JUDICIAL DETERMINATION OF FITNESS TO PLEAD – THE FITNESS HEARING

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Introduction

The question of disability is one of the most important pre-trial issues to be determined in any criminal proceeding. Although deciding whether or not a person is fit to plead or be tried invariably involves substantial medical input in the form of expert psychiatric testimony it should not be forgotten that disability is primarily a legal not a medical question. It has been noted that the idea that a person of unsound mind should not be made to stand trial is one rooted in the age-old concept of fair play and fundamental justice. The "fitness" principle is both the product of the fundamental right of an accused to defend himself and a logical extension of the common law rule which prohibits trials in absentia.[1] Furthermore, courts have recognised a person's constitutional right to be tried even where the person is incapable of acting in his own best interests.[2] There is still, however, a danger in "over-medicalising" the disability procedure, particularly where the input of medical personnel predominates over that of lawyers. There is also a danger of offenders being detained in psychiatric institutions for periods of time in excess of what their criminal culpability would normally require, even where legislation provides for a "maximum period of detention" as a patient under disability.

For these reasons it is my view that the judicial hearing to determine fitness ought to be paramount in the fitness procedure. The task of determining fitness should not be abdicated in favour of medical professionals, however well qualified. Because this is a judicial function it is necessary and important to understand the nature of the judge's role and the scope and purpose of the hearing. This will also assist in developing a rational understanding of the fitness rules as a whole.

Distinguishing Disability and Insanity

The mental health concepts most frequently misunderstood are the doctrines of legal insanity and unfitness to plead. The former is concerned with mental non-responsibility at the time of the alleged offence while the latter is concerned with the non-triability of defendants found mentally incompetent to undergo proceedings. Confusion sometimes arises when legal insanity is referred to as "insanity at the time of the offence" and unfitness as "insanity at the time of trial". It is important to note that

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1 M Cheang, "Fitness to Plead in Singapore and Malaysia" (1988) 17 Anglo Am LR 209.
2 See *R v Robertson* (1968) 52 Cr App R 690.

the doctrines depend upon different legal tests and give rise to different questions of substance, procedure and disposition. Legal insanity (see section 23 of the Crimes Act 1961 (NZ)) is an affirmative defence to criminal charges which, if established, negates the culpability required for a finding of guilty. The unfitness to plead doctrine, in contrast, has no bearing on guilt or innocence. It is concerned not with culpability as such, but rather with procedural fairness. It defines the limits to which society may go in prosecuting defendants who may be unable, because of their mental condition, to defend themselves.

The concern of this paper is exclusively with the doctrine of disability or unfitness to plead, and in particular the judicial process by which such a determination is made. It is not concerned with legal insanity.

Meaning of Disability

In New Zealand the fitness to plead doctrine is defined in section 108 of the Criminal Justice Act 1985. The current statutory definition has its origins in the common law, dating at least to early nineteenth century England. At common law the determinative emphasis was a defendant's inability to defend him/herself at trial. This emphasis is reflected in the statutory definition. The test for fitness gives expression to two principal rationales for the doctrine: first that conviction or punishment of a mentally disordered person would not deter future criminal offending; and secondly that it is fundamentally unfair to try a mentally incompetent defendant who might be unable because of mental incapacity to present evidence in defence. For the purposes of this discussion the relevant provision is section 108(1) which states:

> (1) For the purposes of this part of this Act, a person is under disability if, because of the extent to which that person is mentally disordered, 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 purposes of conducting a defence.

It should be noted that while disability in New Zealand is conditional upon a finding of mental disorder, mental disorder per se is not determinative of whether a person is "under disability". That is to say mental disorder is a necessary but not sufficient basis for a finding of disability, in the same way that proof of "disease of the mind" is a necessary but not sufficient condition of legal insanity.

The test for disability in section 108 requires proof that a person was so mentally disordered as to be incapable of effectively participating in the trial process. While the test clearly allows for disability to be founded upon a deficiency in the defendant's rational understanding of the proceedings, caused by mental disorder, it will also be sufficient if mental disorder is shown to have caused the accused to be functionally unable to participate in the trial process. Thus while mutism or profound deafness cannot, without more, amount to disability, as symptoms or effects of mental disorder they may in limited circumstances provide the basis for a disability finding. However, for practical purposes the most difficult

form of disability to assess is that based upon a defendant's alleged inability adequately to instruct counsel for the purposes of conducting a defence. Because the test emphasises the quality rather than the fact of communication, under this head a careful examination must be undertaken to determine the extent to which the accused has been able meaningfully to discuss with counsel matters relevant to his/her defence. However, before dealing with that issue some preliminary observations concerning the history of the doctrine and the legal requirements for a disability hearing are in order.

History

Historically the requirement for a judicial hearing to determine fitness was an integral part of the old common law three-step process to determine first the nature of an accused's refusal to plead (whether mute of malice or not), secondly whether the accused was fit to plead to the indictment, and finally whether the accused was now sane or not.[3] At common law the determination of muteness was a matter of some consequence since a person who wilfully refused to plead was, at least until 1772, subject to the barbaric ordeal of *peine forte et dure,* whereby a person was either forced to plead or face the consequences of a cruel and protracted death.[4] However, refusing to plead and dying under *peine forte et dure* meant that the offender's property could not be forfeited to the Crown. The determination of muteness was thus seen as an important component of the question of fitness. Where a person was found to be mute "by visitation of God" (ie congenitally mute, and often signifying profound auditory and vocal disability) a fitness hearing was automatic to determine ability to plead.[5]

While the present statutory scheme enables a judge to enter a plea of not guilty upon arraignment if the accused neglects or refuses to plead,[6] for practical purposes the issue of muteness and the associated question of disability are much more likely to have arisen at an earlier stage of the proceedings and the offender already made the subject of court-ordered evaluations.[7]

Right to a Fitness Hearing

In the USA the absolute right to a fitness hearing is viewed as a fundamental constitutional protection once a "good faith doubt" about competency has precipitated a court-ordered inquiry concerning an accused person's fitness.[8] In the USA judicial failure to afford a formal hearing

3 See I G Campbell, *Mental Disorder and Criminal Law in Australia and New Zealand* (1988, Butterworths) 101 and the cases cited there.

