Disability Hearings Under The Criminal Justice Act —a Judge's View

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Introduction

Disability hearings are rare and somewhat tricky. I commend the Legal Research Foundation for hosting this seminar which may do much to dislodge some of the mystique that surrounds this aspect of Mental Health/Criminal Justice Law.

The right to have a disability hearing is doubtless a most important one. Not only that, but defendants who may be eligible are often the most vulnerable in terms of the criminal justice system. I apprehend that there may be many defendants who come into the criminal justice system but who, for a variety of reasons, are never directed for psychiatric assessment or have the benefit of the consequences that may flow from that.

The comments and observations I now set out are done so in an effort to bring a practical and clinical outline of the procedure from a judge's point of view.

Spotting the candidate

When defendants first appear in Court it is invariably a busy list court of the District Court. It is not unusual for well in excess of a hundred defendants to be processed in the course of a day. The task of the judge is to attend to each case as quickly, efficiently but humanely as time permits.

If a defendant appears dishevelled and/or disorientated, this may be the first cue to having that defendant's personal situation assessed before a plea is taken.

In the Auckland District Court there exists the all important Court Liaison Nursing Service. This is a community mental health nursing service provided to and operating from within the Justice Department. It is staffed by community mental health nurses and in Auckland the service extends to most courts. It is funded by Waitemata Health. The stated aims of the Service are:

> The primary aim of the Service is to provide and act as a focus for the interface between Justice and Mental Health services, in order to facilitate efficient and responsive systems when dealing with issues concerning Mental Health.

It is important that court officers, ie, defence counsel, duty solicitors, prosecutors and judges are aware that the service exists and that defendants are able to be referred for on the spot assessment within the Court building.

As a matter of practice, a defendant may be assessed by a forensic nurse before appearing

in the dock or may first appear in the dock and be stood down for assessment at the suggestion of a court officer.

The important point to stress is that considerable care must be taken to ensure that a defendant who may be a candidate for assessment is spotted and assessed.

Initial report

In the greater Auckland area where the forensic service is in place, an initial and brief report will ask the Court to do one of a number of things. The report could for instance indicate that the defendant is already subject to the Mental Health system but that he or she should be processed by the criminal justice system in the normal way. However, if upon initial assessment it appears that the defendant's mental state is likely to be directly relevant to the charge faced or will otherwise impact on the judicial process, a remand to enable further investigation should be requested. This invariably occurs by requesting a psychiatric report pursuant to s 121 of the Criminal Justice Act.

This section is something of a trap for young players. It is a complex section and it is most important to prescribe exactly which statutory provision is in issue. *Do not leave it up to the judge, study the section and make your request carefully.*

In courts where no forensic service operates I think it best that a short remand is obtained so that an initial assessment can be carried out. If that seems to warrant a full psychiatric report, then the request under s 121 can be made.

The question of plea

A psychiatric report may suggest that a defendant is under a disability or is otherwise mentally challenged. Before the defendant is called on the date to which he has been remanded, an amount of work is required in preparing the way for what should happen next. In a busy list court a judge appreciates counsel who has thought through the issues and can succinctly summarize the position and what is sought.

If the psychiatric report suggests that the defendant is mentally disordered and could not or should not participate in a court hearing within the meaning of s 108 of the Criminal Justice Act, a request should be made at that time for a disability hearing. My suggestion is that having made the request, a further adjournment is sought to set up the hearing properly. We found in *Police v M* [1993] DCR 1119 that successive dates for hearing were required because insufficient court time had been allocated initially for proper disposition of the case. It became a protracted and stressful affair. Once the report is available, I would be inclined to:

1) Discuss the position with the prosecutor and obtain a Police or Crown view;

2) Assess what witnesses might need to be called having regard to the issues raised;

3) Liaise with the Fixtures Clerk as to what time will be required and when that time can be allocated.

Some priority should be given to disability hearings. I would tend to insist that court administration ensures that that occurs.

