

Mental Condition Defences and the Criminal Justice System

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*Perspectives from Law
and Medicine*

Edited by

Ben Livings, Alan Reed and Nicola Wake

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PREFACE

BEN LIVINGS, ALAN REED
AND NICOLA WAKE

The genesis of this collection lies in a series of events organised by, amongst others, the editors of this volume, chiefly the one-day conference, organised by Nicola Wake and Ben Livings, which took place at the University of Northumbria in October 2013. Several of the contributing authors were present at this event, which allowed for the interdisciplinary exchange of ideas between legal and medical practitioners and academics. The views expressed at this conference have helped to inform and shape the compilation of this volume.

The contributing authors bring to bear a range of perspectives on the various topics and views herein presented. The matters with which the volume concerns itself are important and timely, with the law relating to mental disorder and criminal justice in a state of flux, but the book is not intended to be a comprehensive account of criminal justice when it comes to matters pertaining to mental disorder; the subject is, in reality, far too broad and rather too fragmented for any single volume to be able to achieve this. It does, however, set out to address some of the problematic aspects in the area, and to provide a platform for further research and policy reform.

The contributions range from the academic and theoretical to the more practice- and policy-focused, and one of the aims of the collection was to achieve a balance in this respect. So far as it is practicable, the chapters are arranged thematically, in order to assist the reader to navigate the different topics addressed. The volume is intended to form a coherent whole, connected by the overarching theme, and it can be read as such, or more selectively by those interested in particular themes or chapters. To this end, there are cross-references between the chapters where appropriate, but these are kept to a minimum.

As editors, we would like to take this opportunity to thank the contributors to this volume, both for their excellent chapters and for the professional and timely manner in which they were completed. These

factors have made the editing process a relatively straightforward one. It has been a pleasure to receive, and have the opportunity to edit, such a fine collection of work. We hope that readers will find the chapters, and the volume as a whole, a useful and interesting addition to the expanding literature in this area. In addition, we would like to thank the publishers, and Emma Smith, of Northumbria Law School, (for her valuable assistance in formatting the chapters), and the University of Northumbria's Centre for Evidence and Criminal Justice Studies, and the University of Sunderland, for supporting the activities that have made this work possible.

INTRODUCTION

BEN LIVINGS, ALAN REED
AND NICOLA WAKE

The criminal law has struggled to keep pace with developments in psychiatry, both in substantive and procedural terms, and it is widely recognised that increased inter-disciplinary discussion of mental condition defences is required in order to begin to address this gap between the law and psychiatry. This edited collection comes at a time of review of this sensitive area of the criminal law. The Law Commission for England and Wales recently placed its evaluation of insanity, automatism and intoxication on hold, whilst the Commission considers the law on unfitness to plead. These reviews are set against the backdrop of earlier Law Commission reports on partial defences to murder which informed significant changes that were made to the law in this area under sections 52-56 of the Coroners and Justice Act 2009. Recent developments in case law in this substantive field not only illustrate the importance of the role of the medical expert, but also that reform in this area is informed by ongoing inter-disciplinary research.

This edited collection brings together medical and legal conceptions of mental disorder in order to appraise the operation of the criminal law relating to mental condition defences. In this context, the edited collection is grouped into themes covering the law on unfitness to plead, insanity, automatism, and partial responsibility. The authors also consider the law on the age of criminal responsibility, and intoxication.

The collection takes as its logical starting point the issue of unfitness to plead, with contributions from Rudi Fortson and Ronnie Mackay. In chapter one, 'Reforming Unfitness to Plead for Adults in the Crown Court: A Practitioner's Perspective', Fortson explores the Law Commission for England and Wales' Consultative Document 'Unfitness to Plead', which put forward the Law Commission's provisional proposals for reform on the law concerning a defendant's unfitness to plead. Fortson asserts that, commendable as the Commission's work is, the question arises whether

existing law and practice justifies statutory reform in respect of concerns that are prone to being overstated.

In ‘Unfitness To Plead in Operation’ (chapter two), Ronnie Mackay examines the parameters of unfitness to plead which, by way of comparison with academic commentaries on the insanity defence and M’Naghten Rules, has been somewhat neglected by academics. Little is known about how unfitness to plead, also referred to as disability in relation to the trial, operates in practice. The chapter attempts to redress this gap in knowledge by exploring empirical data that the author has acquired on findings of unfitness to plead over several decades. In doing so it assesses the value of empirical studies and what they bring to the reform agenda.

From here, the focus moves to the insanity defence, with contributions from Claire De Than and Jesse Elvin, Keith Rix, John Stanton-Ife and R A Duff. In the first of these (chapter three), ‘The Boundaries of the Insanity Defence: The Legal Approach where the Defendant did not “know that what he was doing what was wrong”’, De Than and Elvin look to a particular facet of the insanity defence, insofar as the English case law has consistently held that ‘wrong’ here means ‘contrary to law’ rather than ‘morally wrong’. As a consequence of this, a defendant cannot use the insanity defence where s/he appreciates the nature and quality of the act in question and that it is legally wrong, even if s/he has a mental disorder that makes him/her think that the act is morally right. The Law Commission called this ‘an unusually, and arguably unjustifiably, narrow interpretation of the “wrongfulness” limb’ (Law Com DP, 2013, para 2.50), and De Than and Elvin’s chapter considers whether English law has taken the correct approach in this respect. They posit the question of whether the defence of insanity should extend to those who understand the legal wrongfulness of their acts, but perform them because they believe them to be morally correct. An important issue examined in this respect is how the law should respond to cases of alleged ‘brainwashing’, where the defendant argues that he or she was brainwashed and, as a result of this, believed that the act in question was morally right. This issue has been raised in relation to a number of notable cases, such as the trials of Patty Hearst and Lee Malvo in the US, and is pertinent in relation to the so-called ‘War on Terrorism’, where it is sometimes claimed that brainwashing by extremists has caused defendants to participate in acts of terrorism.