4 For a more detailed discussion of this practice see my article, "A Contemporary Analysis of the Doctrine of Fitness to Plead" [1982] NZ Recent Law 84.

5 For a full discussion of the determination of muteness as a preliminary fitness issue see discussion below.

6 Crimes Act 1961, s 356(2).

7 See Criminal Justice Act 1985, s 121(1)(a).

8 *ABA Criminal Justice Mental Health Standards,* American Bar Association (1989) 204. Hereinafter referred to as *Mental Health Standards.*

is viewed as infringing the "meaningful opportunity to be heard" on the issue of mental competency, required by due process as a prerequisite to a judicial determination of fitness.[9]

In New Zealand the right to a fair and public hearing by an independent and impartial court and the right to be present at the trial and to present a defence[10] are appurtenant to a person charged with an offence "in relation to the determination of the charge". Since a fitness hearing is not a "determination of a charge", those particular minimum standards of criminal procedure may not apply to defendants at a fitness hearing. However, the more expansive right to justice preserved in section 27 of the New Zealand Bill of Rights Act 1990 would clearly apply to an accused person at a fitness hearing and puts a clear obligation on the judge to observe the principles of natural justice. Failure by a court to accord a fitness hearing where one is requested could well be in breach of the section. In any event section 111 of the Criminal Justice Act 1985 itself prescribes certain procedural requirements which, as will be considered later, must be strictly adhered to.

Beyond these specifically constitutional concerns there are also compelling policy grounds supporting the conclusion that courts and prosecutors as well as defendants should have an opportunity to contest findings contained in court-ordered psychiatric reports. As has already been observed, disability is a legal, not a medical, determination, and is based on legal not medical criteria. While in New Zealand mental illness is necessarily relevant to present mental ability, it is nevertheless possible that a defendant, though severely mentally ill, may still be competent to undergo trial. Such a person should not lightly be deprived of the right to trial. Other defendants on the other hand may not be seriously mentally ill yet be incompetent because they are unable to meet the minimum legal criteria for fitness.[11] Because courts are concerned with triability within the limits established by law, treatment and care are relevant only to the extent that they may make a defendant capable of being tried in the foreseeable future.[12] It follows that while court-ordered psychiatric reports are useful to the extent that they contain contemporary observations and descriptions of observed data relating to the mental disorder of an accused it is not the function of medical professionals to draw legal conclusions from their observations.[13] In my view both parties to the proceedings should have a right to a hearing in order to evaluate reports, to cross-

9 *State ex rel Matalik* v *Schubert,* 57 Wis 2d 315, 204 NW 2d 13, 18 (1973) cited in *Mental Health Standards,* supra, 205.

10 New Zealand Bill of Rights Act 1990, s 25(a) and (e).

11 See Criminal Justice Act 1985, s 108.

12 See eg *R* v *Carrel* [1992] 1 NZLR 760 where Heron J underscored the importance of an unfit accused's disposition being directed towards promoting his recovery so as to enable him to return to court with a minimum of delay.

13 It has often been observed that medical personnel sometimes confused tests for disability and legal insanity rendering their reports of dubious value, particularly when the reports are couched in conclusory legal terms: W T Pizzi "Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems" (1977) 45 U Chi L Rev 21 cited in *Mental Health Standards,* supra, 205.

examine their authors and if necessary challenge their conclusions and to seek a judicial finding on the issue of fitness.

The Fitness Hearing

The procedure for a fitness hearing in New Zealand is laid down in section 111 of the Criminal Justice Act 1985, which replaced section 39C(1) and (2) of the Criminal Justice Act 1954 as amended by the Criminal Justice Amendment Act 1969. The procedure defined in section 111 is applicable at any stage of the proceedings where the issue of fitness requires to be determined. Section 111 provides:

> (1) In any case where a defendant who is charged with an offence punishable by imprisonment or death appears to be under disability and the Judge is satisfied on the evidence of two medical practitioners that the defendant is mentally disordered, the Judge shall, after giving the prosecution and the defendant an opportunity to be heard and to call evidence on the matter, determine whether the defendant is under a disability.
>
> (2) Where the Judge is satisfied that the defendant is under disability the Judge shall direct a finding to that effect to be recorded.
>
> (3) The jurisdiction conferred on a Judge or court by this section and sections 109 and 110 of the Act may be exercised in the absence of the defendant, if the Judge or court is satisfied that the defendant's mental condition is such that he or she is too ill to come to court.

