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# Mental incapacity and criminal liability: Redrawing the fault lines?

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ABSTRACT

The proper boundaries of criminal liability with respect to those with questionable mental capacity are currently under review. In its deliberations in the areas of unfitness to plead, automatism and the special verdict of not guilty by reason of insanity the Law Commission for England and Wales have been cognizant of particular difficulties in fairly attributing criminal responsibility to those whose mental capacities may or may not have impinged on their decisions, either at the time of the offence or at trial. And they have referenced the potential breaches of the European Convention on Human Rights (ECHR) posed by the state of our current laws. However, in their efforts to remedy these potential deficiencies is the Law Commission heading in a direction that is fundamentally incompatible with the direction embodied by the United Nations Convention on the Rights of People with Disabilities (CRPD)? Whether one must cede sensibly to the other, or whether some compromise might emerge, perhaps through an extension of supportive services or through the development of disability-neutral criminal law, forms the subject of this paper.



## 1. Introduction

Questions of fitness to plead, automatism and the special verdict of not guilty by reason of insanity are raised in only a very small number of criminal cases in England and Wales. Fitness to plead has, admittedly, increased somewhat following procedural revisions over the last two decades but it still arguably falls short of its latent potential. This situation is not necessarily mirrored in other jurisdictions, where, for example, unfitness or lack of competence is a much more common finding (see, for example, the situation in the US, Mossman et al., 2007). However, whilst the focus of this article is on arrangements in England and Wales, the issues it raises exist in many, if not most, other jurisdictions. What are the proper limits of criminal responsibility with respect to those with mental disorder or disability; and how does the importation of a capacity test affect trial participation and the various defences based on mental disability? Fitness to plead, automatism and the special verdict of not guilty by reason of insanity thus provide a vehicle for examining some wider questions about developments in these fields.

The Law Commission have recently been reviewing all three problematic areas; and the theme of mental capacity – or lack of it – runs through their deliberations, and has, in part, structured their provisional recommendations (Law Commission, 2010, 2012, 2013a, 2013b, 2014). If this is the direction future law is to take, it would be welcomed in providing a more coherent basis than those which we currently have, dating back as they do to the 19th century.[1]

But one tension is clear. The Law Commission's recommendations are seemingly cognizant of a lack of compliance in some areas with the European Convention on Human Rights (ECHR). And whilst it is possible that their recommendations will help to remedy these shortcomings, it is possible they will find themselves in conflict with the direction advocated by the United Nations Convention on the Rights of People with Disabilities (CRPD). The state of our laws in these areas is arguably already non-compliant with what the CRPD seems to demand, albeit the UK government generally has been in something of a state of denial about this (Office for Disability Issues, 2011). However, in their latest publication on unfitness (Law Commission, 2014: paras 2.69–2.83) the Commission themselves express concern about this. It is perhaps not surprising that the ECHR and the CRPD would drive the mental capacity based areas in different directions, since the philosophies underlying the two Conventions are not on a par with one another; the ECHR endorsing the marginalisation of those with disabilities in certain circumstances and the CRPD seeking to make unlawful such segregation from mainstream justice on the basis of disability (Fennell & Khaliq, 2011: 665). Is there, however, any way in which they can be reconciled through revised law or enhanced procedures?

This article partly addresses that issue and the question of why it matters. In short, whilst this appears an arcane matter it is important in three respects. First, the question of justice: the consequences of unjustifiable findings of guilt cannot be underestimated, and in a field which intersects with questions of mental health, getting those findings right can be peculiarly demanding. Imprisoning the innocent is manifestly wrong, but the alternative for those with mental disabilities can sometimes be, not acquittal, but psychiatric detention with compulsory treatment. Second, altering the balance between who falls into the

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[1] *R v Pritchard* (1836) 7 C & P 303; the *M'Naghten* rules (1843) 10 Cl & F 200.

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remit of the mental health sector and who goes into the penal system has significant financial and resource consequences. Third, the questions of disposal are in some instances stark in their disparities, and in others subtle (for example, with respect to the supervision order); but such disposals all need to be better understood since their spectre appears to have an important role in shaping the decisions that precede them, and in some circumstances appear to drive them. And if mental capacity is to underpin these decisions or play a greater role in it, then its role in turn needs to be examined.

The territory with respect to the CRPD has already been explored by Peter Bartlett (2012:776) who has rightly warned that "The requirement that criminal law move away from engagement with mental disability is counter-intuitive". Drawing attention to the current over-representation of those with mental disabilities in our prison population, he further argues that to reduce the scope of our mental condition defences will exacerbate rather than ameliorate the problem. Over-representation is evident in all parts of the criminal justice system for those with mental and intellectual disabilities, and particularly with respect to the prison population (Peay, 2014). Whilst accurate numbers are always hard to come by, the recent report from Her Majesty's Inspectorate of Constabulary, with respect to those with intellectual disabilities in the criminal justice system, notes that it is a sizeable minority, "possibly as high as 30%" (HMIC, 2014:2). As they observe

> We were particularly concerned to find that the processes, absence of services or a simple lack of knowledge and training often led to offenders with a learning disability being perceived as a problem to be processed, rather than an individual with particular needs requiring individual treatment. HMIC (2014:4)

