

Assessment of Fitness to Stand Trial

*Ian Freckelton*¹

*Barrister, Victoria, New South Wales, Australian Capital Territory,
South Australia and Tasmania, President, Australian and
New Zealand Association of Psychiatry and Law, William Evans
Fellow, University of Otago*

The determination of fitness to plead, or competency to stand trial as it is known in the United States, has long been a vexed issue for the law. The interpretation to be given to legislative provisions on the subject and common law decisions remains unclear and troubled in New Zealand, Australia, England, Canada and the United States. However, the fitness of a person to stand trial is of its nature a threshold issue, determining whether or not they properly belong within the criminal justice system or whether they should be detained in a non-penal institution without a determination of their legal culpability.

Although issues in relation to fitness have come before the courts on many occasions, a substantial portion of the case-law that has arisen has focussed not on the indicia of fitness or unfitness but on the adjectival law—the procedures to be employed in fitness hearings. Similarly the legal literature on fitness to stand trial has been largely devoted to these “applied” issues, while for its part most psychiatric and psychological literature on the subject has been descriptive, reciting characteristics of particular accused found unfit to stand trial, factors typical of such findings and the custodial consequences of being found unfit.²

Thus both the decided cases and most of the literature have begged the fundamental question requiring answer by mental health assessors and courts alike: what actually constitutes unfitness to stand trial?

Inevitably, decision-makers in relation to fitness to stand trial must depend significantly upon expert assessments provided on the issue by psychiatrists and psychologists.³ Rates of agreement between mental health professionals and court determinations have been found to exceed 90%.⁴ To facilitate the provision of probative material, the ultimate issue

- 1 The author acknowledges the helpful comments of John Dawson on an earlier draft but takes full responsibility for all errors and omissions.
- 2 This point is usefully made by Bonnie, “The Competence of Criminal Defendants: Beyond *Dusky* and *Drope*” (1993) 47(3) *University of Miami Law Review* 539, 540. See the review by Grisso, “Five Year Research Update (1986-190): Evaluations for Competence to Stand Trial” (1992) 10 *Behavior, Science and the Law* 353.
- 3 See Brookbanks, “Judicial Determination of Fitness to Plead—the Fitness Hearing” (1992) 7 *Otago Law Review* 520, 537. However, of course, the decision is ultimately for the court “and not for medical men of whatever eminence”: *R v Rivett* (1950) 34 Cr App R 87, 94
- 4 See Nicholson & Johnson, “Prediction of Competency to Stand Trial: Contribution of Demographics, Type of Offense, Clinical Characteristics, and Psycholegal Ability” (1991) 14 *International Journal of Law and Psychiatry* 287.

rule in relation to such matters is routinely ignored.⁵ The burden of such reliance was described by a Scottish psychiatrist as placing “an awesome responsibility on the examining psychiatrist calling for extra caution on his part”.⁶ However, the mental health assessor can only assess in terms of the criteria provided by the law. The uncertainty in those criteria has been described as leading to “a lack of uniformity in the evaluation and decision-making process and the real possibility that the final decisions are unreliable and invalid”.⁷

This paper analyses what it asserts should be regarded as the key features of unfitness to stand trial, and assesses the extent to which legislation and decided cases have taken them into account. In addition, the paper argues both that an assessment of fitness must be functional in nature, context-dependent and pragmatic, and that it must focus in an informed way upon the capacity of the accused for rational evaluation and communication.

Fitness to stand trial

The insistence that an accused be fit to stand trial arose out of a concern in the common law that criminal trials be fairly conducted.⁸ The justifications for the requirement that the accused be fit to stand trial may be divided into four:

- a recognition that it is fundamentally unfair to try an unfit accused;
- a recognition that it is inhumane to subject an unfit accused to trial and punishment;
- a perception that a trial of an unfit accused is comparable to trial of an accused in absentia,⁹ a procedure which our legal system repudiates; and
- a concern to avoid diminution of the public’s respect for the dignity of the criminal justice process if unfit accused are subjected to trial and punishment.¹⁰

A variety of different procedures are employed in different jurisdictions, ranging from allowing a judge or magistrate to decide the issue, empanelling a separate jury for the purpose and deferring to a specialist body constituted for the task.¹¹

The precise criteria for fitness to plead vary significantly from country to country but all have at their core a determination of whether an accused person at the time assessed is able

5 See Freckelton, “The Ultimate Issue Rule” in Freckelton & Selby (ed), *Expert Evidence*, Law Book Co, Sydney, 1993. However, such permissiveness is not without its critics in this context: see eg Lindsay, “Fitness to Stand Trial: An Overview in Light of the Recommendations of the Law Reform Commission of Canada” (1976-77) 19 *Criminal Law Quarterly* 303.

6 Chiswick, “Insanity in Bar of Trial in Scotland: a State Hospital Study” (1978) 132 *British Journal of Psychiatry* 598, 601; see also Normand, “Unfitness for Trial in Scotland” (1984) 7 *International Journal of Law and Psychiatry* 415.

7 Roesch et al, “The Fitness to Stand Trial Interview Test: How Four Professions Rate Videotaped Fitness Interviews” (1984) 7 *International Journal of Law and Psychiatry* 115.

8 See Blackstone, *Commentaries on the Laws of England*, Clarendon Press, Oxford, 1769, Vol IV, p 25. Allen, *Kesevarajah & Moses* (1993) 66 A Crim R 376, 397.

9 See Vernia, “The Burden of Proving Competence to Stand Trial: Due Process at the Limits of Adversarial Justice” (1991) 45 *Vanderbilt Law Review* 199, 201; Cheang, “Fitness to Plead in Singapore and Malaysia” (1988) 17 *Anglo-American Law Review* 209.