Keith Rix in chapter four ‘Prising Open the Door to Justice: Reforming the Wrongfulness Limb of the M’Naghten Rules’ deals with the meaning of ‘wrongfulness’ in the ‘wrongfulness limb’ of the M’Naghten Rules. Rix’s chapter commences with an analysis of the case law in England and

Wales which have established that the wrongfulness limb has been held to be limited to those who lack awareness that what they are doing is *legally* wrong and does not apply to those who lack awareness that what they are doing is *morally* wrong. Rix criticises this interpretation, before contrasting it with evidence that psychiatrists in England and Wales interpret wrongness as referring to *moral* as well as *legal* wrongness. This analysis is contextualised with an account of the approaches adopted in other jurisdictions. This examination of comparative law is used as background to the introduction of the Law Commission's proposals for reform of the insanity defence in England and Wales and suggestions for a way forward pending reform.

In 'Total Incapacity' (chapter five), Stanton-Ife examines the recent work of the Law Commission, undertaken with a view to reforming the defence of insanity. Stanton-Ife suggests that any claim the new proposed 'recognised medical condition' test has to being radical or novel lies not in its structure, which is similar to the extant *M'Naghten* rules, but rather in its extension of the qualifying condition that launches the defence beyond mental conditions into medical conditions in general and its addition of a new kind of resulting incapacity. It is the nature of this incapacity, in particular, that interests Stanton-Ife, and the majority of his chapter engages in criticism of the Commission's proposal that 'total incapacity' be required in order for a defendant to be able to satisfy the reformed defence.

R.A. Duff, in 'Incapacity and Insanity: Do We Need the Insanity Defence?' (chapter six), presents his views on the criticism of the Law Commission's proposals offered by Stanton-Ife, and then moves to a critical examination of the structure of the existing defence of insanity, which is ostensibly maintained in the Commission's proposed defence. Here, Duff clearly agrees with Stanton-Ife about the importance of capacity issues for the reformed defence, and he argues that the importance of the question of capacity renders the Commission's additional requirement for a 'recognised medical condition' superfluous. Duff concludes that it is time to abolish the insanity defence, but that this should be done 'in favour not of the "recognised medical condition" defence proposed by the Law Commission, which still sticks too closely to the structure of the insanity defence, but of a simple defence of "lack of rational capacity"'.

Often closely aligned to insanity is the separate concept of automatism, a subject addressed by Alan Reed, Mark A Turner and Nicholas Moran, and Adam Jackson, Gethin Rees and Natalie Wortley. In chapter seven, 'Quasi-Involuntary Actions And Moral Capacity: The Narrative of Emotional Excuse And Psychological-Blow Automatism', Reed examines

the proposition that an individual's capacity for self-control is fundamentally a moral question. Too much focus in this regard has concentrated upon the control element of culpability, and not enough on the narrative attached to any emotional excuse presentation of the defence as part of fair labelling. Involuntariness should be viewed as a continuum in this perspective between strict deontological and detentive, but with a greater appreciation of the proposed semi-voluntary reduced capacity categorisation. Moral capacity and the wider legal prism of emotional excuse in contextualised, developing the nature of the moral responsibility and partial liability nexus, and a wider range of more sophisticated judicial remedies to deal with gradations of individuated blameworthiness. The review is developed in terms of psychological-blow automatism, set in the context of post-traumatic stress disorder and dissociative states. It is extended to consider the wider parameters of provocation and sexual infidelity killings, and beyond to individuals whose emotional state becomes a compound of phenomenological grief, fear, anger and despair. A broader perspective should attach to the emotional narrative engaged, reflected in a new via media pathway and an affirmative excusatory defence normatively linked to societal interests of justice. A new pathway is chartered in this chapter towards an appropriate inculpatory-exculpatory equipoise, and fact-finder recognition of physiological control reactions encompassing sexual jealousy, anger, revenge, fear and "compassionate" mercy killing.

In 'Automatism: The Ictus, the Character, and the Law' (chapter eight) Turner and Moran provide an analysis of the concept of automatism from a medical perspective and then examine the nature of medical expertise in legal contexts. The focus is on epilepsy, and mainly on complex partial seizures, but it is anticipated that the other main categories of automatism, namely sleep and sane automatisms, could be usefully subjected to an analysis which focuses on the how medical expert opinions are formulated in legal contexts, and the implications thereof.

Turner and Moran note that the Law Commission's draft proposals for reforming the law on insanity and automatism are rightly concerned to bring legal terminology into line with medical terminology. Medical evidence supporting an automatism is likely to continue to carry significant implications, and progress in this area will therefore be assisted by further analysis of the clinical and legal application of the concept. This is particularly true where evidence of automatism is confined to the offence behaviour and where questions of 'diagnosis', motive and character are most closely associated.