The hearing

Section 111 of the Criminal Justice Act suggests that disability hearings are largely inquisitorial. There is no "proof" required to a requisite standard. Section 111(1) provides that a judge must be satisfied on the evidence of two medical practitioners and after hearing from prosecution and defence that a defendant may be under a disability.

Who should provide the evidence at disability hearings is a moot point.

I have found it useful in disability hearings to conduct a judicial conference with counsel beforehand to discuss the format of the hearing and the evidence to be provided.

It could be argued that it is for the defendant to provide the further medical opinion required by s 111 but equally it may be the Court's responsibility to organize that. I favour a procedure which sees counsel for the defendant assembling the evidence in support of the notion of disability, calling it and allowing that to be tested by the prosecution. The prosecution, of course, has the right to call its own evidence. The Court has no right to call evidence but by appointing counsel to assist, a canvassing of the important issues is often facilitated.

The important issues

When the Mental Health (Compulsory Assessment and Treatment) Act 1992 was passed, the new definition of "mentally disordered" was transported into the Criminal Justice Act.

A reading of *R v T* [1993] DCR 600, *Police v M* [1993] DCR 1119, *Police v M (No 2)* [1994] DCR 388 and finally *Police v M (No 3)* (DC Auckland, 30 November 1994) convey clearly the uneasy relationship between the Mental Health Act and the Criminal Justice Act. I illustrate the problem in this way. Section 108 of the Criminal Justice Act provides that a person is under a disability if that person is unable:

(a) To plead; or

(b) To understand the nature or purpose of the proceedings; or

(c) To communicate adequately with counsel for the purpose of conducting a defence.

But before getting to that stage the person must first be defined as mentally disordered.

Section 2 of the Mental Health Act sets out the definition of persons who are mentally disordered. Medical health professionals have tended to approach s 2 restrictively and exclude from the definition persons with a hint of intellectual disability. They have often tended to focus on whether or not a person can be assisted therapeutically by the Mental Health model and if they cannot, to exclude them from the definition. This is understandable from a Mental Health point of view but is quite inconsistent with the spirit of s 108. I do not wish to repeat all that was said in the decisions to which I have just referred. But I think it is important that counsel stand their ground, notwithstanding what medical opinion may opine.

I would accordingly suggest that evidence focuses on:

1) Whether a defendant has "an abnormal state of mind" in the pure not populist psychiatric sense;

2) That broadly that person's abnormal state of mind poses a serious danger or otherwise restricts that person's ability to care for himself. In this respect note the way in which authority is developing. In *Re JK* (1994) NZFLR 678 a quite restrictive view was taken to this requirement. However, in *Re D* (1995) NZFLR 28 and in *Re KLD* (DC Auckland, No 113/94, 13 February 1995) the Court has interpreted this second leg of the definition to "mentally disordered" much more liberally.

Disposition

If the evidence supports a finding of disability, the Court must make an order pursuant to s 115 of the Criminal Justice Act. Once again, this is not an easy section to interpret.

Police v M (No 2) was in large part concerned with disposition. It was contended by the Police in that case that the Court was required to make an inpatient compulsory treatment order. This submission was rejected and it has important consequences for the defendant.

You will see from s 115 that a defendant:

1) May be released;

2) Be detained as a special patient;

3) Be subjected to either a community or inpatient compulsory treatment order;

4) No order may be made if the person is otherwise subject to a full-time custodial sentence.

It is very much in the defendant's interests if a community treatment order can be made or failing that, an inpatient compulsory treatment order is made. Detention as a special patient is much more restrictive and it may be important to ensure that evidence is placed before the Court which could justify detention other than as a special patient.

Conclusions

The undertaking of a disability hearing will be very much assisted if we are clear from the outset what the objectives are and what points need to be covered. The procedure is sufficiently difficult as to probably warrant a check list being drawn up.

Judges are not highly experienced in this field, simply because the procedure does not often arise. It may be, however, that many more defendants are candidates for orders than is recognized.