act impose obligations which are consistent with its principles being applied in the criminal law context. Section 42(4) provides that it is the duty of a person to have regard to any relevant

code under the Act if he is acting in a professional capacity or for remuneration on behalf of a person who lacks capacity.

In similar vein, section 42(5) provides that if it appears to a court or tribunal conducting “any criminal or civil proceedings” that a provision of the code or failure to comply with a code is relevant to a question arising in the proceedings, the provision or failure must be taken into account in deciding the question. It may also be significant that while section 62 of the Act expressly declares that it is not intended to change the law on murder, manslaughter and assisting suicide (inserted to satisfy the anti-euthanasia lobby), no such declaratory statement has been made in relation to the law on fitness to plead.

Human Rights Act

Although the House of Lords has found that the procedure under the 1991 Act for a trial of the facts after a finding of unfitness is compatible with Article 6⁵ (on the basis that the latter does not amount to the determination of a criminal charge), the House has not been called upon to decide whether the current test for unfitness stands up in the light of other legal developments, notably the Human Rights Act. Now that the MCA has revealed the yawning gap which has emerged between an outdated criminal test for unfitness and current medical understanding and legal practice in the field of incapacity, there are compelling grounds for believing that the current criminal law position is unsustainable and ripe for challenge. ❖

References

- 1 Grubin R., ‘What constitutes fitness to plead?’, [1993] Crim.L.R. 748
- 2 Mackay RD, ‘The decline of disability in relation to the trial’, [1991] Crim.L.R. 87
- 3 *R v Pritchard* (1836) 7 C. & P. 303
- 4 *R v Robertson* (1968) 52 Cr.App.R. 690
- 5 *R v H* [2003] 2 Cr.App.R. 25

Lucy Scott-Moncrieff is the managing partner, Scott-Moncrieff Harbour and Sinclair solicitors: Email: LScottMoncrieff@scomo.com
Guy Vassall-Adams practises from Doughty Street Chambers
Email: g.vassall-adams@doughtystreet.co.uk