Jackson, Rees and Wortley, in chapter nine, 'Sleep disorders / sexsomnia: the role of the expert and the external/internal factor

dichotomy', identify that since 2005, there have been a number of cases in which defendants charged with sexual offences have claimed that they carried out the acts alleged whilst sleeping, seeking to use the condition *sexsomnia* as the basis of a defence of either insanity or automatism. This chapter considers the role of the forensic sleep expert in establishing a defence based on *sexsomnia*. The admissibility of sleep expert evidence and the limitations on the conclusions that can be drawn by such experts, based on clinical evaluation and other relevant factors, is also discussed. In order to properly understand the context in which expert evidence is admitted, this chapter considers the application of the internal/external factor test to *sexsomnia* cases and the appropriateness of the test in such circumstances. Consideration is given to the potential impact of the recent amendments to Part 33 of the Criminal Procedure rules and the associated Criminal Practice Direction on the admissibility of forensic sleep expert evidence in *sexsomnia* cases.

In chapter ten, 'From Marx to Majewski: A Review Of The Law On Voluntary Intoxication In The Former German Democratic Republic' Michael Bohlander suggests that the treatment of voluntary intoxication in the criminal law and the wider legal order in general poses problems at the fault-lines between individual blameworthiness on the one hand, and endangerment of society and of the public interest on the other, i.e. it raises complex questions of balancing competing positions in the public policy debate. It also treads on uncertain ground as far as the cross-disciplinary conversation between law and medicine is concerned; while medical science, being purely fact-oriented, may have no qualms about conceding that a sufficient degree of intoxication will eradicate the human capacity of forming a conscious decision in such a state, either entirely or partly, the law as a normative discipline has to ask the additional question of which consequences should attach to the effects arising from such a state of lack of capacity within society. People tend to do irrational and often dangerous acts when intoxicated, so society must ask whether anyone - and if so, who - is to blame and is liable under the law if harm occurs to another from the conduct of the intoxicated person. Not surprisingly, attitudes and rationalisations differ across national jurisdictions. The former German Democratic Republic (GDR), which existed from 1949 – 1990, had at first continued the tradition of the German law from before the Second World War, but had then moved to a specific socialist approach in the criminal law reform of 1968 which in effect mirrored the public policy choice in *DPP v Majewski* almost down to the details, including the basic/specific intent division, albeit not the exclusion of insanity and/or diminished responsibility. The new law basically stated

that even if these states were present, their effect would be disregarded for reasons of public policy; in a way a more transparent version of the English approach. This chapter will trace the criminal policy and doctrinal development of the law in the GDR in the legislature and the courts and thus try to show that even radically different state ideologies can come to very similar public policy choices – whether it is the staunchly capitalist tradition of England and Wales or the socialist attitude of the former GDR.

In ‘How should the criminal law deal with people who have “partial capacity”?’ (chapter eleven), De Than and Elvin’s second contribution, the authors consider how the criminal law should deal with people who have ‘partial capacity’ in two senses: that they lack capacity in relation to some decisions relevant to criminal liability; or that they sometimes lack capacity. The chapter explores legal issues relating to those with reduced ability to understand or appreciate their actions, or to control these actions, due to a range of conditions such as learning disabilities, brain injuries or youth; and unpredictable health conditions such as sleepwalking. In so doing, De Than and Elvin address a range of important issues and their impact on a wide range of criminal offences. This includes examining whether the law on insanity operates unfairly against those who have learning disabilities or children who do not fall within the scope of the M’Naghten rules because they do not have a ‘disease of the mind’. It also involves considering how the law should deal with sleepwalkers. They ask whether a simple acquittal on the basis of non-insane automatism, as has happened in several recent unreported cases, is appropriate. The chapter concludes by suggesting reform proposals to improve compliance with enhanced human rights standards.

The chapters of Helen Howard, Arlie Loughnan and Nicola Wake concern themselves with the issue of partial defences to murder. In chapter twelve, ‘Diminished Responsibility, Culpability and Moral Agency: The Importance of Distinguishing the Terms’, Howard suggests that the defence of diminished responsibility has always offered an uncomfortable compromise between ascribing full responsibility for murder and the removal of all responsibility. This chapter will consider whether it is ever acceptable for an individual to be found *partially* responsible for a crime. In pursuit of this aim, the difference between the concepts of reduced culpability and reduced responsibility will be examined. First, an individual’s mental capacity should determine whether he is a moral agent and, consequently, minimally responsible. Only when this is established should the question of his culpability by reason of his reduced mental capacity enable his liability to punishment to be determined. These theoretical issues are examined in the light of the partial defence of

diminished responsibility as amended by section 52 of the Coroners and Justice Act 2009 and it is suggested that the new defence has come no nearer to resolving them.

Loughnan in chapter thirteen, 'From Carpetbag to Crucible: Reconceptualising Diminished Responsibility Manslaughter' suggests that there is a perception that the social meanings around unlawful killing have become more complex under late modern social and political conditions. Against this complex and changing backdrop, the core idea of individual responsibility for crime confronts new conditions of possibility. Under such conditions, diminished responsibility manslaughter has been operating in an important yet hitherto now unappreciated way – accommodating diverse and dynamic social meanings around unlawful killing that do not fit neatly into the familiar legal distinctions of offence and defence, and act and actor. Rather than embrace this aspect of diminished responsibility, the literature reveals that scholars regard diminished responsibility manslaughter as either dogged by doubts about its theoretical coherence, or dismiss it as a by-product of the law of homicide. In this chapter, Loughnan suggests that conceptualising diminished responsibility manslaughter as a hybrid legal form – as an offence/defence in which the act and actor are inextricably enmeshed – reveals both its significance and its wider potential in meeting the challenges facing practices of responsibility attribution in criminal law

In chapter fourteen entitled, 'Anglo-Antipodean Perspectives on the Positive Restriction Model and Abolition of the Provocation Defence' Wake compares the new extreme provocation defence in New South Wales with the loss of control defence in England and Wales. This analysis is complemented by a review of the law in New Zealand and Victoria where the provocation defence has been abolished. Wake suggests that a common failure to understand the circumstances of abused women within these jurisdictions is a major factor in the problems associated with current and former iterations of the provocation defence. Wake argues that it is imperative that the circumstances of those who kill their abusers are considered in order to achieve just results, and accordingly, she suggests that much is to be learned from the approach adopted in Victoria, where evidence of familial violence is admissible in relation to particular defences.