Section 111 outlines the minimum procedural requirements for a disability hearing. The section requires a formal hearing at which not less than two medical practitioners are required to attend for the purposes of giving evidence.[14] It has been suggested that when the issue of fitness is tried, the hearing should be a thorough and full inquiry in which all evidence relevant to the issue is placed before the court.[15] This is consistent with the developments in the USA where a baseline of the Mental Health Standards on competence is that all rights afforded criminal defendants in the course of criminal proceedings apply to competency hearings.[16] The delineated rights include adequate advance notice to facilitate preparation for hearings, discovery of evaluation reports, representation by counsel, compulsory process for witnesses including evaluating professionals, confrontation and cross-examination, and transcripts of fitness hearings.[17] At present the rights of a defendant at a fitness hearing in New Zealand are unclear. The issue is not addressed in criminal justice legislation and caselaw is largely silent on the point. However, the ABA standards may afford an appropriate model.

Counsel as a Witness at Disability Hearing

An issue not addressed in current New Zealand legislation concerns the ability of defence counsel to give evidence at a disability hearing concern-

14 *R* v *S* unreported, High Court, Wellington, 3 May 1991, T 95/90.

15 Law Reform Commission of Canada, *Report on Mental Disorder in the Criminal Process* (Ottawa, 1976) 19.

16 *Mental Health Standard,* 7-4.8(a), supra n 8, commentary at p 209.

17 *Mental Health Standards,* supra n 8, 209-210.

ing the accused's ability to instruct counsel. Generally, a practitioner is not permitted to act in the dual capacities of counsel and witness [18] because of the danger of divulging matters which would normally fall within the attorney-client privilege. Yet, as one well-respected American judge has observed, "Counsel's first hand evaluation of a defendant's ability to consult on his case and understand the charges against him may be as valuable as an expert psychiatric opinion on his competency".[19]

In the USA there now appears to be some consensus that attorney-client privilege would not be invaded so long as the information sought by a prosecutor in cross-examination of defence counsel only involved the lawyer's description of demeanour and attitude.[20] Consistently with this view the American Bar Association has formulated rules governing the manner and extent to which defence counsel may disclose information endemic to the professional attorney-client relationship. The Criminal Justice Mental Health Standards provide:

> Standard 7-4.8(b)
> (i) Defence counsel may elect to relate to the court personal observations of and conversations with the defendant to the extent that the counsel does not disclose confidential communications or violate the attorney-client privilege: counsel so electing may be cross-examined to that extent.
>
> (ii) The court may properly inquire of defence counsel about the professional attorney-client relationship and the client's ability to communicate effectively with counsel. The defence counsel, however, should not be required to divulge the substance of confidential communications or those that are protected by the attorney-client privilege. Defence counsel responding to inquiry by the court on its own motion should not be subject to cross-examination by the prosecutor.

The rationale for this rule is the belief that the ability of defendants to consult and interact appropriately with their defence lawyer lies at the heart of the fitness to plead rules: that defence counsel may be the single most important witness on that aspect of unfitness.[21] Indeed it has been suggested that in any given case "not only might the testimony of the defence counsel be admissible on the issue of competence, it might well be essential".[22]

It is arguable that any potential conflict of interest between counsel's role as witness and defence lawyer is obviated by the fact that in the narrow context of fitness to plead evidence is not directed at the substantive merits of the case and counsel does not serve in an adversary role with respect to other litigants or witnesses. All that would be necessary would be for the lawyer to establish that it was impossible to provide a detailed

18 R A McGechan, *Garrow and McGechan's Principles of the Law of Evidence* (Butterworth, 7th edn 1984) 295.

19 *US* v *David* (DC 1975) 511 F 2d 355 per Bazelon J, cited in J T Philipsborn, "Assessing Competence to Stand Trial: Rethinking Roles and Definitions" (1990) 11 Am Journ For Psych 45, 54.

20 Philipsborn, ibid, 54.

21 *Mental Health Standards,* supra, 211.

22 Ira Mickenberg, "Competency to Stand Trial and the Mentally-Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem" (1981) 17 Cal WL Rev 365, 386, cited in *Mental Health Standards,* 212.

account of all the facts underlying the opinion that the accused was or was not competent to give full instructions.[23] In many instances it would be sufficient for counsel to establish, as a matter of fact, without needing to draw any inferences, that he could not understand or make himself understood to his client.

The ABA Standards would expressly prohibit data bearing on client fitness that had been derived from confidential communications otherwise protected by the attorney-client privilege,[24] but would permit the relating of non-confidential communications with a client which the client did not intend to be private or privileged.

In New Zealand the question of disclosure of confidential lawyer-client communications in the context of a fitness hearing was recently considered in *R* v *Carrel*.[25] The court allowed certain evidence to be given by the solicitor for the accused, in spite of her expressed concern as to whether she was entitled to breach the confidentiality the accused enjoyed by virtue of her position as solicitor. In *Carrel* the evidence was admitted provisionally on the basis that the accused had indicated his consent to defence counsel, a fact confirmed by the judge at the hearing. However, the court cautioned that without the accused's consent it would not have allowed the evidence to be called but decided to do so because the ultimate inquiry into fitness to plead would be advanced by accepting the accused's consent. Heron J said at p 765:

> There is nothing contradictory in such a finding of consent validity and ultimate disability. The ability to communicate on a narrow technical issue outside the question of plea or defence is in my view unaffected by his illness and tends to demonstrate the nature of the problem which has to be addressed in this case when one considers adequacy of communication in the conduct of a defence.

The limitation of consent to "narrow technical issue[s] outside the question of plea or defence" suggests a logical restriction on counsel's role as witness that is consistent with the approach of the American Bar Association.[26] Arguably, the suggested limitation is sufficiently open-ended to include such matters as the defendant's physical characteristics, demeanour and the coherence of his or her communications (provided their substance is not disclosed).[27] Ultimately how much information bearing on defendant fitness may be disclosed in this way involves a careful balancing of interests. On the one hand professional ethics and the requirements of evidence law dictate limitations on disclosure, while on the other hand the courts will be concerned to have access to all information bearing on fitness to plead. In my view professional or legislative guidelines in the terms discussed above would be the only effective means of ensuring that both these concerns are met.