11 For a comprehensive outline of the procedures adopted in New South Wales, particularly in relation to intellectually disabled defendants, see New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, DP 35, NSWLRC, Sydney, 1994, chs 4 and 5.

meaningfully to participate in the criminal trial process.

1 England

The English common law¹² criteria for fitness to stand trial were formulated by Baron Alderson in *R v Pritchard*¹³ (emphasis added):¹⁴

There are three points to be inquired into: firstly whether the prisoner is mute of malice or not, secondly *whether he can plead to the indictment* or not, and 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.*

The word “comprehend” has been held to mean no more than “understand”.¹⁵ The emphasis, therefore, is upon understanding of the proceedings, while the scope of the requirement that he be able to “plead to the indictment” remains somewhat unclear. There is little emphasis upon capacity for communication or decision-making, and no distinction is drawn between intellectually disabled, physically or mentally ill accused.

Chiswick has commented that in practice:¹⁶

the concept has been narrowed to the capacity of the accused to understand the charge, distinguish between a plea of guilty and one of not guilty, follow the evidence in court, and give instructions to his defending solicitor. These are tests of comprehension and communication, functions that may be compromised by mental dysfunction.

There has been little by way of judicial analysis of the forms of mental illness which should be accounted sufficient to render an accused unfit to plead¹⁷ although the decision of Devlin J (as he then was) in *R v Roberts*¹⁸ accepted that “defects of the senses”, whether or not combined with a “defect of the mind” may render a person unfit to plead.¹⁹

The Committee on Mentally Abnormal Offenders chaired by Lord Butler of Saffron Walden²⁰ recommended the replacement of the expression “unfit to plead” by the expression “under disability” and proposed that the reference to challenging a juror should be omitted from the *Pritchard* criteria. The Committee suggested that two further criteria be added: namely, whether the defendant could give adequate instructions to his

12 See also Criminal Procedure (Insanity and Unfitness to Plead) Act 1991; White, “The Criminal procedure (Insanity and Unfitness to Plead) Act” [1992] Criminal Law Review 4.

13 (1836) 7 C & P 103.

14 See also *R v Governor of Stafford Prison* [1909] 2 KB 81; *R v Robertson* (1968) 62 Cr App R 690; *R v Berry* (1977) 6 Cr App R 156.

15 See *R v Podola* [1959] 3 All ER 418; [1960] 1 QB 325, 354; *Ngatayi v R* (1980) 30 ALR 27, 31.

16 Chiswick, “Psychiatric Testimony in Britain: Remembering Your Lines and Keeping to the Script” (1992) 15 International Journal of Law and Psychiatry 171, p 172.

17 See Brookbanks, “A Contemporary Analysis of the Doctrine of Fitness to Plead” (1982) Recent Law 84, p 91ff.

18 [1954] 2 QB 329, 331.

19 See also *R v Berry* (1978) 66 Cr App R 156.

20 Home Office DHSS, *Report of the Committee on Mentally Abnormal Offenders*, Cmnd 6244, HMSO, London, 1975.

or her legal advisers and also plead with understanding to the indictment.

2 *Canada*

In Canada s 2 of the Canadian Criminal Code provides that a person is “unfit to stand trial” if they are “unable *on account of mental disorder to conduct a defence* at any stage of the proceedings before a verdict is rendered or *to instruct counsel* to do so, and, in particular, unable on account of mental disorder to (a) *understand the nature or object of the proceedings*; (b) *understand the possible consequences of the proceedings*; or (c) *communicate with counsel*”²¹ (my emphasis). The focus of the section, therefore, is again upon understanding and capacity for communication. There is a requirement of a “mental disorder” but no criterion of rationality or any comparable concept.

A key decision to have interpreted the Canadian provisions is that of *R v Taylor*.²² The accused (a lawyer) was found to be suffering chronic paranoid schizophrenia. Expert evidence suggested him to be articulate and conscious of the nature and possible consequences of the proceedings but expressed the view that he was unfit to stand trial because due to his paranoia he would not be able to trust counsel and instruct them in his best interests. At first instance he was found unfit to stand trial because his mental illness deprived him of the capacity to instruct counsel rationally or to communicate with counsel or to conduct his case.²³ He appealed and the Court of Appeal rejected the “analytic capacity test” and adopted what they classified as the “limited cognitive capacity test”, under which the presence of delusions does not vitiate the accused’s fitness to stand trial unless the delusions distort the accused’s rudimentary understanding of the criminal justice process.²⁴ They held that the accused’s ability to conduct a defence and to communicate and instruct counsel is limited to:²⁵

an inquiry into whether an accused can recount to his/her counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence. It is not relevant to the fitness determination to consider whether the accused and counsel have an amicable and trusting relationship, whether the accused has been cooperating with counsel, or whether the accused ultimately makes decisions that are in his/her best interests.

It is not easy to gauge the breadth of the decision. It appears to repudiate the contention that the impact of a paranoid illness would necessarily render an accused unfit to stand trial, but it does require that the quality of the accused’s instructions be such that counsel can “properly” conduct a defence on their behalf. It may be that irrationality in instructions, contradictory versions of events or uncooperativeness would all preclude a

21 See Savage, “The Relevance of the Fitness to Stand Trial Provisions to Persons with Mental Handicap” (1981) 59 Canadian Bar Review 319; Eaves et al, “Attitudes of the Legal Profession to the Law Reform Commission Recommendations on Fitness to Stand Trial” (1981) 24 Criminal Law Quarterly 233. Lindsay, “Fitness to Stand Trial: An Overview in Light of the Recommendations of the Law Reform Commission of Canada” (1976–77) 19 Criminal Law Quarterly 303.

22 (1992) 11 OR (3d) 323.

23 See also *Lafferty v Cook* 949 F 2d 1546, 1554 (10th Cir 1991).

24 Page 338.

25 Page 336.

“proper” defence. The court gave no indication.