Raymond Arthur, in chapter fifteen, 'Youth, Mental Incapacity and the Criminal Justice System' notes that in England and Wales the age of criminal responsibility is set at 10 years. The current law therefore assumes all children are sufficiently mature at this age to accept criminal responsibility for their behaviour. Arthur suggests that this approach to

youth criminal capacity pays little attention to the evidence, tested under a variety of sampling and measurement conditions, that children and young people differ in developmental maturity from adults and thus may be less culpable than adults for their choices and behaviour. Under the current rules, even an incompetent child who did not understand the consequences of his behaviour may be held criminally responsible. This chapter argues that the English criminal justice system has overestimated children's capacities and disregards the child's right to respect for their evolving capacities and competencies. Furthermore, Arthur asserts that the law should protect children from the full rigours of the criminal justice system until they are old enough to take full responsibility for their actions.

CHAPTER ONE

REFORMING UNFITNESS TO PLEAD FOR ADULTS IN THE CROWN COURT: A PRACTITIONER'S PERSPECTIVE

RUDI FORTSON Q.C.¹

Introduction

Rules relating to a defendant's 'fitness to plead' (or otherwise) have been the subject of sustained criticism. It is criticism that has received detailed and painstaking consideration by the Law Commission for England and Wales,² and indeed, by the Scottish Law Commission.³ This chapter seeks to demonstrate that the question of what constitutes a defendant's 'fitness to stand trial' (or 'to plead') is deceptively complex

¹ Rudi Fortson QC Barrister, 25 Bedford Row, London, WC1R 4HD. Visiting Professor of Law, Queen Mary, University of London. The views expressed herein are those of the author alone and they are not to be taken as representing the views of any professional body. The author is a signatory to the 'Response by the Law Reform Committee of the Bar Council and the Criminal Bar Association for England and Wales' (January 2011) to the Law Commission's Consultation Paper No.197 (Unfitness to Plead), but he is not to be taken as representing the views of other signatories to that joint response.

² The Law Commission, *Unfitness to Plead* (Consultation Paper No 197, 2010); Law Commission Scoping Paper, *Insanity and Automatism* (July 2012); Law Commission Discussion Paper *Criminal Liability: Insanity and Automatism* (July 2013); Law Commission: *Unfitness To Plead: An Issues Paper* (2014); and see The Law Commission, *Mental Incapacity* (Law Com No 231, 1995)

³ Scottish Law Commission, *Report on Insanity and Diminished Responsibility* (Report 195, 2004).

and not one that can be comprehensively answered by statutory rules alone.⁴

In the case of *Bhanji*,⁵ the appellant was convicted of duty evasion following a trial lasting several weeks. Although physically unwell, Bhanji was sufficiently fit to stand trial. By the date of confiscation proceedings he was chronically ill and unable to attend court in person, but he was legally represented, gave limited instructions to his legal advisers, and evidence was adduced on his behalf over several days. A confiscation order was made in the sum of £1,202,815.90 (the value of the pecuniary advantage obtained) with a sentence of three years' imprisonment in default of payment. In refusing to hold that the judge was wrong not to stay confiscation proceedings as an abuse of process of the court, the Court of Appeal held that the correct test was whether the proceedings were fair. Bhanji had been given many months to prepare for confiscation proceedings, and although he was unable to testify personally in those proceedings, he had not been wholly incapable of giving instructions (or supplying information) during that period. The Court accepted that it is 'axiomatic that any defendant should have the right (should he so wish) to attend and participate in confiscation proceedings; the dictates of a fair trial would ordinarily so require'.⁶ However, having regard to *R v Jones*,⁷ the court retains discretion, in respect of a trial, to proceed in a defendant's absence, including cases where he or she has a genuine but intermittent illness.⁸ It was conceded that, by a parity of reasoning, the discretion extends to confiscation proceedings.

⁴ For a useful discussion of a range of legal problems and issues concerning the accommodation of mentally disordered defendants in the criminal justice system, see Ben Livings and Nicola Wake (eds) 'The Special Issue: Mental disorder and Criminal Justice', (2014) 65 (2) Northern Ireland legal Quarterly, 137-258.

⁵ [2011] EWCA Crim 1198

⁶ *ibid* [6] (Hedley J). As the Court pointed out, confiscation proceedings are 'criminal proceedings' and thus within Article 6.1 of the ECHR, but because they are part of the sentencing process they do not involve a defendant being 'charged with a criminal offence' and accordingly Article 6.2 ECHR does not apply.