23 New Zealand Law Commission, *Evidence Law: Expert Evidence and Opinion Evidence*, Preliminary Paper No 18 (Dec 1991) 1.
24 See *Mental Health Standard* 7-4.8(b), supra.
25 [1992] 1 NZLR 760.
26 *Mental Health Standards*, supra, 213.
27 Idem.

Essential Elements of a Disability Hearing

In order to conform to the existing statutory requirements of section 111 six essential elements must be satisfied.

1 Offence punishable by death or imprisonment

The first requirement of section 111 is that the person must have been charged with an offence punishable by imprisonment or death. Since the Abolition of the Death Penalty Act 1989, however, there are no offences punishable by death in New Zealand. Because of the inclusive language of the section ("in any case") it follows that a disability finding may never be made in respect of a person charged with a summary offence not carrying imprisonment as a penalty.[28] In England, magistrates' courts have no power to detain a defendant who in their opinion is unfit to stand trial. However, in trivial cases magistrates may resort to the expedient of adjourning the proceedings *sine die* or of simply not proceeding.

In New Zealand the courts also lack the power to remand persons charged with minor non-imprisonable offences for psychiatric examination.[29] There is no general statutory power to detain persons who appear to be under disability for examination or treatment. In this context the law is concerned to preserve the principles of legality and proportionality. In *Mitchell* v *Allan*[30] it was held that only if the facts of a case lie within the strict boundaries defined by the terms of the statute is a court justified in ordering a person's detention against their will.[31] In *R* v *Elliot*[32] the Court of Appeal held that there must be a proportionality between the seriousness of the original offending and the length of detention as a committed patient pursuant to the predecessor to section 118.[33] Applying this principle in the present context it would be clearly unacceptable if a person charged with a very minor criminal offence were to be in jeopardy of loss of liberty in order simply to determine the question of disability.

It is submitted that the appropriate procedure in such trivial cases would be either for the court to adjourn the proceedings in anticipation of an improvement in the defendant's mental state enabling him to be dealt with by the court, or for the prosecution simply to withdraw the charges. The latter option is desirable where there is a realistic prospect that the defendant's mental condition would justify the making of a compulsory treatment order pursuant to section 28 of the Mental Health (Compulsory Assessment and Treatment) Act 1992.

28 See also s 109(a) ". . . relating to an offence punishable by imprisonment or death".
29 See Criminal Justice Act 1985, s 121.
30 [1969] NZLR 110.
31 The dangers of not observing the "strict boundaries" of the statute are well illustrated in the recent Watene Enquiry, where a court making a hospital order pursuant to s 118 of the Criminal Justice Act 1985 failed to obtain medical certificates of two medical practitioners as required by the section. See *Report of the Committee of Inquiry into the Death at Carrington Hospital of a Patient, Manihera Mansel Watene and Other Related Matters,* July 1991.
32 [1981] 1 NZLR 295.
33 See Criminal Justice Act 1954, s 39J.

2 Defendant must "appear" to be under a disability

Section 111 operates where a defendant "appears" to be under disability. The Act does not specify who must make the evaluation. However, authorities suggest that the question of disability may be raised by almost any interested party and at any time. In *R* v *Dashwood*[34] Humphreys J said:

> It does not matter whether the information comes to the court from the defendant himself or his advisers or the prosecution or an independent person such as, for instance, the medical officer of the prison where the defendant has been confined.

Thus any responsible participant in the proceedings may, once alerted to the possibility that the accused is under disability, advise the judge of his/her concern, whether or not the judge has made the observation him/herself. The meaning of "appears" does not seem to have been judicially considered in this context. It is submitted, however, that in order to protect criminal defendants from unnecessarily intrusive litigation, "appears" should be interpreted as requiring objective grounds, so that mere suspicion or intuition that an offender is mentally disordered will be insufficient to satisfy the threshold test.[35] An objective test would also obviate the risk of any interested party using a disability hearing vexatiously in order to achieve some collateral purpose unrelated to the proceedings. Thus a court would consider the grounds upon which the belief in disability is based, and in the absence of any clear indications could determine that there is no "appearance" of disability sufficient to raise it as a live issue.

3 "Satisfied"

Once it appears that the person is under disability the judge must be "satisfied" that the person is mentally disordered. It has been noted that the word "satisfied" may be subject to different standard of proof requirements according to the type of legislation in which it appears. In the context of family legislation it has been held that "satisfied" does not mean "satisfied beyond reasonable doubt", but means simply "makes up its mind".

> [T]he court comes to a conclusion which, in conjunction with other conclusions, will lead to the judicial decision. There is no need or justification for adding any adverbial qualification to "is satisfied".[36]

In *Angland* v *Payne,*[37] on an application under the Mental Defectives Amendment Act 1935, the Court of Appeal held that the phrase "satisfied that there is substantial ground" requires that the judge hearing the application should weigh the opposing contentions of the applicant and the proposed defendant and reach a clear conclusion that a substantial

34 [1943] 1 KB 1.

35 However, it is arguable that when a word like "appears" is used only a subjective requirement is expressed and no quasi-judicial process is required. (eg *Bulier Hospital Board* v *Att Gen* [1959] NZLR 1259, 1267 per F B Adams J.)

