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Mental health and fitness to plead proposals in England and Wales

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ABSTRACT

Proposals to reform fitness to plead legislation have been published by the Law Commission in England and Wales; they include a new test of decision making capacity and a new psychiatric test that has yet to be fully developed. Although proposals have met with some support, there have also been detractors. The history of fitness to plead is reviewed and current case law (including the 1836 Pritchard criteria) is examined. Although existing arrangements have been criticised, this may be attributable to inconsistent practical application, rather than inherent conceptual flaws. The Pritchard test has largely stood the test of time and has emerged relatively unscathed. Fitness to plead is not a medical construct, but rather a legal entity and any new test would be likely to introduce its own difficulties. A capacity based assessment could enhance debate and disagreement and increase court time in many cases, presenting new resource implications with questionable benefit. As the existing Pritchard criteria, amended by case law, already include a five limb test that closely resembles a capacity assessment (ability to plead to the indictment, to understand the course of the proceedings, to instruct a lawyer, to challenge a juror and to understand the evidence) and given the difficulties in introducing a functional test format in other jurisdictions, the Law Commission's proposals should now be set aside, perhaps for another day: reconsideration may be possible some decades hence, pending enhanced scientific developments within psychiatry and better understanding of the mind.

1. Introduction

In 2010, the Law Commission in England and Wales published a consultation paper in which it proposed comprehensive reform of the law on fitness to plead (The Law Commission, 2010). Fitness to plead refers to the ability of a defendant to engage in the legal process, including entering a plea and standing trial; the closest equivalent in the United States of America being competency to stand trial. As a consequence of this paper, a national consultation was introduced and has since reported; the final recommendations, following consideration of the national consultation, are scheduled for publication at some stage in 2013 (although the precise timetable has yet to be confirmed and may not report as originally intended). As regards the paper's general principles, a new test of "*decision-making capacity*" is proposed. This new test seeks to move the focus away from a defendant's intellectual ability to understand the court process, towards their functional ability to make the decisions required to participate in a trial (i.e. the defendant's ability to participate effectively in the process regardless of their intelligence quotient).

This paper describes the history of fitness to plead legislation in England and Wales in order to understand the medico-legal background and examine the Law Commission's proposals more fully. It then seeks to evaluate the proposals in order to assess the timeliness of their introduction and to establish whether they could improve existing practice.

1.1. Historical perspective

The difficulty in dealing with offenders who are unable to enter a plea, or are not able to stand trial because of illness, has historically been the subject of evolving case law in the Commonwealth. Historically, there were clear difficulties in differentiating between defendants who were unfit to plead because of insanity, cognitive incapacity or other impairments and those who wilfully chose not to enter a plea. Findings of unfitness to plead sometimes meant that defendants could avoid a conviction and thereby avert the loss of any property they might have (Forrester, Ozdural, Muthukumaraswamy, & Carroll, 2008). In order to seek better justice and to clarify existing practices, juries were appointed by courts to determine whether someone was mute by malice or by visitation of God as early as 1583 (R v Somervile, 1583: described in Walker, 1968): however, people under the examination of the courts were regularly subjected to *peine forte et dure*, which

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introduced the practice of withholding food and pressing the defendant with a gradually increasing weight until they died or entered a plea (Walker, 1968). This method was last used in 1736 and was finally abolished in 1772. However, even those who were unable to enter a plea by visitation of God were not considered, in all circumstances, to be exempt from being tried, as demonstrated in R v Steel (1787), where Mr Justice Gould ruled that "*the verdict finding the prisoner to be mute by the visitation of God*" was "*not an absolute bar to her being tried upon the indictment*".

In the 19th Century, legal and structural changes led to an increase in the number of defendants who were found unfit to plead or stand trial. For example, the Criminal Lunatics Act (1800) allowed people who had been found unfit to be remanded into prison custody. Despite this, a new hospital disposal did not become available to the courts until Broadmoor, a hospital for the criminally insane, was opened in 1863. In the meantime, wider societal changes and enhanced sympathy for the consequences of harsher penal servitude meant that courts were sometimes more inclined to findings of unfitness to plead in cases where there was clear evidence of vulnerability. As a measure of new concern, the introduction of the Prison Act 1865 meant that people could be reviewed by a prison surgeon at least once a week; as a result the likelihood of being found unfit to plead probably improved (Walker, 1968).