⁷ [2003] 1 AC 1

⁸ see *Abrahams* (1895) 21 VLR 343 distinguished in *Howson* (1982) 74 Cr App R 172. A conviction was quashed where, taking into account the nature of the appellant's illness and his two operations, the Court of Appeal was satisfied that it would not have been fair to require him to face up to cross-examination on a serious charge given his then state of health (he was not fit to give evidence) and given the fact that he had missed so much of the trial. The jury should have been discharged. The trial lasted 49 working days. H was absent for 15 ½ days, all of

Bhanji was not 'unfit to plead' in the *Pritchard* sense⁹ - he was *physically* unfit rather than lacking capacity to make decisions - but his illness curtailed his ability to participate in person in confiscation proceedings, and thus the argument mounted on Bhanji's behalf had to be one of abuse of process. But, even if Bhanji had satisfied the *Pritchard* criteria, this was not a case where section 4 of the Criminal Procedure (Insanity) Act 1964 ('CP(I)A 1964') would have applied to the confiscation proceedings¹⁰ because that provision, which empowers a Court to determine whether a defendant is 'unfit to plead', applies only at the stage at which the defendant is about to be arraigned for trial (or is being tried) for an indictable offence, and not to proceedings ancillary to conviction (typically, sentence).¹¹

which were during the prosecution case. H submitted to the trial judge that but for his medical condition, he would have wished to have testified but that he did not feel well enough to stand up to cross-examination. A prison doctor opined that H was fit to understand the case and that he was fit to give evidence provided he sat down. H was taking 10 pain killing tablets a day of an opiate derivative. H's own doctor expressed more reservations about H's fitness to give evidence, with a slight fear that H being a 'bit slow' and mentally below par, he would not be able to answer questions as well as he could if fit.

⁹ *Pritchard* (1836) 7 Car & P 303.

¹⁰ Section 4 provides: (1) This section applies where on the trial of a person the question arises (at the instance of the defence or otherwise) whether the accused is under a disability, that is to say, under any disability such that apart from this Act it would constitute a bar to his being tried. (2) If, having regard to the nature of the supposed disability, the court are of opinion that it is expedient to do so and in the interests of the accused, they may postpone consideration of the question of fitness to be tried until anytime up to the opening of the case for the defence. (3); (4) Subject to subsections (2) and (3) above, the question of fitness to be tried shall be determined as soon as it arises. (5) The question of fitness to be tried shall be determined by the court without a jury. (6) The court shall not make a determination under subsection (5) above except on the written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved.

¹¹ It is submitted that notwithstanding the headnote to *McCarthy* [1967] 1 QB 68, the issue of unfitness to plead is not one that must be raised before arraignment, but having regard to section 4(2) of the 1964 Act, must be raised no later than the opening of the case for the defence. In *McCarthy*, the Court stated 'it seems to this court that the question arises in the ordinary case where the prosecution or the defence get up before arraignment, and say to the judge that there is a preliminary issue, namely, as to whether the defendant is fit to plead.' [74] Note the words 'in the ordinary case'.

The case of *Bhanji* usefully highlights a number of issues discussed in the Law Commission's Consultation Paper No.197 ('CP 197'),¹² and the subsequent Issues Paper,¹³ namely (among other issues), what we mean by 'unfitness to plead'; whether the *Pritchard* test for unfitness is too narrow; whether determinations of issues of unfitness to plead should be unitary or disaggregated; disposals, appeals and remissions for trial.

The number of hearings of unfitness to plead has been relatively small, although the number has increased since 1992,¹⁴ and anecdotal accounts suggest that, in recent years, the incidence of asserted issues of unfitness to plead has risen sharply. In *Walls*,¹⁵ the Court of Appeal (Criminal Division) called upon judges to 'rigorously examine evidence of psychiatrists adduced before them' and for the court to 'reach its own conclusions'.¹⁶ There may be a significant number of instances when issues of unfitness are raised on a contrived basis (for example, in order to delay the date of judgment, or to 'cultivate' mitigation) there is also increased awareness on the part of legal practitioners to be alive to the relevance of any vulnerabilities and disabilities on the part of defendants, victims, and witnesses, in the conduct of the proceedings in question. There are many defendants whose 'decision making capacity' might be questioned by their legal advisers and other professionals (for example, probation officers, and social workers) on the grounds, for example, that a client may have a personality disorder or is a problematic alcohol or drug user. It is not always necessary or even advisable for defendants to raise the matter with the Court unless their interests are put at risk. That said, as the case of *Bhanji* illustrates, trials are becoming increasingly complex to prepare and to conduct, and there will be several stages in the proceedings which require a defendant's participation. These include (for example) whether to answer questions put by investigators, the preparation of Defence Statements, the preparation of bad character and hearsay applications, whether to give evidence, and – if convicted – possible *Newton* hearings,¹⁷ or confiscation proceedings¹⁸, or the making of Serious Crime Prevention Orders (among other orders).

¹² Law Com CP No 197, 2010 (n 2).

¹³ Law Com IP, 2014 (n 2)

¹⁴ Law Com CP No 197, 2010 (n 2) See Impact Assessment, page 2.

¹⁵ [2011] EWCA Crim 443

¹⁶ *ibid*, (Thomas LJ, as he then was) [38].

¹⁷ *Newton* (1983) 77 Cr App R 13, (1982) 4 Cr App R (S) 388.

¹⁸ *R v Ali* [2014] EWCA Crim 1658.

Where a defendant's participation in criminal proceedings is limited (or wholly lacking), whether by reason of illness, physical or mental disability, or having absconded, the question of whether the proceedings should continue, and if so, in what form, must be answered by deciding whether the proceedings are fair and article 6 ECHR compliant.¹⁹ This requires a consideration of what we mean by the 'participation of a defendant', that is to say, whether his or her participation need only be active or whether it must also be effective. After all, a person may be active in sport but be wholly ineffective.

