

# **The Operation of Unfitness to Plead in England and Wales**

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# Unfitness to Plead

## The current test in English law

# The Pritchard Test

**In R v Pritchard (1836) 7C & P303, a case involving a deaf-mute Alderson B directed the jury:**

**“The question is, whether he has sufficient understanding to comprehend the nature of this trial, so as to make a proper defence to the charge.**

**There are three points to be inquired into:-**

- first, whether the prisoner is mute of malice or not;**
- secondly, whether he can plead to the indictment or not;**
- thirdly, whether he is of sufficient intellect to comprehend the course of the proceedings on the trial, so as to make a proper defence – to know that he might challenge any of you to whom he may object – and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation.”**

# Unfitness to plead - the legal criteria in English Law

- Ability to plead to the indictment;
- Ability to understand the course of the proceedings;
- Ability to instruct a lawyer;
- Ability to challenge a juror;
- Ability to understand the evidence.
- Ability to give evidence in his own defence

# Pre-1992 Position

- Under the Criminal Procedure (Insanity) Act 1964 there was only one form of disposal in respect of Unfitness to Plead which was indefinite and indeterminate hospitalisation.
- In addition there was no procedure in place requiring the prosecution to test its case against the unfit accused.

## Findings of Unfitness to Plead by 5 Year Period from 1987-1991

<u>la 1964 Act</u>	
<u>Final 5 years</u>	
<u>Year</u>	<u>Number</u>
1987	16
1988	13
1989	11
1990	13
1991	10
<b>Total</b>	<b>63</b>

# 1992-2005 Position

**The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991** provided:

- That a determination of the defendant's unfitness to plead cannot be made “except on the oral or written evidence of two or more registered medical practitioners at least one of whom is duly approved”.
- That in addition to the mandatory, indefinite hospitalisation under the 1964 Act, the court be given the discretion (except where the charge was murder) to order admission to hospital without the equivalent of restrictions; or make a guardianship order under the Mental Health Act 1983, or a supervision and treatment order, or an order for an absolute discharge of the accused.
- For a ‘trial of the facts’ so that in all cases **after** a finding of UTP the prosecution must prove beyond reasonable doubt that D “did the act or made the omission charged”.

# New Disposal Regime

Domestic Violence, Crime and  
Victims Act 2004 came into force on  
31 March 2005



# Domestic Violence, Crime and Victims Act 2004

- There are now three forms of disposal
  1. A hospital order (with or without restrictions) now identical to one made under the MHA 1983 (but where D is charged with murder and the court has power to make such an order it must impose restrictions).
  2. A supervision order.
  3. An absolute discharge
- The issue of fitness to plead is now to be decided **“by the court without a jury”**.
- This does not alter the need for the “trial of the facts” to be decided by a jury.

So guardianship orders are abolished.

## Findings of Unfitness to Plead by 5 Year Periods from 1987-2011

<u>1a 1964</u>		<u>1b 1991</u>		<u>1c 1991</u>		<u>1d 1991</u>		<u>1e 1991</u>	
<u>Act</u>		<u>Act</u>		<u>Act</u>		<u>Act</u>		<u>Act</u>	
<u>Final 5</u>		<u>1<sup>st</sup> 5</u>		<u>2<sup>nd</sup> 5</u>		<u>3<sup>rd</sup> 5</u>		<u>4<sup>th</sup> 5</u>	
<u>years</u>		<u>years</u>		<u>years</u>		<u>years</u>		<u>Years</u>	
<u>Year</u>	<u>Number</u>	<u>Year</u>	<u>Number</u>	<u>Year</u>	<u>Number</u>	<u>Year</u>	<u>Number</u>	<u>Year</u>	<u>Number</u>
1987	16	1992	11	1997	50	2002	115	2007	100
1988	13	1993	13	1998	53	2003	92	2008	114
1989	11	1994	31	1999	80	2004	85	2009	82
1990	13	1995	35	2000	70	2005	118	2010	91
1991	10	1996	33	2001	76	2006	109	2011	101
<b>Total</b>	<b>63</b>	<b>Total</b>	<b>123</b>	<b>Total</b>	<b>329</b>	<b>Total</b>	<b>519</b>	<b>Total</b>	<b>488</b>

***R v Norman*** [2008] EWCA 1810 per Thomas LJ at para. 34. 'Although it appears from the careful research of Professor R.D. Mackay and others set out in their paper *Continued upturn in unfitness to plead - more disability in relation to the trial under the 1991 Act* published at [2007] Crim LR 530 that the number of cases where unfitness to plead arises is relatively small (though rising), it is an area of some difficulty where serious problems can arise..'

