Disability and Dispositional Issues: a Legal Perspective

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Introduction

The question of the appropriate disposition for offenders found to be under disability in terms of s 108 Criminal Justice Act 1985 is currently one of the most difficult medico-legal issues facing professionals in the criminal justice system. The importance of the under disability (fitness to plead) doctrine has been well rehearsed in other contexts.[1] While the fitness rules themselves have a long history in New Zealand criminal law, the issue of fitness to plead has, until relatively recently, seldom been the subject of litigation in this country. The present "crisis" in this area of practice arises directly from the recasting of the definition of "mentally disordered" in the Mental Health (Compulsory Assessment and Treatment) Act 1992. It is also compounded by a lack of suitable facilities for the containment and management of certain classes of "under disability" offenders with special needs. Notable amongst these are offenders with an intellectual disability.

The purpose of this paper will be to focus on the dispositional options which are currently available to the courts under the Criminal Justice Act 1985 and to consider their appropriateness in relation to persons found to be under disability. I will attempt to demonstrate that the rapidly changing landscape in the area of disabilities and human rights law also impacts on practical questions of disposition, and adds to the complexity of the issues that must be addressed in particular cases. It is an area, I would suggest, where urgent reforms are needed.

Meaning of disposition

The word "disposition" is not used in relevant legislation in New Zealand. While in its generic sense it may be taken to include sentencing, it has acquired a more specialized meaning, signifying the manner in which an offender is dealt with by a court following a specific finding that the offender is mentally disordered, legally insane or otherwise unfit to be tried or sentenced. It follows that an offender may be subject to disposition who has not been convicted of an offence or has been found to be not criminally responsible on account of insanity. Equally the question of disposition may be relevant to an offender who has been tried and convicted but who, because of the supervening presence of mental disorder, is not fit to be sentenced according to conventional principles. Disposition in New Zealand generally signifies the activation of a specific therapeutic process aimed at the treatment and/or containment of the offender. It is unconcerned with formal sentenc-

1 See Brookbanks, "A Contemporary Analysis of the Doctrine of Fitness to Plead" [1982] NZ Recent Law 84; "Judicial Determination of Fitness to Plead—The Fitness Hearing" (1992) 7 Otago LR 520; "Fitness to Plead and the Intellectually Disabled Offender" (1994) 1 Psychiatry, Psychology and Law 171.

ing aims in that its concerns are not with the punishment but rather the treatment and detention of mentally disordered offenders. We might say that disposition represents a distinctive "specialist" response to specific challenges presented by mental disorder in the course of the trial process. Its concerns are, as such, much narrower than those of sentencing.

Disposition and human rights

An aspect of the changing landscape in this area of practice concerns the impact of human rights upon mental health law generally.[2] The significance of such international human rights documents as the International Covenant on Civil and Political Rights and the United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care cannot be ignored in their application to the practice of forensic psychiatry. Increasingly relevant local legislation is being subjected to the scrutiny of international standards which articulate the optimum standards of treatment and management for persons with mental illness.[3] Furthermore, the implications of the New Zealand Bill of Rights Act 1990 are increasingly being worked out in this area, particularly as regards the right to a fair trial, and minimum standards of due process. Although the connection has been slow in developing, it is now clear that these external standards are as relevant to the practice of forensic psychiatry as to other areas of mental health. The New Zealand Law Commission has recently confirmed the relevance of international standards in the context of disability in its recent report on Community Safety.[4] The consequences of these developments have only begun to be felt and have yet to be fully explored. However, it is clear from recent decisions like *Police v XYZ*,[5] *R v T*,[6] *In Re S*,[7] and *In Re M*[8] that judges are aware of the importance of giving expression to relevant human rights where mentally disordered and intellectually disabled offenders are concerned and have expressed concern that effective remedies ought to be provided when those rights are breached. Relevant human rights are by no means exclusively concerned with the need to achieve procedural fairness, which is at the heart of the doctrine of fitness to plead. Other relevant rights include the right to refuse medical treatment and the right to freedom from cruel and unusual treatment or punishment. The latter right might be a relevant consideration where, for example, a severely intellectually disabled offender is sentenced to imprisonment in a penal environment that makes no particular provision for inmates with special needs.