36 *Blyth* v *Blyth* [1966] 1 All ER 524, 541, per Lord Pearson.

37 [1944] NZLR 610.

ground exists for the applicant's contention with reasonable prospect of success. Similarly in *R* v *White*[38] McMullin J, delivering the judgment of the court, held that "is satisfied" appearing in section 75 of the Criminal Justice Act 1985 means "makes up its mind" and is indicative of a state where the court on the evidence comes to a judicial decision. The court held that the phrase does not require the court to be satisfied beyond reasonable doubt. The reason given for so deciding was that the materials upon which a judge acts in the sentencing process are not all susceptible of proof beyond reasonable doubt.

> In that process a judge acts not only on sworn testimony and admitted facts but also on pre-sentence and psychiatric reports, counsel submissions and not least of all, his own experience and judgment.

The court declined to follow the decision in *R* v *Carleton*[40] where the Alberta Court of Appeal held that the phrase "established to the satisfaction of the court" in legislation similar to section 75(2) of the Criminal Justice Act 1985 imposed the ordinary criminal burden of proof on the Crown of establishing beyond a reasonable doubt the matters of which the court was required to be satisfied before passing on an indeterminate sentence. It held that the decision in *Carleton* was an exception.

Considering the meaning of "is satisfied" in the context of section 111, it would be difficult to argue, on the authority of *R* v *White,* that the phrase means anything more than "makes up its mind", or that it should be construed as requiring proof beyond a reasonable doubt. However, adopting the caution suggested by the court in *White's* case, it is submitted that a court should not come to a finding of mental disorder lightly, because such a finding is a serious matter, and significantly affects the liberty of the defendant.

Such an approach is logical when the section is considered as a whole. The requirement that the court be "satisfied" concerning the question of mental disorder is a preliminary issue and does not resolve the main substantive question, namely whether the accused is under disability. To read it as meaning "satisfied beyond reasonable doubt" would mean that a court if not so satisfied would be precluded from conducting a fitness hearing. That cannot, in my submission, be the true interpretation of section 111.

4 Evidence of two medical practitioners

The basis upon which the court makes up its mind concerning the presence or otherwise of mental disorder is expressed as being "the evidence of two medical practitioners". "Medical practitioner" is not defined in the Criminal Justice Act. However, in the Mental Health Act it means a person registered as a medical practitioner under the Medical Practitioners Act 1968.[41] The section does not specify that the medical practi-

38 [1988] 1 NZLR 264.
39 Ibid, 267.
40 (1981) 69 CCC (2d) 1.
41 Mental Health (Compulsory Assessment and Treatment) Act 1992, s 2.

tioners certify the person is mentally disordered,[42] but that they give "evidence" to that effect. Under section 121 of the Criminal Justice Act 1985 the court may request a psychiatric report to assist in determining whether the defendant is under disability.[43] However, such reports are not a determination of the accused's fitness per se. Evidence must still be given by two medical practitioners as to the accused's mental state at the time of the hearing. In *R* v *S*[44] Heron J said "[t]he . . . matter must proceed to a formal hearing at which not less than two medical practitioners are required to attend for the purposes of giving evidence." This statement clarifies a question left at large in the legislation, namely whether the physical attendance of the doctors at the hearing is required. The physical presence of witnesses will generally be desirable, given the adversarial nature of the proceeding, to enable effective cross-examination to occur.

Heron J implies in the passage quoted that more than two medical practitioners may be required to attend to give evidence at the disability hearing. While the Act only specifies two such witnesses there is no reason in principle why either party should not have authority to call and examine any appropriately qualified medical professional who may be able to provide useful evidence on the question of mental disorder. An important reason for requiring the physical presence of expert witnesses at a fitness hearing is that mental disorder and ultimately disability itself are legal determinations. It is not unusual for psychiatric reports to be couched in language that appears conclusive on issues that are strictly for the court to determine instead of simply stating clinical observations and diagnoses. Often courts have accepted such evidence uncritically. It should not be forgotten that normally the task of an expert witness in providing a psychiatric report is not to offer an opinion on the ultimate issue, ie whether the offender is under disability, but to provide information that will "assist the court" in that determination.[45] This specific statutory obligation which applies to court reports obtained for the purpose of determining both fitness and legal insanity[46] should logically pertain to viva voce evidence given in open court. However, under New Zealand law it would seem that the exclusionary rules[47] have never been totally or consistently applied, with the effect that psychological and psychiatric evidence as to insanity is seldom excluded.[48] The approach of the courts generally to such evidence has been to treat it with suspicion in cases where it is highly subjective or would tend to conflict with the common sense reasoning of jurors. In *R* v *B*[49] Casey J, referring to the possibility of some evidence of a psy-

42 See Criminal Justice Act 1985, s 118, requiring "a certificate by 2 medical practitioners".

43 Criminal Justice Act 1985, s 121(1)(a).

44 Unreported, High Court, Wellington, T95/90, 3 May 1991.

45 Criminal Justice Act 1985, s 121(1)(a).

46 See Criminal Justice Act 1985, s 121(1)(b).

47 Formal rules of evidence restricting the admissibility of expert evidence where the proposed evidence is on a matter within the knowledge and experience of the fact-finder or is an opinion on the ultimate issue which the jury or judge has to decide.

48 See Law Commission, *Evidence Law: Expert Evidence and Opinion Evidence,* supra n 23, 19. The same would be the case with such evidence as to fitness to plead.