3 *United States*

In the United States two cases are authoritative on the nature of unfitness to stand trial: *Dusky v United States*²⁶ and *Drope v Missouri*.²⁷ In the vital but cryptically short decision of *Dusky*, the Supreme Court agreed with the submission from the Solicitor-General that it is “not enough for the district court judge to find that ‘the defendant [is] oriented to time and place and [has] some recollection of events’.” The Court held that (emphasis added):²⁸

The test must be whether he has *sufficient present ability to consult* with his lawyer with a *reasonable degree of rational understanding*—and whether he has a *rational as well as a factual understanding of the proceedings* against him:

Thus, the inquiry of the court is not upon whether the accused is mentally ill per se or intellectually disabled but upon whether his or her experience of hallucinations, delusions or other abnormalities will adversely impact upon his or her functioning in court.²⁹ The attempt is to ensure that each accused is a conscious, rational participant in their trial;³⁰ otherwise it has been suggested that a criminal trial “loses its character as a reasoned interaction between an individual and his community and becomes an invective against an insensible object”.³¹ The key concept in the decision is capacity for rational understanding.

In *Drope v Missouri* the Supreme Court was more expansive, noting that it had long been accepted that a person whose mental condition is such “that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defence may not be subjected to trial”.³² They agreed too that “Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial”.³³ The decision is often regarded as a gloss upon *Dusky* but does not exhibit the same concern with the need for rational understanding in the competent defendant. It probably takes the law no further.

4 *Australia*

In Australia the common law remains as set out in 1958 in *R v Presser*³⁴ where Smith J held that the test to be applied was one of “common sense”: “whether the accused, because of mental defect, fails to come up to certain minimum standards which he needs to equal

26 362 US 402, 4 L Ed 2d 824, 80 S Ct 788 (1960).

27 420 US 162, 43 L Ed 2d 103, 95 S Ct 896 (1975).

28 4 L Ed 2d 824, 825 (1960).

29 See Winick, “Presumptions and Burdens of Proof in Determining Competency to Stand Trial: An Analysis of *Medina v California* and the Supreme Court’s new Due Process Methodology in Criminal Cases” (1993), 47 University of Miami Law Review 817, 897.

30 See Note, “Competence to Plead Guilty and to Stand Trial: A New Standard When a Criminal Defendant Waives Counsel” (1982) 68 Virginia Law Review 1139, 1141.

31 Note “Incompetency to Stand Trial” (1967) 81 Harvard Law Review 454, 458.

32 43 L Ed 103, 113 (1975).

33 43 L Ed 2d 103, 119.

34 [1958] VR 45. See Freckelton, “Current Issues in Forensic Psychiatry” in H Strang and S Gerull (ed), *Homicide: Patterns, Prevention and Control*, Australian Institute of Criminology, Canberra, 1993.

before he can be tried without unfairness or injustice to him".³⁵ His Honour gave what is one of the most substantial lists of indicia that exists in reported case-law (emphasis added):³⁶

He needs, I think, *to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of proceedings* so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs *to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any.*

The High Court has made it plain that the *Presser* rules are the "minimum standards with which an accused person must comply before he or she can be tried without unfairness or injustice."³⁷ The requirements centre upon capacity for understanding and ability to make forensic decisions, as well as to communicate both to the court and his or her legal representatives.³⁸ It is not necessary that a represented accused understand the law "if that lack of capacity does not render him unable to make a proper defence".³⁹ Nor is a requirement of rationality articulated, but it would be open to argument that such a requirement is inherent in Smith J's ratio. However, the High Court has held that "in some cases, complete understanding [of proceedings] may require intelligence of quite a high order".⁴⁰

The *Presser* criteria have attracted a measure of controversy. They were endorsed by the Victorian Law Reform Commission⁴¹ but criticized by the Victorian Intellectual Disability Review Panel which referred to:⁴²

The possible danger of too readily dismissing the person's capacity to comprehend, and ... the subjective nature of determining the extent to which the person may satisfy the *Presser* criteria. It also fails to consider that the person may benefit from

35 Page 48.

36 Page 48. See also *Allen, Kesevarajah and Moses* (1993) 66 A Crim R 376, p 396ff.

37 *Kesevarajah v R* (1994) 68 ALJR 670, 677; *Ngatayi v R* (1980) 147 CLR 1, 8.

38 Section 631 of the Western Australian Criminal Code and s 613 of the Queensland Criminal Code similarly focus upon whether the accused is capable of understanding the proceedings so as to be able to make a "proper" defence. The High Court in *Ngatayi v R* (1980) 30 ALR 27, 32 applied the approach of Smith J in *R v Presser* [1958] VR 45, 48 in interpreting the Western Australian Criminal Code provision.

39 *Ngatayi v R* (1980) 30 ALR 27, 31.

40 *Kesevarajah v R* (1994) 68 ALJR 670, 677; *Ngatayi v R* (1980) 147 CLR 1, 8.

41 Victorian Law Reform Commission, *Mental Malfunction and Criminal Responsibility*, Report No 34, Vic Govt Printer, Melbourne, 1990, para 126.

42 Intellectual Disability Review Panel of Victoria, Submission, 17 December 1992, p 8.

assistance or tutoring, in order to better understand the proceedings.

Late in 1994 the Model Criminal Code Officers Committee promulgated a draft Mental Impairment Bill 1994. In its terms it is very similar to the *Presser* criteria:

3. A person is mentally unfit to stand trial for an offence if the person's mental processes are so disordered or impaired that the person is:
 - (a) unable to understand the nature of the charge; or
 - (b) unable to plead to the charge and to exercise the right of challenge; or
 - (c) unable to understand the nature of the proceedings (namely, that it is an inquiry as to whether the person committed the offence); or
 - (d) unable to follow the course of the proceedings; or
 - (e) unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
 - (f) unable to make a defence or answer the charge.