Other areas in which human rights concerns might be expected to have an impact in future

2 For a useful general discussion of human rights in the context of mental health law see Rosenthal & Rubenstein, *"International Human Rights Advocacy under the 'Principles for the Protection of Persons with Mental Illness'" (1993)* 16 International Journal of Law and Psychiatry 257. See also Dawson, "'Fundamental Rights' and the Mentally Disabled", (1986) 6 Otago L R 291.

3 The processes for the implementation of international standards into domestic law are usefully considered in Mulgan, "Implementing International Human Rights norms in the Domestic Context: The Role of a National Institution" (1993) 5 Canterbury L R 235.

4 Law Commission Report No 30 *Community Safety: Mental Health and Criminal Justice Issues* , Wellington, 1994.

5 [1994] DCR 401.

6 [1993] DCR 600.

7 [1992] 1 NZLR 363.

8 [1992] 1 NZLR 29.

"fitness" litigation include pre-hearing psychiatric and psychological evaluations in association with the right to refuse treatment, and "dangerousness" assessments in the determination of whether or not to make a special patient order. There is, above all, a need for vigilance to ensure that offenders are afforded the full range of relevant human rights to which they are entitled and that relevant procedures are apt to secure such rights.

Relevant legislation

The principal statutory provisions governing disposition in New Zealand are contained in s 115 of the Criminal Justice Act 1985. Disposition is also, arguably, a relevant concept in relation to hospital orders provided for in s 118 Criminal Justice Act 1985. However, hospital orders are distinguished from other forms of disposition in that they require the conviction of the offender as a precondition and represent a "benevolent alternative" to a custodial sentence.[9] In this context the issue is not procedural protection as such, rather the need to ensure that convicted offenders who are mentally disordered are dealt with humanely. By contrast the disposition options in s 115 Criminal Justice Act 1985 require neither conviction nor eligibility for imprisonment as preconditions for their utilization. The terms of s 115 have recently been modified by statutory amendment effected by the Mental Health (Compulsory Assessment and Treatment) Act 1992.[10] These amendments ensure that normal mental health law principles apply once a change in status to "patient" has occurred. Because the provisions in s 115 are part of a statutory code[11] a judge does not have the freedom to consider any disposition possibility not expressly provided for in the statute. However, there may be nothing to prevent a judge from ordering a stay of proceedings in an appropriate case. This was the course undertaken in *Police v XYZ*[12] for the purpose of ensuring that an offender who was *functionally* unfit to stand trial though not legally under disability was not forced to undergo a trial which he would have been unable to meaningfully participate in. While the powers that are given, including the power to discharge, are sufficiently broad to cover most cases, recent experience has shown that some categories of offender patients present very special difficulties which the present legislation has been unable to adequately address. To the extent that the statutory dispositions give rise to duties under the Mental Health Act, high degree of care must always be exercised to ensure that the facts of individual cases are within the strict boundaries which the statute defines.[13] This interpretative approach is necessary to ensure that there is no peremptory or indiscriminate interference with personal freedom arising from the exercise of the statutory options.[14]

Section 115 provides four disposition options:

1) An order that the person be detained as a special patient (s 115(1)(a)).

2) An order that the person be detained as a patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (s 115(2)(a)).

9 *R v Elliot* [1981] NZLR 295.
10 The relevant amendments are contained in the Fourth Schedule to the Act.
11 *R v Mason* [1987] 2 NZLR 249.
12 [1994] DCR 401.
13 *Mitchell v Allen* [1969] NZLR 110, 113.
14 Ibid.

3) An order that the person be immediately released (s 115(2)(b)).

4) Make no order at all where the person is liable to be detained under a custodial sentence (s 115(2)(c)).

While detention as a special patient is mandated as the normative disposition for any person found under disability or acquitted on account of insanity, the statute permits the discretionary use of the options of immediate release or detention as a patient where it would be safe in the interests of the public to do so (s 115(2)). In general, judges are reluctant to impose special patient status because of its indeterminate character and the difficulties for an offender in securing reclassification. However, in cases involving very grave offences it has been held to be irresponsible to suggest that any option other than special patient status is an appropriate disposition.[15] In any case where the court considers an option other than special patient status, psychiatric evaluation of dangerousness is an essential precondition. While this is a formal statutory requirement, there is currently no requirement that the psychiatric evaluation be presented as evidence at a formal hearing to assess dangerousness. However, considering the grave consequences for a defendant of a special patient order and the relative unreliability of dangerousness assessments, it may now be timely for the legislature to consider recasting the dangerousness assessment as a formal adversarial hearing, analogous to a disability hearing. This would enable defendants to challenge the assessments of clinicians through cross-examination and to adduce their own evidence on the issue of danger to the public.