49 [1987] 1 NZLR 362, 373.

chologist being admissible by way of corroboration, observed that to be of any value "the essentially objective character of such evidence" must be preserved. Consistently with this observation the Court of Appeal in *R* v *Misimoa*[50] has recently held that the evidence of psychiatrists expressing the view that the accused was incapable of knowing his acts were morally wrong having regard to the commonly accepted standards, should be rejected, not because it went to the ultimate issue but rather because their opinions "presented some problems and perhaps equivocation". The court seemed unconcerned that one witness expressed an opinion on the ultimate issue, but was concerned that in doing so the reasons for forming the opinion were not clear cut.[51]

In the context of fitness to plead the courts also seem to be willing to allow evidence of expert witnesses on the ultimate issue of disability to be admitted. In *R* v *Carrel*[52] Heron J noted, without criticism, that in pre-trial examinations of the accused who had been charged with murder, at least two psychiatrists from the defence and the Crown had concluded that he was fit to plead. This illustrates the point made earlier that psychiatric reports are often couched in conclusive legal language yet are accepted, often uncritically, by the courts. The fact that this practice is common suggests a need to ensure that wherever the contents of a report are challenged at a fitness hearing the writer of the report should be present for examination and cross-examination on the substantive issue of fitness.

5 Giving prosecution and defendant an opportunity to be heard

Section 111 requires that before a judge determines the issue of fitness both the prosecution and the defendant must be given an opportunity to be heard and to call evidence on the question of disability. It seems from the way in which the section is structured that the purpose of granting the parties standing to make submissions and call evidence is not simply to enable further psychiatric or psychological evidence to be called on the defendant's mental state. It may be considered desirable, as was done for example in *R* v *Carrel,* to call the solicitor who took instructions from the accused to give evidence as to the accused's ability to communicate. As was discussed earlier, it may be appropriate in some instances for defence counsel himself or herself to give sworn evidence on such matters, provided of course confidential communications are not disclosed. In addition, in cases involving deaf/mute defendants, experts in deaf and dumb signing may be called to advise on the accused's ability to communicate by the use of signs or symbols or his or her capacity to be taught to do so for the purposes of achieving fitness to plead.[53] Because of the issues of individual freedom which are ultimately at stake it is important that the same rights be afforded a defendant in a disability hearing as would

50 Unreported, Court of Appeal, 18 November 1991, CA 182/91, Cooke P, Jefferies & Henry JJ.

51 Ibid, 6.

52 [1992] 2 NZLR 760, 761.

53 For a useful general discussion on the problems of muteness see C M Haw and C C Cordess, "Mutism and the Problem of the Mute Defendant" [1981] Med Sci Law 157.

be granted in any other criminal proceedings. Thus there should be no limitation on the right to call any evidence which is relevant to the question of disability. Some writers have argued that hearings should always be non-adversarial, because fitness determinations do not necessarily impel the prosecution and defence to take opposing positions. Nevertheless, the usual adversarial tools should be available to the defence if it opposes the prosecution position.[54]

Ultimately the amount of expert evidence required on the issue of fitness is a question of balancing fairness to the accused against expediency. While two medical practitioners are mandated by the terms of section 111, the guiding principle would seem to be that a defendant should not be put in jeopardy of loss of his/her liberty, unless there is an agreed opinion by at least two doctors. This should include where possible the evidence of the defendant's own doctor who would already know the person's history and might, therefore, be best able to testify as to the defendant's ability to comprehend the proceedings.[55]

6 Determing the issue of disability

Section 111 requires that the question of whether an accused person is under disability be determined by the judge. Although the judge's determination may be assisted by medical evidence, s/he alone must determine the issue together, it is submitted, with the issue of muteness.

At common law the question of fitness is determined by a jury.[56] Similarly, if an accused on being arraigned stands mute and does not answer, the judge must direct a jury to be empanelled and sworn to try the issue whether he is mute of malice or mute by visitation of God.[57] It has generally been assumed in New Zealand that if there is any doubt as to the reasons for muteness, the same procedure would be adopted, and a jury sworn to try the issue.[58] In practical terms the determination of muteness seldom arises in New Zealand. However, there are objections to the suggested procedure. First, in those jurisdictions where the issues of muteness and fitness are determined by a jury the power to determine such questions is generally limited to proceedings on indictment and does not extend to the summary jurisdiction. In New Zealand, however, the power to determine fitness applies to both summary and indictable jurisdictions. The legislation says nothing about the procedure for determining muteness. Nevertheless it would seem to follow that if muteness may be determined in proceedings on indictment, it may also be determined in any summary proceeding where a defendant is liable to imprisonment on conviction and at any preliminary hearing of an indictable offence conducted in the District Court. This would also imply that whereas in any

54 See Pizzi, supra n 13, 57 et seq.

55 See *Report of the Committee on Mentally Abnormal Offenders* (The Butler Committee), Cmnd 6244, 155 (1975, UK).

56 Criminal Procedure (Insanity) Act 1964, s 4 as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, s 2.

57 Halsbury's Laws of England, 4th ed, vol 11(2), para 962.

58 See F B Adams, *Criminal Law and Practice in New Zealand* (2nd ed 1971) para 2864.

proceedings on indictment[59] the issue of muteness would have to be determined by a specially-empanelled jury, in any summary proceedings the issue could only be determined by a judge, there being no express statutory power to empanel a jury for the determination of collateral or preliminary issues in the District Court. In my submission this distinction is anomalous. However, before drawing any conclusions as to what the correct position is under current law, it is arguable that since Part VII of the Criminal Justice Act 1985 is a code,[60] the procedure for determining disability in section 111 was intended by the legislature to override the common law, and thus that all questions bearing on disability (including the issue of muteness), are matters for determination by a judge alone. However, that solution is unsatisfactory because section 111 is expressly limited to determining disability in relation to mental disorder. The purpose of a muteness hearing on the other hand may have nothing to do with mental disorder, and is designed to determine the practical question of whether the accused is "mute of malice" or "mute by visitation of God". Most deaf/mute defendants are not mentally disordered.