The proposed legislation does not measure the fitness of a person by evaluation of the extent to which they are prejudiced in their capacity to take part in the trial process save by reference to a variety of open-ended cognitive criteria. With the limited exception of (e), they are not qualified in terms of adequacy or sufficiency for any purpose, but starkly stated. They are similar to the rudimentary understanding criterion articulated in Ontario in *R v Taylor*.⁴³

5 New Zealand

The key fitness to plead provision in New Zealand is s 108 of the Criminal Justice Act 1985 (NZ) where it is prescribed that a person is “under a disability” if *because of the extent to which a person is mentally disordered, they are unable (a) to plead; (b) to understand the nature or purpose of the proceedings; or (c) to communicate adequately with counsel* for the purpose of conducting a defence (my emphasis). To this extent, therefore, the concentration is upon the unclear notion of ability to plead, presumably to express a wish to plead guilty or not guilty, to understand what the trial is about in principle and to communicate “adequately” with their legal representative. Again much lies within the word “adequately”. Adequately for what, one would like to know. The legislation gives no indication but Heron J in *R v Carrel*⁴⁴ has accepted that it requires consideration of the quality of the accused's communication as well as the physical possibility of communication.

In that case his Honour held that the delusional system entertained by the defendant was preventing him giving adequate instructions to his counsel:⁴⁵

[h]e will not discuss the critical aspects of the case. I consider all that amounts to a communication but an inadequate one. It is not just a matter of being unwise, although it is that as well, but a failure to communicate sufficiently and suitably. There exists a form of communication which in dictionary terms and giving the

43 (1992) 11 OR (3d) 323.

44 [1992] 1 NZLR 760, 762.

45 Page 766.

word its etymological origins is not equal because part of the defence is not addressed by one of the parties to the communication.

The effect of this focus upon the quality of the defendant's communication was to all intents and purposes an assessment of the defendant's rationality and the adverse impact of his state of mind upon his best interests in the criminal justice process.⁴⁶ This decision builds upon the earlier decision of Wilson J in *R Owen (No 2)*⁴⁷ where his Honour inquired into whether the accused was able to "reach a proper decision whether to plead guilty or not guilty" and did so explicitly in terms of assessing whether he was "able to reach a rational judgment" on the issue.⁴⁸

In the recent unreported case of *R v M*⁴⁹ the High Court was called upon to rule upon the fitness of a 39 year old accused who had been a patient in a psychiatric facility since his teenage years. However, it was his intellectual disability that was the problematic aspect of his capacity to stand trial. Neazor J found that the accused's suffered from a disorder of cognition and found that his understanding of what is involved in pleading to a charge was deficient and unlikely to be susceptible of improvement. He also found that the accused could not be brought to understand the nature or purpose of the proceedings. However, importantly, his Honour found that the accused's capacity to convey his version of events was not so impaired as "to prevent counsel becoming informed" after a good deal of hard and careful work. He accepted that the accused might well be unable to make an informed decision on whether to give evidence but found that as a matter of law he was not satisfied that that was a factor coming within s 108(1)(c) and its reference to communication with counsel. In my respectful view, this highlights a significant deficiency in the legislation as presently framed.

No definition of "mentally disordered" is found in the Act so recourse must be had to the definition in the Mental Health (Compulsory Assessment and Treatment) Act 1992 (NZ) where mental disorder is defined as:

an abnormal state of mind (whether of a continuous or intermittent nature) characterized by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it

- (a) Poses a serious danger to the health or safety of that person or others; or
- (b) Seriously diminishes the capacity of that person to take care of himself or herself.

In relation to an intellectually disabled person this focuses the court's inquiry upon their disorders of cognition, or potentially of their disorders of mood, perception or volition. This is appropriate if the quest is for assessment of the person's ability to understand

46 Compare *R v Berry* (1978) 66 Cr App R 156.

47 [1964] NZLR 828.

48 Page 831. A difference exists, however, between His Honour's finding that an accused must be able to have a rational recollection of the events and circumstances in which he was a participant at the time of the alleged offence (p 832) and the decision of the English Court of Criminal Appeal in *R v Podola* [1959] 3 All ER 418 where it was held that hysterical amnesia does not render an accused unfit to stand trial.

49 HC Wellington, T66/94, 8 November 1994, per Neazor J.

proceedings and to participate meaningfully in them through their counsel. The problem comes in the qualifying aspects of the definition, namely whether the person poses a serious danger to their own or others' health or safety or their impairment seriously diminishes their capacity to take care of themselves.⁵⁰ Such criteria, in my respectful view, are simply not pertinent to the inquiry to be undertaken. These matters are neither germane nor useful for the purpose of assessing an individual's fitness to engage in a forensic process.⁵¹

Expert assessment

Forensic clinicians generally concede that the meaning of fitness to stand trial is highly contextualized and that the standard that they apply is "open-textured", depending upon the seriousness and complexity of the charges, on the challenges facing the accused in the given case, the relationship between the accused and his or her lawyers, those lawyers' communication skills and a number of other criteria.

The United States Supreme Court has recognized that there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed"⁵² and has conceded that the question is often a difficult one "in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts".⁵³ Once again, this does not advance understanding very far.

Aside from the difficulty of the process, in light of the unclear requirements of the courts for their assessments, a little is known about expert assessments of fitness to stand trial. The context in which an accused is referred for a fitness to plead assessment is important. It may be at the aegis of the accused, the Crown or the judge. Studies by Aubrey in 1987 and 1988⁵⁴ have indicated that certain characteristics are particularly prominent among those who are assessed for fitness to plead, namely that 55% had a history of inpatient treatment, while 48% had a previous conviction for a serious offence. He also found that such assessments are more common where violence of some kind has been displayed in the offence with which they are currently charged.