The fourth option will not be further considered in this context.

Special patient status (s 115(1))

In New Zealand the phrase "special patient" is statutorily defined (see Mental Health (Compulsory Assessment and Treatment) Act 1992 s 2). It is not a diagnostic category. It describes a range of offenders who have been made subject to therapeutic intervention at different stages of the prosecution process. It may include persons who have been found to be under disability or legally insane but also includes offenders who have been transferred to a hospital while serving a custodial sentence pursuant to the provisions of Part IV Mental Health (Compulsory Assessment and Treatment) Act 1992. In the present context special patient signifies that the offender is under disability but not conclusively ineligible for trial. Section 116 of the Criminal Justice Act 1985 prescribes the maximum period that an offender may be detained as a special patient before either being brought back to court for trial or reclassified to "patient" status. Detention under s 116(1) should be for as short a period as is necessary to determine the offender's ability to stand trial.[16] Furthermore, there is nothing to prevent a Court ordering a defendant's return to court after a stated period in order to assess his current mental status and to order, if necessary, his return for trial.[17]

15 *R v GH* [1977] 1 NZLR 50. The case involved a multiple homicide. The patient was said to have fully recovered from his illness at the time of disposition and was not thought to represent a danger to the public.

16 *R v Carrel* [1992] 1 NZLR 760.

17 Ibid, 768.

In the statute it seems reasonably clear that special patient status is separate and distinct from detention as a patient under s 115(2). However, there does appear to be some judicial uncertainty or confusion on this point. In *R v S (No 1)*[18] where the court had to consider the disposition options in s 115 in relation to an offender who had suffered a stroke subsequent to the offence being committed, Heron J appears to conflate the "special patient" and "patient" options into a single category or, alternatively, to overlook the possibility of detention as a patient under s 115(2)(a). In any event the court proceeded on the basis that there is only one hospital-based option pertinent to s 115, in respect of which the descriptions "special patient" and "patient" appear to be used interchangeably. The same analysis is repeated in a later decision involving the same defendant.[19] This would seem to be a misreading of the statute, but should not be taken to imply that there is only one category of patient status for dispositional purposes.

As a matter of law it is not clear when the making of a special patient order is appropriate. However, it has been held that in making any order under s 115 the starting point is detention as a special patient and that this is only to be departed from in certain circumstances.[20] Nevertheless, special patient status may be inappropriate for certain classes of offenders, notably the intellectually disabled who may not be assisted by conventional psychiatric treatment and whose psycho-social needs are more apposite to a 24 hour supervised setting.[21] It must be remembered that special patient status is an indeterminate disposition and subject to political control. In my submission it should never be used unless it is clearly established, by evidence if necessary, that it is the *least restrictive* means of intervention available to achieve the ends of public protection.

Detention as a patient under the Mental Health Act

In reality a "committal" order under s 115(2)(a) opens up two quite distinct disposition options. A person may be detained pursuant to an inpatient order or as an outpatient. As regards the prior decision whether to order the person's detention as a "patient" or to immediately release him or her, there are at present no statutory guidelines. The matter is entirely in the discretion of the sentencing judge. However, if it is conceded that the principal justification for committal will normally be to ensure that the person receives treatment for an extant mental disorder, it could be argued that committal will be inappropriate where, at the time the order is made, the offender is not suffering from a psychiatric illness or disorder within the meaning of the generally accepted psychiatric classifications. This rationale may be of great significance when considering how to deal with an intellectually disabled offender who has been found unfit to plead or legally insane. There is some authority for the view that if the form of disability suffered by the offender is not of a type that would justify detention in a mental hospital and the person does not represent a danger to the public in the wider sense, then it may be appropriate

18 (1991) 7 CRNZ 186, 187.
19 See *R v S (No 2)* (1991) 7 CRNZ 576, 579.
20 *R v T* [1993] DCR 600, 10 FRNZ 195.
21 *Police v M (No 2)* [1994] DCR 388. An offender "under disability" detained as a special patient would normally be detained in a Regional Secure Unit. A widely held perception is that such environments pose serious risks for intellectually disabled offenders and that such placements are generally against the interests of the patient.