The better view, in my submission, is to regard the question of muteness as distinct from the question of disability and, therefore, not subject to the procedure in section 111. At the same time, recognising that the distinction between the determination of muteness in the indictable and summary jurisdictions is anomalous, a new procedure should be established allowing muteness in both jurisdictions to be determined by a judge, using a procedure similar to that in section 111. Thus the accused, through counsel, would be able to address the court and call witnesses to prove that she/he is mute by the visitation of God, which if established would automatically trigger a fitness hearing in terms of section 111. If, on the other hand, the accused is found to be mute of malice, and wilfully refuses to plead[61] the judge may order a plea of not guilty to be entered on his/her behalf, according to current practice.[62]

The Act does not allow a judge a discretion to delegate the determination of fitness to medically trained professionals, however well qualified. It is, therefore, important that, whatever the degree and quality of medical input at the fitness hearing, the ultimate determination on the question of disability be made by the judge after due consideration of the evidence.

Recording the Finding of Disability

Section 111(2) requires that a finding of disability must be recorded. Failure to do so would appear to be contrary to the requirements of section 71 of the Summary Proceedings Act 1957, which requires an appropriate entry in the criminal record book. Accordingly, any order for deten-

59 Including the hearing of indictable offences in the District Court, pursuant to the provisions of District Courts Act 1947, s 28 A-F as amended by District Courts Amendment Act 1980.

60 See *R* v *Mason* (1987) 3 CRNZ 7, 12.

61 Crimes Act 1961, s 356(2).

62 Ibid.

tion made pursuant to such a finding would be invalid. Such a detention would also, arguably, be arbitrary and contrary to the provisions of section 22 of the New Zealand Bill of Rights Act 1990.

The Burden of Proving Unfitness

At common law, if the contention that the defendant is under disability is put forward by the defence, the onus of proof is upon the defence, and is discharged if the jury is satisfied on the balance of probabilities that the contention is right.[63] Conversely, if the Crown makes the allegation and the defence disputes the issue, the burden rests upon the Crown.[64] Where the burden falls on the Crown the standard of proof is proof beyond a reasonable doubt. That this represents an accurate statement of the law in New Zealand has recently been affirmed in *R* v *Carrel*.[65] In *Carrel* although the accused himself did not support the raising of the issue of fitness, which was drawn to the court's attention and advocated by the defence, Heron J concluded that the defence should carry the "lesser onus" of proving unfitness. After hearing medical evidence, the court concluded that the evidence called by the defence was more persuasive and was satisfied "on the probabilities" that it was the delusional system that the accused suffered from that affected the communication that would normally take place in the conduct of his defence.

Where the issue of fitness is raised by the court on its own motion the general practice would appear to be for the prosecution to call the evidence and to carry the legal burden of proving unfitness beyond reasonable doubt. One commentator has said:

> . . . support for the argument that the burden must always rest with the Crown lies in the recognition that any participant, including the court of its own motion, may raise the issue of fitness. If concern that the accused may be unfit emanates solely from the court itself, surely it is the Crown which must satisfy the trier of the issue that the accused is fit if the prosecution which the Crown has initiated and over which the Crown has conduct is to proceed.[66]

It may be argued that requiring the prosecution to prove unfitness beyond a reasonable doubt is demanded by the seriousness of the consequences of a finding of unfitness. When the Crown asserts unfitness, it amounts to an attempt by the State to deprive the citizen of liberty. It should not be forgotten that the offender at a fitness hearing, even though an accused person within the criminal process, has not been convicted of a crime. S/he has a constitutionally protected right to be presumed innocent.[67] On this basis it may be argued that the State must carry a substantial burden before it is entitled to deprive the accused of his/her liberty.[68]

63 J F Archbold, *Criminal Pleading Evidence and Practice* (44th ed 1992) para 4-162.
64 Idem. See *R* v *Podola* (1959) 43 Cr App R, 220 CCA.
65 [1992] 2 NZLR 760, 765.
66 A S Manson, "Fit to be Tried: Unravelling the Knots" (1982) 7 Queens LJ 305, 324.
67 See New Zealand Bill of Rights Act 1990, s 25(c).
68 See Manson, supra, n 66.

Presence of Accused at Fitness Hearing

By virtue of section 111(3) a determination of disability may be made in the absence of the defendant where the court is "satisfied that the defendant's mental condition is such that he or she is too ill to come to court". In Canada the power to conduct a fitness hearing in the accused's absence is conditional upon the court being satisfied that requiring the accused to be present "might have an adverse affect on the mental health of the accused".[69] However, the provision in section 111(3) is not limited to proceedings on indictment, as is the case in the Canadian legislation. Section 111(3) is not premised on a theory as to the cause of mental deterioration which may be extremely difficult either to substantiate or to refute by empirical evidence. It simply requires evidence that the accused is "too ill" to come to court. The actual wording of section 111(3) would seem to exclude the use of the section for the purpose of preventing the accused from hearing his or her mental condition discussed — sometimes regarded as justification for excluding an accused from a fitness hearing. In any event it is arguable that the accused's absence from court during the fitness hearing may interfere with the defendant's ability to advise counsel on the cross-examination of prosecution witnesses. On this basis it may be challenged as being contrary to the right to justice guaranteed by section 27 of the New Zealand Bill of Rights Act 1990.