Summarising the position with respect to the ECHR is not straightforward, in part because of the complex interplay between victims' and offenders' rights in the arena of criminal justice and in part because of the state's duty to provide, in practice, an adequate framework to protect against acts of violence (Law Commission, 2013b, para 1.68). But it is fair to say that our current rules on not guilty by reason of insanity (the *M'Naghten Rules*) are sufficiently narrow so as to exclude some seriously ill offenders. Drawing the line too conservatively here has consequences: some such convicted offenders may be dealt with in hospital or the community under conventional sentencing arrangements, but serious offenders will most likely find themselves in a penal setting, with all of the risks of suicide and self-harm that entails, and in turn the potential breach of the Article 2 right to life requirements. With a broader insanity defence based on capacity, these individuals would be ineligible for a penal disposal (see Law Commission, 2013b at para 1.70). Equally with respect to unfitness to plead, its exclusion of those who do not satisfy the *Pritchard* criteria can mean that those who cannot effectively engage with the trial process are nonetheless exposed to it, potentially in breach of their Article 6 rights to a fair trial (Law Commission, 2010 para 2.101). This may be particularly pertinent with respect to people with intellectual disabilities (Jacobson with Talbot, 2009).

All of these deficiencies could be addressed by adopting mental capacity, or its absence, as the underpinning concept. The exclusionary basis of the law would thus be expanded, arguably offering more protection from criminal liability to those with a disability; but it would arguably also bring the law into greater conflict with the CRPD.

So how have we got into this pickle and what might be done about it?

## 2. Some basics

It would be fair to start by explaining that there is no single conception as to the function our mental condition defences serve. However, all three of the areas under discussion – fitness to plead, not guilty by reason of insanity and insane automatism – are located at the intersection of legal principles (in particular, those relating to criminal liability) and therapeutic values (in particular, those relating to compulsory detention and treatment). However, the intersection is one that is policed by the legal system, so it is perhaps not surprising to see that in many situations it is the legal ethic which prevails over the therapeutic ethic. Thus, the dominant pressure seems to be to move people towards a legal resolution (trial) and not a therapeutic interregnum (unfit to plead) or therapeutic disposal (not guilty by reason of insanity/insane automatism) — but not always.

Indeed, there is not even full agreement as to whether some procedures in which accused persons become embroiled by way of alleged offending are essentially criminal or civil proceedings. For example, the Law Commission have disagreed with the House of Lords in *R v H* (2003)[2]. The Law Commission have concluded that the s.4A hearing, which takes place after a finding on unfitness, is potentially in breach of Article 6(2) since it is a hybrid procedure, rather than a civil one as the House of Lords have asserted, and thus violates the presumption of innocence under Article 6(2) since there is no proper examination of the accused's *mens rea*. The Commission would rectify this by having a s.4A hearing which required the prosecution to prove both the accused's conduct and fault states. Yet the House of Lords has deemed the disposals following a finding of unfitness to plead to be essentially civil, even though their implications look and feel like penal disposals where protection of the public rather than the therapeutic interests of the individual take precedence[3]. In legal terms, this neatly sidestepped the prior issues around the relevance of the presumption of innocence.

The terrain that unfitness to plead, not guilty by reason of insanity and insane automatism occupy thus takes in a broad sweep of potential criminal liability, civil disposals and medical treatment imperatives and values. There is a limited ragbag of outcomes[4] which manages neither fully to recognise the individual's autonomy (which perhaps they ought as there has been no criminal conviction) nor, contrarily, fully absolves individuals of the taint of unlawful conduct (since the conduct elements of criminal offending have been established) or the seeming need for compulsory state intervention. Thus, whilst Article 14(1)(b) of the CRPD notes that "the existence of a disability shall in no case justify a deprivation of liberty" it is easily outmanoeuvred where there has been a criminal conviction. But where there has not, as in these cases, the taint of criminality hangs uneasily with the CRPD's bold assertions. There is inevitably going to be conflict.

And each of these three designations embraces at least two different interpretations. Hence, some would argue that a finding of "unfit to plead" places an accused person in limbo with respect to the potential non-resolution of their criminal culpability whilst exposing them to compulsory treatment for mental disorder. This is because under s.4A of the *Criminal Procedure* (*Insanity*) *Act* 1964, as amended, a positive finding can be made which exposes an individual to the possibility of compulsory detention and treatment, even though full criminal responsibility (that is, including establishing the person's *mens rea* for the offence) has not been made out. Others would say it protects vulnerable individuals from the risk of unfair convictions due to their lack of ability to engage with various crucial aspects of the trial process, and currently provides a route out of the criminal justice system where the prosecution cannot establish that the individual committed the *actus reus* of the offence.

[2] *R v H* (*Fitness to Plead*) [2003] UKHL 1.

[3] *R v H* concerned a 13 year old charged with indecent assault on 14 year old. The House of Lords deemed that orders made on a jury finding adverse to the accused following a finding of unfitness are not punitive. They approved a disposal of absolute discharge together with notification requirements under the *Sex Offenders Act* 1997 and *Rehabilitation of Offenders Act* 1974 arguing that these were to protect the public and for the purposes of rehabilitation. So, they were not punitive orders.

[4] Under the *Criminal Procedure (Insanity) Act* 1964 as amended these are discharge, a supervision order, and admission to hospital (on the equivalent of a s.37 order with or without a restriction order under s.41 of the *Mental Health Act* 1983).