Participation by the defendant: must it be 'active' or 'effective'?

In *IH v the Federal Republic of Germany*,²⁰ IH complained that he was unfit for trial because he suffered from 'Pickwick syndrome' during his trial (which was only discovered later) and that he was not in a position to follow 'great parts' of the case. He also complained that other parts of the trial took place in his absence because the Court refused to adjourn the proceedings having wrongly formed the view that an operation he underwent at the time to have a pace-maker implanted, was a delaying manoeuvre. In declaring this part of the application to be manifestly ill-founded,²¹ the Commission²² found that IH had not shown that the 'Pickwick syndrome' rendered him unfit to stand trial. His capacity to attend the hearings was 'possibly limited but not excluded' and that this was 'duly taken into account by the trial court which held the hearings at intervals'. IH was defended by counsel; he had not alleged that he was not able to instruct his counsel in order to be defended in an adequate manner; and he was able 'himself to make use of the right to finalise submissions'.

In the *Stanford case*²³, the applicant had difficulties in hearing some of the evidence given during the trial. The ECtHR said that Article 6 of the Convention, read as a whole, guarantees the right of an accused 'to participate effectively in a criminal trial'. It is apparent from the judgment that the word 'effectively' (and its concomitant expressions), has a limited

¹⁹ *Ensslin and others v Germany* (1978) 14 DR 64, *Stanford v United Kingdom* (1994) series A/282-A.

²⁰ Application No. 14453/88, 12 February 1990.

²¹ Within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

²² Sitting in private.

²³ *Stanford* (n 19).

meaning. On the facts in *Stanford*, although ‘in general’, the right includes, *inter alia*, a defendant’s right to be present and to hear and follow the proceedings, the Court held that there had been no violation of article 6. It attached significance to the fact that Stanford had been ‘ably defended’ by a solicitor and counsel ‘who had no difficulty in following the proceedings and who would have had every opportunity to discuss with the applicant any points that arose out of the evidence which did not already appear in the witness statements’.²⁴

In *T v UK*,²⁵ and *V v UK*,²⁶ the Court took a stronger line in relation to children, stating that it is essential ‘that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings’.²⁷ It was not necessarily sufficient for the purposes of Article 6.1 that the defendant child was represented by skilled and experienced lawyers. In respect of those two cases, there was arguably more than just a hint that the ECtHR took the view that the *Pritchard test* (which of course predated the decision in *John M*²⁸) set the threshold for unfitness too low in order to provide a domestic remedy in cases such as *T* and *V*.²⁹

It is not suggested that the applicant’s immaturity and level of emotional disturbance were sufficient to satisfy the test of unfitness to plead. ...the Government have not referred the Court to any example of a case where an accused under a disability falling short of that required to establish unfitness to plead has been able to obtain a stay of criminal proceedings on the grounds that he was incapable of fully participating in them, or where a child charged with murder or another serious offence has been able to obtain a stay on the basis that trial in public in the Crown Court would cause him detriment or suffering.³⁰

In the concurring opinion of Lord Reed in *T*, it was said that there was ‘little evidence before the Court as to the applicant’s ability to follow the

²⁴ *ibid* [30].

²⁵ [1999] ECHR 170; the ECtHR found that there had been a violation of article 6.1, ECHR.

²⁶ [1999] ECHR 171; the ECtHR found that there had been a violation of article 6.1, ECHR.

²⁷ For further discussion see Arthur herein, Chapter 15.

²⁸ [2003] EWCA Crim 3452

²⁹ (n 25) [58]; *V v UK* (n 26) [60].

³⁰ *T v UK* (n 25) [58]

trial proceedings, to participate effectively in the conduct of his defence or to give evidence in his own defence'.³¹ In T's case, the Court found 'noteworthy' the findings of a psychiatrist (Dr Vizard) that the post-traumatic stress disorder suffered by the applicant, combined with the lack of any therapeutic work since the offence, had limited his ability to instruct his lawyers and testify adequately in his own defence.³² T, in his memorial had stated that due to the conditions in which he was put on trial, he was unable to follow the trial or take decisions in his own best interests.

Following the decisions in *T v UK*, and *V v UK*, the then Lord Chief Justice issued in 2000, a Practice Direction stating that, 'all possible steps should be taken to assist the young defendant to understand and participate in the proceedings'.³³ The Direction has been superseded by paras.III.30.1 of the Practice Direction (Criminal Proceedings: Consolidation) – 'Treatment of vulnerable defendants' - part of which reads:

A defendant may be young and immature or may have a mental disorder within the meaning of the Mental Health Act 1983 or some other significant impairment of intelligence and social function such as to inhibit his understanding of and participation in the proceedings.... *All possible steps should be taken to assist a vulnerable defendant to understand and participate in those proceedings. The ordinary trial process should, so far as necessary, be adapted to meet those ends.*³⁴

In *SC v The UK*,³⁵ the ECtHR went further than it had in *V v UK* and *T v UK*. It accepted the Government's argument that Article 6.1 does not require that a child on trial for a criminal offence should understand or be capable of understanding every point of law or evidential detail, but added that 'effective participation' - in this context - presupposes the following:

...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, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or

³¹ *T* (n 25)

³² *T* (n 25)[87].

³³ [2000] 1 Cr App R 483, [3]. For further discussion see Arthur herein at Chapter 15.

³⁴ Inserted by Practice Direction (Criminal Proceedings: Further Directions) [2007] 1 W.L.R. 1790 [emphasis added].