Rogers and Mitchell⁵⁵ maintain in the Canadian context that there is "a notable absence of specific guidelines for assessing fitness to stand trial" and that no doubt for this reason "forensic psychiatrists and psychologists often adopt rather idiosyncratic interpretations of fitness to stand trial".

50 This issue was resolved by Neazor J in *R v M*, above n 49, by something of a sleight of hand holding that the accused's disorder of cognition seriously diminished his capacity to take care of himself (p 7).

51 Curiously, there is a history of confused criteria in this context with *R v Dyson* (1831) 7 C & P 305, subsuming intellectual disability under the rubric of insanity. This was continued in *R v Pritchard* (1836) 7 C & P 303; see D Grubin, "What Constitutes Fitness to Plead?" [1993] *Criminal Law Review* 748.

52 *Drope v Missouri* 43 L Ed 2d 103, 118.

53 Ibid.

54 Aubrey, "Evaluations of Competency to Stand Trial: Frequency of Repeated Referrals" (1987) 15 *Journal of Psychiatry and Law* 425; Aubrey, "Characteristics of Competency Referral of Defendants and Nonreferred Criminal Defendants" (1988) 16 *Journal of Psychiatry and Law* 233.

55 Rogers & Mitchell, *Mental Health Experts and the Criminal Courts*, Carswell, Ontario, 1991, p 96.

The problem is exacerbated where a request from either court or legal representative is in terms that do not enable the expert to be clear about the purpose of the report or where the report is apparently commissioned for more than one purpose. Such a practice is both dangerous and unsatisfactory.

Larkin and Collins⁵⁶ found in assessing 77 pre-trial psychiatric reports that in 27% the criteria for assessment of fitness to plead were not explicitly mentioned by the authors,⁵⁷ leading them⁵⁸ to agree with the proposition advanced earlier by Chiswick⁵⁹ that “some psychiatrists ... seem uncertain of the criteria for fitness to plead and confused the issue with responsibility”. Given the mixed messages sent by the legislature and the courts in many jurisdictions, such confusion is hardly surprising.

Relevant factors for expert assessment

One of the most difficult factors posed for experts endeavouring to assist the courts in supplying assessments of accused persons’ fitness to stand trial is the inherent vagueness of most legal formulations of fitness. That given extra-curially by Nicholson J of the Western Australian Supreme Court (as he then was), is not unusual where he argued that the essence of a fitness to plead finding should focus upon the capacity of the accused to understand proceedings. He qualified this by stipulating simply that:⁶⁰

this does not require an accused to have a complete understanding or an ability to conduct a defence. It is a test to be applied in a reasonable and commonsense fashion. It is enough that the accused can understand the evidence and instruct his or her counsel as to the facts of a case.

While this formulation may have considerable merit, it assists the expert little in knowing what criteria should occupy his or her mind in undertaking a fitness assessment. What quality of understanding is necessary? What if the accused is quite irrational? What if the accused is apparently self-harming in his or her attitude toward the trial? What if the accused’s perception of the trial process or his or her representation is dominated by paranoid ideation? What if he or she cannot make choices as to strategies or if the instructions as to forensic tactics are perverse?

Bonnie⁶¹ sets out the following sophisticated criteria for assessing fitness to stand trial:

- ability to communicate a preference;
- ability to understand relevant information about a particular forensic decision to be made by the accused;

56 Larkin & Collins, “Fitness to Plead and Psychiatric Reports” (1989) 29 *Medicine, Science and the Law* 26.

57 See also Chiswick, “Fitness to Stand Trial and Plead, Mutism and Deafness” in R Buglass and P Bowden (ed), *Principles and Practice of Forensic Psychiatry*, Churchill Livingstone, London, 1990. Page 31.

58 Chiswick, “Insanity in Bar of Trial in Scotland: A State Hospital Study” (1978) 132 *British Journal of Psychiatry* 598.

60 Nicholson, “Waving the Magic Wand: Solving Key Legal Issues Relating to Intellectual Disability” (1995) 2(4) *Journal of Law and Medicine* (forthcoming); see also RD Nicholson, “Recognition of Intellectual Disability in the Criminal Justice System: The Role of Law” (1994) 1(2) *Psychiatry, Psychology and Law* 81, 88–89; *Ngatayi v R* (1976) 11 ALR 412.

61 Above, n 2, p 576ff.

- ability to appreciate at a basic level, or at a substantial level, the significance of information in relation to his or her situation;⁶² and
- the ability to make reasoned choices during the forensic process.

Within the criterion of ability to communicate preferences, of course, is the assumption that an accused has the ability to make decisions. Even under these criteria, though, the possibility exists that the reasoning processes of the accused will be perverse and contrary to his or her best interests by reason of the presence of mental disorder.⁶³

Arguably the capacity to understand the import of proceedings and the capacity to provide lucid instructions to counsel will vary on the basis of the Crown case and the nature of the case. A complex case involving obtaining property by deception or fraud, for instance, is likely to require considerably more application of cognitive faculties than a simple assault case.

A series of requirements may be plotted, depending upon the nature of the case and the defence strategy:

- ability to understand the nature of the charges;
- ability to understand the possible consequences of the proceedings;
- ability to understand forensic options;
- ability to make choices;
- ability to maintain appropriate courtroom demeanour;
- ability to understand evidence;
- ability to give evidence;
- ability to instruct as to lines of cross-examination;
- ability to make decisions on the calling of witnesses.

One might qualify each one of these capacities for understanding, decision-making and communication by the adjective such as “rational” or one might impose a limit upon the level of understanding such as “to a basic degree”. It depends upon how substantially as a matter of principle one is concerned to ensure that the accused be able to function within the trial setting.