to order the person's immediate release.[22] In any event it may be doubted whether inpatient detention can be justified in order to put in place "safeguards" or for the purposes of achieving supervision, as has been held in two recent cases.[23] The principal difficulty with such an approach is that the Mental Health (Compulsory Assessment and Treatment) Act 1992 is an Act concerned with *compulsory assessment* and *treatment*. Any detention under that Act for purposes other than treatment would, arguably, be unrelated to the purpose of the legislation and could be impugned as being arbitrary and in breach of s 22 of the New Zealand Bill of Rights Act 1990. Again, the principle of the least restrictive alternative is relevant here. No person should be detained ostensibly for treatment under compulsory procedures where there is no prospect of treatment being given. The court must endeavour to achieve a dispositional solution consistent with the offender's *actual* needs which involves the least intrusion upon individual liberties necessary to achieve any relevant public interest goals. While public safety will often be a relevant consideration in such cases, it is not an exclusive concern. Other considerations including enhancing patient autonomy and self-determination are also relevant and may need to be weighed with other competing policy interests.

Outpatient detention

In the first instance where an order is made pursuant to s 115(2)(a) it is deemed to be a compulsory treatment order. On the making of the order the provisions of the Mental Health (Compulsory Assessment and Treatment) Act 1992 "apply accordingly" (Criminal Justice Act 1985 s 115(4A)). It has been held that the fact that s 115(2)(a) specifies that the offender be "*detained in a hospital*" does not necessarily mean that in every case where that disposition option is employed a person must be received and held in a hospital. In *Police v M (No 2)*[24] Judge Boshier held that there is nothing in the statute to suggest that any such order must be treated as an inpatient order and that the omission of the word *inpatient* from subs 4A must be interpreted as deliberate.[25]

The Mental Health Act specifies that in making a compulsory treatment order the Court *shall* make a community treatment (outpatient) order unless it considers the patient cannot be treated adequately as an outpatient (s 28(2)). However, while the thrust of the legislation is in favour of treatment in the community, it would seem that a court cannot make a community treatment order unless it is sufficiently satisfied that services for care and treatment on an outpatient basis *appropriate to the needs of the patient* are available and that the *social circumstances* of the patient are adequate for his or her care in the community (s 28(4) Mental Health (Compulsory Assessment and Treatment) Act 1992). It will not be enough that the Court is satisfied in general terms that the patient is well enough to manage in the community.[26] It has been held that the words used in s 28(4)(a) cannot be read as implying an obligation upon service providers to ensure that such services are in existence and available. Rather, they require the court to *investigate* the resources which are available to support a patient in the community, and to investigate the ability of the service to provide those resources.

22 *R v S (No 2)* (1991) 7 CRNZ 576.
23 See *Police v M* [1993] DCR 1119,1125; *R v T* [1993] DCR 600, 613.
24 [1994] DCR 388.
25 Ibid, 395.
26 *In Re JK [mental health]* (1994) 12 FRNZ 14.

Immediate discharge

This disposition option will be appropriate where the court is satisfied that the release of the offender will not pose a danger to the public and the offender is unlikely to benefit from any form of treatment or detention. Immediate release would be appropriate where, for example, a finding of disability has been made in relation to a relatively minor charge, since there is no presumption that persons under disability who are an occasional nuisance must be dealt with under either the Criminal Justice or Mental Health regimes.[27]

A difficulty with this option as it presently stands is that the legislation does not specifically authorize that any such release may be subject to conditions imposed by the court. It is doubtful whether a judge exercising his or her discretion pursuant to the section would be lawfully authorized to impose conditions in the absence of clear statutory authority. However, such a power could make discharge a more attractive option in cases where the offending is minor, there are no clear advantages in committal, but the court is reluctant to authorize the offender's release into the community without some official oversight. This aspect could well benefit from consideration as a possible area of law reform.