³⁵ [2004] ECHR 263

friend, should be able *to understand the general thrust of what is said in court*. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.³⁶

In its Issues Paper, the Law Commission opined that the *Pritchard* criteria ‘do not fully align’ with (what it calls) the, ‘separate test of “effective participation” required by article 6 ECHR, and in particular, the requirements set out in *SC v United Kingdom*’.³⁷ This may be to exaggerate the extent to which there is misalignment (if any). The cases of *V v UK*³⁸, *T v UK*³⁹, and *SC v UK*⁴⁰ concerned a vulnerable *class* of persons, namely, children. Their cogitative ability featured significantly, albeit not exclusively, in the reasoning of the Court in *SC v UK*⁴¹ (note the words ‘understand’, ‘able to follow’). There is no reason to suppose that the principles stated in *SC v UK*⁴² do not apply to defendants generally, the Court did not disapprove of the reasoning in *IH v Germany*⁴³ or in *Stanford*⁴⁴ where no violation of article 6 was found. Whilst it must be kept in mind that Strasbourg jurisprudence is evolving, and that standards are not fixed, it is doubtful that the ECtHR would rule that the *Pritchard* criteria,⁴⁵ as updated in *John M*,⁴⁶ is *structurally* not Convention compliant.⁴⁷ No such point was made by the ECtHR in *Juncal v UK*⁴⁸ in which *Pritchard* and *John M* were cited.

The relevant issue may boil down to whether the threshold in *Pritchard* is set correctly. In the cases of *V v UK*⁴⁹, *T v UK*⁵⁰ and *SC v*

³⁶ [emphasis added] (see, for example, the above-mentioned *Stanford judgment* (n 19) § 30).

³⁷ *SC v UK* (n 35) see also Law Com IP, 2014 (n 2) para 2.9.

³⁸ *V v UK* (n 26)

³⁹ *T v UK* (n 25)

⁴⁰ *SC v UK* (n 35)

⁴¹ *ibid*

⁴² *ibid*

⁴³ *IH v Germany* (n 20)

⁴⁴ *Stanford* (n 19)

⁴⁵ (1836) 7 Car. & P. 303 KB

⁴⁶ *John M* (n 28)

⁴⁷ These cases are discussed below.

⁴⁸ *John M* (n 28)

⁴⁹ *V v UK* (n 26)

*UK*⁵¹, the answer is arguably in the negative, but it is an answer that has to be inferred, because in each case the issue of unfitness was not raised before the domestic trial court (presumably on the assumption that a plea of unfitness would have failed⁵²).

Even if there has been ‘misalignment’ between article 6 and the *Pritchard* criteria, the criteria are capable of being contextualised (and thus updated) with reference to modern practices and the ethos of a modern trial. Subsequent to the decisions of the ECtHR in *T v UK*⁵³, *V v UK*⁵⁴ and *SC v UK*⁵⁵, there has been increasing awareness within the UK judiciary and legal profession of the needs of vulnerable participants in criminal proceedings, and of the importance of ‘special measures’ and achieving the ‘best evidence’ – all of which is evident in the bespoke directions given by the judge to the jury in the case of *John M.*⁵⁶ In *Att-Gen v O’Driscoll*,⁵⁷ the Royal Court of Jersey declined to follow *Pritchard*⁵⁸, but the Court did not have the advantage of the judgment of the Court of Appeal (Criminal Division) in *John M* that was handed down on 14 November 2013 (some four months after *O’Driscoll*).

Accordingly, the solution is to adjust the threshold for unfitness (which may require clarifying the scope of the *Pritchard* criteria), rather than bolting onto the legal test an ‘additional’ or ‘separate’ test of “effective participation”.⁵⁹ It is important that the threshold for unfitness is not set too high, but it is also important that it is not set too low (because a finding of unfitness does have consequences which a defendant may regard as not being to his or her advantage). There will be cases, such as *Friend* (No.2),⁶⁰ where, by reason of an accused’s physical or mental condition,

⁵⁰ *T v UK* (n 25)

⁵¹ *SC v UK* (n 35)

⁵² Indeed, in the cases of *T* and *V*, It was not suggested that the applicants’ immaturity and level of emotional disturbance were sufficient to satisfy the test of unfitness to plead *V v UK* (n 26) [60]; *T v UK* (n 25) [58]. The issue of unfitness was also not raised in *R v Friend* [1997] EWCA Crim 816.

⁵³ *T v UK* (n 25)

⁵⁴ *V v UK* (n 26)

⁵⁵ *SC v UK* (n 35)

⁵⁶ The trial took place in December 2002.

⁵⁷ 2003 JLR 390 (9th July 2003); and see Law Com IP, 2014 (n 2) para 2.29(2) and (n 34).