In one pivotal case involving a deaf and dumb woman who had been charged with the murder of her child (R v Dyson, 1831), the evidence presented indicated that she would not be able to follow court proceedings; she was subsequently found insane by a jury. This important case set two legal precedents by bringing "*idiocy under the umbrella of insanity*" and by establishing "*intelligence as the foundation on which future decisions about fitness to plead were to be made*" (Grubin, 1993). However, the current criteria for fitness to plead in England and Wales are based on the case of R v Pritchard (1836), a deaf and dumb man who had been charged with bestiality and was found to be mute by visitation of God. Although access to counsel was not readily available and the ability of a defendant to instruct counsel was not mentioned in this particular case, these elements were later added through the case of R v Davies (1853). Using a combination of these historic cases, five criteria were established to determine the criteria for fitness to plead. Since then, it has been the case that in order to be found fit to plead defendants should be able to fulfil each of the stated criteria (in other words, a finding of unfitness to plead is consequent upon failing any one of these five criteria).

Box 1

Fitness to plead criteria.

1. Plead to the indictment
2. Understand the course of the proceedings
3. Instruct a lawyer
4. Challenge a juror
5. Understand the evidence

Inevitably, as time went by there were further legal developments, some of which progressed by statute, others through case law. For example, under section 4 of the Criminal Procedure (Insanity) Act 1964, if a question arose about a defendant's fitness to plead, it was for the jury to determine the issue, regardless of the type of evidence (medical or otherwise) that should be heard: if the defendant was found unfit the trial did not proceed to a further stage. In R v Benyon (1957) it was recognised that the court had a duty to raise the issue of fitness to plead if there were concerns, even if this matter was not raised by the prosecution or the defence, although the case of R v McCarthy (1966) later clarified that "*no question arises*" unless the matter was raised by the court representatives such as the prosecution, the defence or a judge.

In 1963, a national review body which had been set up to examine medico-legal practice found that the existing fitness to plead criteria were satisfactory (Criminal Law Revision Committee, 1963), however the subsequent influential Butler report (Home Office and Department of Health and Social Security, 1975) made suggestions for improvement: these included the removal of the criterion for challenging a juror (i.e. an ability to notify the legal team of an objection to a juror) and adding the ability of the defendant to understand the indictment and to instruct their legal team to an adequate degree. The same report recommended that the issue of fitness to plead should be decided as early as possible in proceedings, thereby allowing the judge to adjourn cases for a maximum of 6-months in cases where medical evidence suggested the possibility of recovery within a specified period of several months. It also suggested that the trial judge should be able to determine the issues of fitness to plead alone, except in cases where the medical evidence was contested — in these instances a jury should then determine the issue. If the defendant was found unfit to plead by the jury, a different jury would then be used to determine whether the act/omission had occurred.

However, the Butler recommendations were not introduced and there were no subsequent changes to the existing process until the Criminal Procedure (Insanity) Act 1964 was amended by section 2 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991. These changes made certain that the jury would hear "*written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved*".[1] It also provided greater flexibility of disposal, such that a hospital order (a section of the Mental Health Act which replaces a prison sentence with a hospital disposal) with a restriction order (attached to a hospital order for public protection, with leave and discharge determined by the Ministry of Justice rather than the hospital[2]) was no longer mandatory.[3] Later, section 22 of the Domestic Violence, Crime and Victims Act 2004 introduced further changes by allowing the determination of fitness to plead by a judge,[4] rather than by a jury.

2. Method

A series of medico-legal databases were searched between January and August 2011 using the following search terms:

"*fitness to plead*", "*Pritchard criteria*", "*criminal procedure in England and Wales*", "*fitness to stand trial instruments*", "*fitness to plead concerns and criticisms*", "*fitness to plead reforms*".

The searched databases included the British and Irish Legal Information Institute (BAILII), HeinOnline Law Journal Library, Justis, Westlaw UK, Lawtel and LexisNexis UK and further wider searches were undertaken using print journals and books, electronic journals, articles, newspapers, e-books and references from Legal judgments. Legal judgments were obtained using the latter three databases.

The overall search was supplemented by a second phase general internet search using widely available and easily accessible PubMed and Google Scholar databases. The information that was retrieved was then reviewed by one of the authors (FM) and its suitability was for use within this specific project was determined.

[1] Approved for the purposes of section 12 of the Mental Health Act 1983 by the Secretary of State as having special experience in the diagnosis and treatment of mental disorder.

[2] Under sections 37 and 41 of the Mental Health Act 1983.

[3] Alternative options to hospital admission included a guardianship order, supervision and treatment order and absolute discharge. This was later amended by s. 23 of the Domestic Violence, Crime and Victims Act 2004 removing the option of guardianship order.

[4] Magistrates' Courts can also make an order in respect of some offences (The Crown Prosecution Website, 2013).