The setting out of such requirements illustrates the fluidity of fitness to plead as a measure of what can be changing functional abilities.⁶⁴ For the most part those prejudiced from effective functioning in the trial process by reason of intellectual disability will be disadvantaged on a continuing basis but those disadvantaged by psychiatric illness will frequently only be impaired during an acute or florid phase of their illness. For this latter

62 This is of particular application in relation to accused suffering limitations in cognitive capacity, disturbances of thought or affective disorders.

63 See, eg, *R v Carrel* [1992] 1 NZLR 760. Ironically it will generally be the accused’s instructing solicitor and barrister who are most privy to such problems but *R v Carrel* and *R v M*, above, n 49, have confirmed the difficulties in legal representatives giving evidence of such matters.

64 See *Rogers & Mitchell*, above, n 55, p 98.

group, the passage of time or the use of medication may well facilitate the return to sufficient mental health to enable their being tried without disadvantage.

Assessment of fitness to plead ought to be coterminous with the demands likely to be made of the accused in the particular proceedings in which he or she is charged. It is inappropriate to apply low level criteria to an accused who is charged in complex proceedings in which he or she will need to play a major role, just as it is inappropriate to apply elaborate criteria to a simple trial in which the defence will primarily be oriented toward assessing sufficiency in law of the Crown's evidence.

Some matters, however, should be regarded as fundamental. For instance, in any proceedings, the accused must be able to understand the charge brought against him or her, as well as the nature of their plea. For any form of proceeding to take place against an uncomprehending or significantly impaired accused strikes at the integrity of the criminal prosecution system and can only detract from the respect in which the criminal justice system generally is held. The solution to the adverse effects upon accused charged with minor offences, and yet found unfit to stand trial, lies within increased flexibility being given to the courts to deal proportionately with all accused found unfit to stand trial.⁶⁵

As a practical matter it can be profoundly difficult to be confident, as counsel, expert assessor or judge, that a person suffering from intellectual disability⁶⁶ or a person with a variety of mental disorders, ranging from paranoid to manias, truly understands the nature of charges, as well as the consequences that could flow from different forms of plea or strategy within a plea decision.

It might be argued that it is sufficient if the accused can understand the overall objectives of the defence strategy so as to provide sufficient instructions to their lawyers. Even this, though, is problematic. It is clear that a degree of autonomy in relation to the conduct of a person's defence is properly possessed by counsel and instructing solicitors but they must have sufficient guidance to make decisions that are consistent with the wishes of their client. Tactical decisions can involve the taking of significant risks with potentially detrimental consequences for the accused. As the Australian High Court pointed out in *Keseverajah v R*,⁶⁷ even late in the trial the accused may need to participate actively "to protect his own interests" to instruct upon the taking of exceptions to the charge, the responses should the jury ask question or make requests, or the approach to be adopted should the jury be unable to reach a verdict or if the judge needed to take action following submissions from the parties.

In the medical context a patient must be acquainted with the potential for significant risks prior to engaging in medical treatment.⁶⁸ In addition, the patient must be able to

65 For instance, some such accused could be released into the community with conditions directed toward reducing the likelihood of their reoffending. The stringency of such conditions could vary according to the seriousness of the offence with which they have been charged (but not found guilty) and the strength of the evidence against them.

66 See Bonnie, "The Competence of Criminal Defendants with Mental Retardation to Participate in their Own Defense" (1990) 81 *Journal of Criminal Law and Criminology* 419.

67 (1994) 68 ALJR 670, 678.

68 See *Rogers v Whitaker* (1992) 175 CLR 479.

communicate their choice as to treatment, to understand the information sufficiently to make an informed choice, appreciating the significance of information provided to them for their own context and would need to be able to engage in a process of rational evaluation, or reasoning, about the information⁶⁹ before they could be said to have given informed consent. Buchanan and Brock⁷⁰ make the useful point that competence is adequate decision-making capacity, not “perfect rationality” and divide its components as follows:

- the ability to understand the relevant options;
- the ability to understand the relevant consequences for the patient’s life of each of the relevant options; and
- the ability to evaluate the consequences of the various options by relating them to his or her own values”.

Surely, comparable principles should apply in the context of an accused participating in the trial process. If adequate instructions cannot be procured from the accused during the trial process, it must surely be counsel’s responsibility to inform the court of that fact with the potential that the accused is found unfit to stand trial or to continue to stand trial. If adequate decision-making capacity is clouded by inadequate intellect or mental illness, a person should not be accounted fit to stand trial. This standard does not demand a high level of rationality but does contemplate the ability in an accused to apply reasoned contemplation to the subject matter of the charges against him or her and the ability to communicate instructions accordingly.

The capacity of an accused to participate in the decision-making process in relation to the calling of witnesses can also be problematical at a practical level if the accused experiences irrational prejudices or, for reason of intellectual impairment or psychiatric disorder, is unable to make a reasoned decision on the subject. Now that accused in almost all jurisdictions no longer have the right to make an unsworn statement, it is also a reality that thought-disordered or impaired accused persons are often in a very poor position to give sworn evidence and be cross-examined. By reason of this, they are in a worse position than other defendant in the criminal process. When their impairment reaches a point where they are unable to give a rational or comprehensible account of relevant matters in evidence, in my view they should be accounted unfit to stand trial.

The United States Court of Appeals for the Ninth Circuit in *Moran v Godinez*⁷¹ made an interesting distinction. It held that the capacity of accused to waive constitutionally guaranteed rights in the trial process should be differentiated from the accused’s

69 See Appelbaum and Grisso, “Assessing Patients’ Capacities to Consent to Treatment” (1988) 319 *New England Journal of Medicine* 1635 who also make the point that ideally the patient be able to manipulate the information given to them rationally, using their logical processes to compare the risks and benefits of the options made known to them. Whereas appreciating a situation entails assigning values to information provided, rational manipulation is the process of weighing information to reach a decision, an option precluded by psychoses, deliria, dementias, extreme phobias or panics, euphorias, depressions or angers.