⁵⁸ *Pritchard* (n 45)

⁵⁹ See the discussion below, “Whether “decision-making capacity” should be a “test”, “limb”, or a factor”

⁶⁰ [2004] EWCA Crim 2661.

unclear aspects of law and practice are exposed (for example, whether continuance of proceedings would be an abuse of process, or whether an adverse inference may be drawn from the defendant's failure to give evidence).⁶¹

The expressions 'fitness to plead', 'unfitness to plead', and 'effective participation', are useful 'shorthand', what we are actually considering is a defendant's ability to engage with the trial process on terms which (although not giving him equivalence of skill and competence possessed by his accusers) gives him the opportunity – with appropriate support - to advance proper arguments and a defence to the charge. In addition, the point made by Baroness Hale in the *Cheshire West* case⁶² that people with disabilities have the same human rights as the rest of the human race, is unanswerable.⁶³ It is a statement that resonates with Article 12(1) and (2) of the UN Convention on the Rights of Persons with Disabilities ('UNCRPD'), namely, that 'persons with disabilities have the right to recognition everywhere as persons before the law'⁶⁴ and that State Parties 'shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.⁶⁵

Many defendants will be able to participate effectively in criminal proceedings notwithstanding that their intellectual capacity or decision-making skills are limited, provided that those limitations are: (a) taken into account in the proceedings (for example, by fact-finders); and, (b) accommodated, insofar as that is practicable (for example, through special measures). Depending on the disability in question, a defendant's case might be micro-managed (for example, the provision of an intermediary), while other situations - such as developmental immaturity - might require procedures that pertain to a *class* of persons (for example, the venue in which the proceedings are conducted).⁶⁶

⁶¹ See Abenaa Owusu-Bempah, 'Judging the Desirability of a Defendant's Evidence: An Unfortunate Approach to s.35(1)(b) of the Criminal Justice and Public Order Act 1994' [2011] Criminal Law Review 689.

⁶² *P v Cheshire West and Chester Council and another: P and Q v Surrey County Council* [2014] UKSC 19

⁶³ *ibid* at [45],

⁶⁴ UNCRPD, art.12(1).

⁶⁵ *ibid*, art.12(2).

⁶⁶ consider *T v UK* (n 25), *V v UK* (n 26) applied in *SC v UK* (n 35); distinguishing *Stanford v UK* (n 19) § 26. For further discussion on the issue of developmental immaturity see Arthur herein at chapter 15.

With those principles in mind, issues of unfitness to plead ought to be seen as part of the rubric relating to vulnerable witnesses and defendants in respect of whom measures are needed to ensure that criminal proceedings are conducted effectively and fairly, having regard to the importance that is to be attached to bringing and concluding proceedings as soon as practicable (i.e., in the interests of justice).

The Nature of ‘Unfitness to Plead’ Proceedings

Historical sketch of unfitness to plead: the ‘Pritchard test’

Hale’s statement of the law in *Historia Placitorum Coronæ*, formed the basis of Mr Justice Parke’s charge to the jury in *Dyson*,⁶⁷ followed in *Pritchard*.⁶⁸ In *Dyson*, D, who was deaf and dumb, was indicted for the murder of her ‘bastard’ child. The Court made efforts to address D’s disability by calling upon a witness to attempt to communicate with D using the ‘dumb alphabet’. The witness reported to the Court that D was ‘not so far advanced as to put words together’ and that D was ‘incapable of understanding the nature of the proceedings against her’. A jury was empanelled to determine whether D was sane or not. The jury (having been referred to Lord Hale’s commentary in his *Pleas of the Crown*, cited above) found that she was not sane. D was ordered to be kept in strict custody until His Majesty’s pleasure was known. The Court did not lay down criteria for determining unfitness to plead, and it did not elaborate on matters encompassed by the expression ‘nature of the proceedings’, which – on one view – is arguably wide enough to include what Duff has styled the ‘normative dimension’ of a criminal trial.⁶⁹ Furthermore, the Court had regard to what is now known as ‘special measures’ to accommodate the defendant’s disability insofar as that was practicable.

Similarly, in *Pritchard*, Alderson B directed the jury to decide whether the prisoner (who was deaf and dumb) had ‘sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence....to the charge’. This is the so-called ‘*Pritchard* test’:

⁶⁷ (1831) 7 C & P 305.

⁶⁸ *Pritchard* (n 45).

⁶⁹ See, below, ‘Criticisms of *Pritchard*; and the Law Commission proposals for reforming UTP’

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 defence - 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 prisoner, so that he can clearly understand them, and be able properly to make his defence 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.⁷⁰

Dyson⁷¹ and Pritchard⁷² were decided prior to *M'Naghten's case* (insanity),⁷³ and at a time when the degree of scientific and medical knowledge of anatomy, the brain, and the mind, were less advanced than it is today. Lawton QC,⁷⁴ in his submissions to the Court in *Podola*,⁷⁵ usefully traced historically the meaning of the word 'insane' at common law⁷⁶ in order to demonstrate that 'sound memory' (actually the lack of it) was a factor of insanity, and that anyone who was not of sound memory was unfit to plead:

The old phrase used was "*in sana memoria*"; "*memoria*" means memory, not mind, while "*sana*" means sound, and a man could not be tried unless he had a good and "sound memory": see Hale's *Pleas of the Crown*, vol. 1, pp. 34-35. That was a factor of insanity, and anyone who did not have it was "insane" and unfit to plead.

The emphasis on a "good and sound" memory runs through the law on this matter: see *Beverley's Case* [Reference was also made to *Somerville's Case*]. Sir John Hawles in his remarks on the trial of *Charles Bateman* [Bateman's Case] said that the true reason of the law was that

"a person of '*non sana memoria*', and a lunatick during his lunacy, is by an act of God....disabled to make his just defence. There may be

⁷⁰ Pritchard (n 45) 304-305

⁷¹ Dyson (n 67)

⁷² Pritchard (n 45)

⁷³ (1843) 1 C & K 130. For further discussion on the insanity defence see De Than and Elvin, chapter 3, herein.

⁷⁴ As he then was.

⁷⁵ On behalf of the appellant. *Podola* [1960] 1 QB 325

⁷⁶ As well as for the purposes of the Criminal Lunatics Act 1800.