Appeal against a disposition order

Current New Zealand law makes provision for appeals against a finding of disability and against acquittal on account of insanity (Criminal Justice Act 1985, ss 112, 114). An appeal against a finding of disability gives the same right of appeal to the defendant as if the finding were a conviction and is conducted as a rehearing of the issue. An appeal against acquittal on account of insanity is also conducted as if it were an appeal against conviction and will enable any ground of defence to be reconsidered which would have given an outright acquittal.[28] However, while these general rights of appeal exist in respect of specific findings of disability and insanity, there is no jurisdiction for a court to reconsider a disposition order under s 115 by way of general appeal.[29] In *Howard v Police*[30] the appellant sought to appeal the decision of the District Court Judge whereby he was made subject to an order for detention as a special patient under s 115(2) following a finding of disability, seeking to argue instead that his committal should have been pursuant to s 115(2)(a) as a committed patient. He proposed to argue that the District Court Judge erred in law in making an order under s 115(1)(a) in that he did not apply the correct legal test and took into account irrelevant matters.

In resolving the issue of jurisdiction, Williams J first noted that s 115(1) of the Summary Proceedings Act 1957 requires as a precondition to any general appeal that there must have been a "*determination ... of [an] information.*" His Honour noted the Crown's objection that because there had been no such determination there could be no appeal, a proposition which, in the event, derived support from the observations of Tipping J in *I v Police*[31] where his Honour said:

27 *Police v XYZ* [1994] DCR 401.
28 Hall, *Sentencing Guide,* Butterworths, 1994.
29 *Howard v Police* (HC Auckland, AP 216/92, 15 October 1992); *R v Crime Appeal CA 393/92.*
30 Above.
31 HC Dunedin, AP 137/90, 25 July 1991.

> ... [I]f a person is ordered to be detained as a special patient there is capacity for the proceedings against him to revive in certain circumstances. That presupposes that the information is still alive and it can hardly be regarded as determined...Also to be noted is s 112 of the Criminal Justice Act which gives a right of appeal against a finding of disability, equating that with a conviction. But there is no right of appeal against an order for disposition, as opposed to an order making a finding of under disability, and it may well be that Parliament has deliberately omitted a right of appeal in the latter context, not equating it with a sentence.

Williams J agreed with the observations of Tipping J but was concerned, as was Tipping J, with what appeared to be a gap in the legislation whereby a general appeal can lie against a finding of disability but not against a subsequent order for disposition. This, the Court held, was anomalous and required a defendant seeking to challenge the basis of a disposition order to go through the "cumbersome" (and costly) procedure of judicial review. Williams J concluded that there was no reason in principle why there should not be a right of general appeal against a disposition decision, given the liberty interests of individuals in such cases, and recommended that the issue be considered as a matter of possible law reform.

Reform

I intimated at the outset of this paper that this is an area of the criminal law that is ripe for reform. In another context I have argued that the time may have come to give consideration to the desirability of establishing a separate code dealing with issues of disposition and sentencing for mentally disordered and intellectually disabled offenders.[32] My view is that such a code would be helpful in defining areas of current uncertainty and would provide guidance for professionals dealing with the relative complexities of this area of law and practice. However, this is not the only area where reform is desirable. The existing disposition options are inadequate to deal with the special problems presented by certain offender groups, in particular, the intellectually disabled. The present options hail from a time when orthodox practice made no distinction between the intellectually disabled and the mentally disordered for the purposes of management and treatment. The intellectually disabled were dealt with for practical purposes as though they were mentally ill.

This thinking is no longer acceptable and fails to appreciate the fundamental changes in approach as regards the characterization and management of intellectual disability that has occurred in the last 20 years. For these reasons facilities for the containment of those with intellectual disability need to be tailored to their specific and distinctive needs and be better able to reflect changes in professional thinking.

Finally, the present incongruity between relevant criminal justice and mental health legislation needs to be resolved as a matter of urgency. It is unsatisfactory that the courts should be forced into strained interpretations of relevant legislative provisions in order to achieve procedural fairness. In this area, where defendants are especially vulnerable

32 See Chapter, "The Sentencing and Disposition of Mentally Disordered Offenders" in *Forensic Psychiatry and the Law,* Brookers, Wellington, (forthcoming).

to being misunderstood and the possibility of arbitrary loss of liberty, it is especially important that the law should be clear and certain. For this reason I favour the Law Commission recommendation that the standard for disability in s 108 Criminal Justice Act 1985 should be redrawn to exclude mental disorder as a necessary pre-condition of a finding of disability. Such a minor legislative change would ensure that persons who were functionally under disability would not be excluded from the protection offered by fitness to plead procedures simply because their mental or intellectual condition failed to conform to the statutory definition of mental disorder. The fitness to plead rules should aim to maximize the procedural protections available to disabled persons and should not be seen to be working against that fundamental goal.