Finally, it should be noted the "opportunity to be heard and call evidence on the matter"[70] is appurtenant to the "defendant". While clearly the right of the defendant personally to be heard and call evidence may be waived in favour of competent counsel instructed for the purpose, it is submitted that the defendant's presence is a normative requirement of a fitness hearing, and should only be dispensed with when it is clearly established that the accused is too mentally ill to come to court.

The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (UK)

In the United Kingdom recent legislation has effected some significant changes to the procedures governing a finding of unfitness to plead. The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 is designed, amongst other things, to increase the opportunity of being acquitted for defendants who cannot be proved to have committed the actus reus of the offence with which they are charged but who would be found to be unfit to plead if their fitness were inquired into.[71] The Act requires that a court which has determined that a defendant is unfit to plead must conduct a "trial of the facts", limited to determining whether the defendant committed the actus reus of each of the offences charged. In relation to each charge not proved the jury must acquit the defendant. In addition the Act contains provisions which determine whether a fresh jury should be empanelled either to determine the issue of fitness to plead or to conduct the trial proper, or to conduct the "trial of the facts".

69 Criminal Code of Canada, s 650(2)(c) (RSC 1985, c.C-46).

70 Criminal Justice Act 1985, s 111(1).

71 Criminal Procedure (Insanity) Act 1964, s 4A. See also S White "The Criminal Procedure (Insanity and Unfitness to Plead) Act" [1992] Crim LR 4, 7 et seq.

However, the Act makes no alteration to the criteria of fitness to plead, which must still be sought at common law. Under the UK legislation the question of fitness to plead is always determined by a jury.[72] The Act makes no special provision as to the conduct of a fitness hearing, which is conducted in the same manner as any trial on indictment, subject to the special provisions concerning burden of proof. The Act provides that where the question of fitness is determined on arraignment and the trial proceeds, the accused shall be tried by a jury other than the one which determined the question of fitness.[73] Where the issue falls to be determined at a later time, it may be determined either by a separate jury or by the jury by whom the accused is being tried, as the court directs.[74]

While the procedure for determining fitness in the UK is largely indistinguishable from any other proceeding on indictment, the Act controls the quality of medical evidence that may be given by requiring that a determination of fitness may not be made except on the written or oral evidence of two or more registered medical practitioners, at least one of whom is duly approved.[75] "Duly approved" in this context means approved for the purposes of section 12 of the Mental Health Act 1983 (UK) by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder.[76] This makes explicit what is implicit in the corresponding New Zealand provision,[77] namely, that the evidence of two medical practitioners is a minimum requirement within the statutory scheme. The purpose of the "trial of the facts" procedure is to obviate the possibility of an accused being detained indefinitely as a patient under disability, in circumstances where it has not been proved that s/he was criminally responsible for the actus reus of the offence charged. Where the jury is unable to make a finding that the accused committed the actus reus it is bound to return a verdict of acquittal.[78]

The limitation of the trial of the facts to proof of the actus reus only has been criticised on the ground that the justifications for so limiting the trial are flawed. In particular, the alleged incongruity in determining the state of mind of someone who is unfit to plead is rejected as being no more incongruous than seeking to discern the state of mind of someone suffering from legal insanity – a task which courts regularly undertake.[79] Furthermore, it is noted that limiting the trial of the facts to actus reus questions overlooks the fact that the state of mind that must be established is that of the person at the time of the offence (when they may not have been suffering from any mental disorder), not their state of mind at the time of their trial.[80]

72 Criminal Procedure (Insanity) Act 1964 s 4(5).
73 Ibid, s 4(5)(a).
74 Ibid, s 4(5)(b).
75 Ibid, s 4(6).
76 Criminal Procedure (Insanity) Act 1964 amended by section 7 of, and sched. 3, para 1(1) to, Criminal Procedure (Insanity and Fitness to Plead) Act 1991.
77 See Criminal Justice Act 1985, s 111.
78 Criminal Procedure (Insanity) Act 1964, s 4A(4).
79 See White, supra, n 71, at 8-9.
80 Idem.

Subject to these criticisms, the introduction in the UK of a new procedure for conducting a trial of the facts has obvious merit. The fitness procedure, by its nature, is highly intrusive and the loss of liberty often associated with it has severe consequences for an accused person. Deciding criminal liability after a determination of disability means that where liability is not established an offender is able to avoid indeterminate detention and the special patient status that would normally be conferred.

Conclusion

A disability hearing is a constitutionally significant pre-trial proceeding. Because it is concerned with evaluating a defendant's current mental competence to stand trial, expert psychiatric evidence will often be determinative. While in New Zealand a finding of "under disability" is necessarily prefaced upon the existence of mental disorder, the legal status of "under disability" may result from causes only tangentially related to mental illness. It is, therefore, important that the fitness hearing provide an opportunity for the full range of relevant evidence bearing on an accused's competence to be placed before the court to enable a fully informed judicial determination to be made. Failure to observe minimum standards of procedural fairness at a fitness hearing could result in a determination of unfitness being challenged by judicial review or by a judicial decision, on an appeal against a finding of disability, that a defendant's detention is arbitrary and contrary to the provisions of section 22 of the New Zealand Bill of Rights Act 1990. A disability hearing should, therefore, be a full judicial inquiry at which the defendant is normally present and where he or she has the right to fully cross-examine all prosecution witnesses and present any evidence bearing on the determination being sought or defended against.