70 Buchanan and Brock, *Deciding for Others: the Ethics of Surrogate Decision Making*, Cambridge Uni Press, Cambridge, 1989, p 82.

71 972 F 2d 263, 266 (9th Cir, 1992).

competency to stand trial. It explicitly adopted the “reasoned choice” test in relation to the waiver of constitutional rights:

A defendant is competent to waive counsel or plead guilty only if he has the capacity for “reasoned choice” among the alternatives available to him. By contrast, a defendant is competent to stand trial if he merely has a rational and factual understanding of the proceedings and is capable of assisting his counsel. Competency to waive constitutional rights requires a higher level of mental functioning than that required to stand trial.

The difficult issue posed in this regard for countries without constitutionally entrenched rights is whether “reasoned choice” should be the major criterion or whether “rational understanding” is sufficient.

It is vital too that the accused be able to communicate *rationally* and effectively with his or her legal representatives. The psychiatric state of akinesia can result in apathy, apparent disinterest on the part of an accused to his or her fate and unpreparedness to communicate with legal representatives. Tomashefsky⁷² points out that such a condition strikes at the root of the ability of an accused to participate in the trial process:

An apathetic defendant who is disinclined to speak up during the give-and-take of cross examination cannot be of much help in his own cause, especially if he does not recognize his own disinclination.

Thus, it becomes apparent that mere capacity to communicate an instruction is not sufficient. The instruction may be in the form of little more than a grunt. It may be monosyllabic or nonsensical in the context of other aspects of the communication. There must be a qualification upon the communication, such that the communication is sufficient to enable counsel to represent the accused effectively.

It needs to be acknowledged too that intangible factors such as the rapport, or lack of it, subsisting between the accused’s lawyers and him or her play a major role in the feasibility of the accused adequately comprehending proceedings. If a substantial alienation has evolved between counsel and the accused, with the accused suspecting his barrister of being part of a conspiracy against him, his ability to comprehend the trial process is likely to be substantially impaired. This is not all that unusual a situation where an accused person with a combination of despair and paranoia becomes convinced that the system will not give him or her a fair go. The situation is further complicated if the accused chooses to represent him or herself.⁷³

72 Tomashefsky, “Antipsychotic Drugs and Fitness to Stand Trial: the Right of the Unfit Accused to Refuse Treatment” (1985) 52 University of Chicago Law Review 773, 785.

73 As Americans put it, waiving the right to counsel, exercising their *Faretta* right (*Faretta v California* 422 US 806 (1975) which requires a judge to warn an accused of the dangers and disadvantages of self-representation so that the record will establish that the accused has made the decision about waiver, aware of what he or she is doing and eyes open. This in itself brings problems in competency assessment: see Note, “Competence to Plead Guilty and to Stand Trial: A New Standard When a Criminal Defendant Waives Counsel” (1982) 68 Virginia Law Review 1139, 1153.

However, as Nicholson J⁷⁴ indicated, pragmatism too must enter into the judicial assessment process. An absolute standard which requires full comprehension of forensic subtleties would result in excessive rates of declaration of unfitness to stand trial. However, if the threshold is set too low for assessment of fitness to stand trial, the potential exists for false convictions because of the impairment of the accused to participate in the trial process. The balance is not easy.

Expert tests for fitness to stand trial

The task of assessment is an unwanted one for many mental health professionals as their primary orientation is frequently toward assessment and treatment of psychiatric impairment, rather than assessment of a patient's competency to function within a legal environment. An irony is that, of necessity, the demands of the legal forum and the problems experienced in the client's communicating instructions required for his or her defence are likely to be better appreciated by the client's lawyers than by mental health professionals.

However, given that determinations have to be made about accused persons' fitness to stand trial, and given that those decisions are significantly influenced by expert evidence from psychiatrists and psychologists, it is important to reduce subjectivity and arbitrariness in the assessment process. These aspects of the process have been the subject of critique by the Victorian Intellectual Disability Review Panel:⁷⁵

Recommendations by experts as to whether a person meets the *Presser* rule are often made too simplistically and quickly judged in a single interview. A person may satisfy some criteria but not others and subjective judgments are made by expert witnesses as to the degree to which a person satisfies each of the criteria.

Clearly, general criteria which would enable falsifiable and reliable assessment of fitness to stand trial, thereby reducing the role of subjectivity of clinical judgement, would be of considerable utility to those responsible for conducting the assessments.

A variety of attempts have been engineered to develop standardized fitness to plead assessments, dating back to 1973 and a scale developed by Dr A Louis McGarry and his associates at the Harvard Laboratory of Community Psychiatry.⁷⁶ This first test contained 13 items directed toward assessing an accused's ability to cope with the trial process, such as appraisal of available legal defences, quality of relating to lawyer and capacity to engage in planning legal strategy.

74 Nicholson, "Waving the Magic Wand: Solving Key Legal Issues Relating to Intellectual Disability" (1995) 2(4) *Journal of Law and Medicine* (forthcoming).

75 Submission, 17 December 1992, p 8.

76 See the *Competency to Stand Trial Assessment Instrument (CAI)* developed by the Laboratory of Community Psychiatry, Harvard Medical School, referred to in Rogers and Mitchell, pp 101–102 (see also AL McGarry et al, *Competency to Stand Trial and mental Illness*, US Govt Printing Office, Washington DC, 1973; R Roesch et al, "The Fitness to Stand Trial Interview Test: How Four Professions Rate Videotaped Fitness Interviews" (1984) 7 *International Journal of Law and Psychiatry* 115, the *Competency Screening Test (CST)*: see PD Lipsitt, D Lelos & AL McGarry, "Competency for Trial: A Screening Instrument" (1971) 128 *American Journal of Psychiatry* 105; the *Interdisciplinary Fitness Interview (IFI)*: see SL Golding, R Roesch and J Schreiber, "Assessment and Conceptualization of Competency to Stand Trial: Preliminary Data on the Interdisciplinary Fitness Interview" (1984) 8 *Law and Human Behavior* 321; the *Georgia Competency Test (GCCT)*: see Rogers and Mitchell, p 104.

However, such standardized assessments are themselves subject to criticism and may be culturally limited by reason of their North American background. They continue to labour under the difficulty that the requirements for participation in the legal process remain to be clearly articulated by the courts.

Most assessments in both Australia and New Zealand are non-standardized and in the case of persons potentially disabled by intellectual disability are clinical in orientation but supported by psychometric testing. Assessment based upon clinical experience is the norm and at a practical level forensically problematical given the reliance customarily placed upon such forms of expert evidence by courts.

Jones⁷⁷ in Australia acknowledged that when called upon to assess the fitness to plead of an intellectually disabled person a variety of options are open to him—interviewing (structured or semi-structured), a general intelligence approach, an abilities approach, a specific test of fitness to plead and an experimental approach. He said that from a psychologist's point of view, there was no standard set of procedures and that for the most part a combination of methods tended to be employed. He advocated the development of a specific screening test and argued that it could be developed in conjunction with lawyers and validated against actual court outcomes and the opinions of relevant people.

When the task required of the mental health practitioner lacks normative texture and is highly discretionary, depending upon clinical impressions, it is both difficult for counsel to cross-examine and unlikely to be the subject of appellate court intervention. This is a recipe for experts to usurp the role of the court. Indeed, Hart and Hare found in a study of males remanded for competency to stand trial that the courts accepted 77 out of 80 clinician assessments.⁷⁸ This may have been because the assessments were so compelling, but it is more likely to be a combination of preparedness to defer to the expertise offered and because the opinions expressed by the assessors were so dominated by clinical impression as to defy ready evaluation.

The need for reform

Fitness to stand trial is a threshold issue whose importance cannot be overemphasized. It is unconscionable that persons who are unable adequately to comprehend what is transpiring in their own trial, or to participate in the trial process or to communicate their rationally formed instructions to their lawyers, be subjected to trial⁷⁹. A criterion for assessment should be upon whether the impact of their intellectual disability or psychiatric impairment means that they are significantly prejudiced as criminal defendants, as compared with persons not suffering such disabilities.

77 Jones, "Criminal Law and People with Intellectual Disabilities: A Psychological Perspective", paper presented to Conference on Criminal Law and People with Intellectual Disabilities—Questions of Balance, Perth, July 1990.

78 See Hart & Hare, "Predicting Fitness to Stand Trial: the Relative Power of Demographic, Criminal and Clinical Variables" (1992) 5 Forensic Reports 53; see also Reich & Tookey, "Disagreements Between Court and psychiatrist on Competency to Stand Trial" (1986) 47 Journal of Clinical Psychiatry 29; Golding et al, "Assessment and Conceptualization of Competency to Stand Trial" (1984) 8 Law and Human Behavior 321.

79 The only exception to this might be asserted to be a "trial of the facts" which can lead to an acquittal only, as under the Criminal Procedure (Insanity and Fitness to Plead) Act 1991 (UK).

However, in most jurisdictions, New Zealand among them, the law has not prescribed with sufficient detail what its standards are for those who are to be tried in its courts. Until it does so with precision, it cannot expect sophisticated and pertinent expert evidence on the subject of fitness. Standardized tests for fitness to stand trial have the potential to be of great assistance to the courts. However, they cannot realistically be developed until legislation or courts prescribe whether or not rationality in understanding, decision-making and communication, or the capacity for exercise of a reasoned choice, is required before an accused can be brought to trial. This is an area which the legislature or the judiciary needs to give the lead and then the other disciplines, psychiatry and psychology, will be able to contribute to the criminal justice process. It is important that the cryptic and inadequately expressed criteria for participation in the trial process be abandoned and substituted by a clear provision, taking into account the approach of the United Supreme Court in *Dusky v United States*⁸⁰ and consolidating on the humane analyses articulated by Wilson J in *R v Owen (No 2)*⁸¹ Heron J in *R v Carrel*⁸² and Neazor J in *R v M*⁸³ such as the following:

An accused shall be found unfit to stand trial if

- (a) he or she cannot substantially understand the charges preferred; or
- (b) he or she cannot rationally make a decision on whether to plead guilty or not guilty to the charges; or
- (c) he or she cannot substantially understand and follow, with assistance from his or her legal representatives, if they exist, the evidence against him or her; or
- (d) he or she cannot rationally give adequate instructions to his or her legal representatives, if he or she is legally represented, in relation to the conduct of his or her defence, or if he or she is not legally represented, make such decisions him or herself rationally; or
- (e) he or she cannot rationally make the decision on whether to give evidence and, if he or she wishes to give evidence, do so rationally and without being substantially prejudiced by psychiatric or intellectual impairment.

Such a provision has the advantage of concentrating upon functional impairments potentially unfairly suffered by psychiatrically and intellectually disadvantaged accused persons in the trial process. It avoids the problems inherent in labelling them with mental illnesses or disorders, or employing irrelevant criteria borrowed from the civil commitment context. Such a provision focuses upon the key aspects of reasoning, understanding, capacity to make choices and communication which are potentially such as to prejudice certain accused persons from participating in the trial process to the level open to other persons accused of criminal offences. It enables flexibility, focussing upon the particular proceedings, and pragmatism in light of the demands posed in different contingencies.

80 362 US 402, 4 L Ed 2d 824, 80 S Ct 788 (1960).

81 [1964] NZLR 828.

82 [1992] 1 NZLR 760, 762.

83 Above, n 49.