# Unfitness to Plead in England and Wales

Empirical Data for the Thirteen Year  
Period 2002-2014

**Table 2a- Findings of Unfitness to Plead 2002-2014**

	Frequency	Percent	Cumulative Percent
2002	115	8.8	8.8
2003	92	7.0	15.8
2004	85	6.5	22.3
2005	118	9.0	31.3
2006	109	8.3	39.7
2007	100	7.6	47.3
2008	114	8.7	56.0
2009	82	6.3	62.3
2010	91	7.0	69.3
2011	101	7.7	77.0
2012	111	8.5	85.5
2013	95	7.3	92.7
2014	95	7.3	100.0
Total	1308	100.0	

### Type of Offence Charged

	Frequency	Percent	Cumulative Percent
fatal assault	65	5.0	5.0
non-fatal assault	440	33.6	38.6
damage to property	131	10.0	48.6
offence of dishonesty	108	8.3	56.9
sexual offence	344	26.3	83.2
driving offence	17	1.3	84.5
drugs offence	17	1.3	85.8
threatening behavior	162	12.4	98.2
other	24	1.8	100.0
Total	1308	100.0	

## Disposals Given

Disposals	Frequency	Percent	Cumulative Percent
none given*	64	4.9	4.9
restriction order without limit of time	411	31.4	36.3
restriction order with limit of time	6	.5	36.8
hospital order	374	28.6	65.4
guardianship order	20	1.5	66.9
supervision (& treatment) order - 2 years	214	16.4	83.3
supervision (& treatment) order -under 2 ye	43	3.3	86.5
absolute discharge	98	7.5	94.0
D died prior to disposal	3	.2	94.3
not known	52	4.0	98.2
defendant discharged	23	1.8	100.0
Total	1308	100.0	

**\*34 acquittals+30 cases of no Trial of the Facts.**

# The “Trial of the Facts”

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

- introduced a new procedure.
- In all cases **after** a finding of UTP the prosecution must prove beyond reasonable doubt that D “did the act or made the omission charged”.

# Trial of the Facts

- If the prosecution fails to satisfy the jury that D “did the act..” s/he is acquitted.
- If the prosecution proves its case D is then subject to disposal under the 1991 Act.
- But what does the prosecution have to prove?



# Trial of the Facts

- In *Antoine [2001] 1 AC 340, 377* Lord Hutton made it clear that the jury is not to consider the mental ingredients of the offence but that “If there is objective evidence which raises the issue of mistake or accident or self-defence, then the jury should not find that the defendant did the ‘act’ unless it is satisfied beyond reasonable doubt on all the evidence that the prosecution has negatived that defence. For example...if a woman was charged with theft of a handbag and a witness gave evidence that on sitting down at a table in a restaurant the defendant had placed her own handbag on the floor and, on getting up to leave, picked up the handbag placed beside her by a woman at the next table, it would be open to the jury to acquit”.

## Result of the Trial of the Facts

	Frequency	Percent	Cumulative Percent
D did the act on all	899	68.7	68.7
did the act on some, acquitted on others	32	2.4	71.2
<b>acquitted on all*</b>	34	2.6	73.8
TOF did not take place as no evidence offered	17	1.3	75.1
uncertain	290	22.2	97.2
indictment to remain on file/stayed	13	1.0	98.2
nolle prosequi	1	.1	98.3
D discharged	19	1.5	99.8
no TOF as certified insane before arraignment	2	.2	99.9
indictment quashed	1	.1	100.0
Total	1308	100.0	

\*12 of the 34 acquittals were in respect of indecent/sexual assault(n=247), which continues to be the most prevalent single offence followed by GBH (n=149) and ABH (n=143) which together with other offences against the person are the most prevalent group of offences (n=440) There are five acquittals for burglary, two for murder and two for rape. There are also single acquittals for attempted murder, GBH, ABH, arson and robbery. It seems clear, therefore, that acquittals are continuing to take place for some serious offences.

# Disposals

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Although hospitalisation by means of restriction and hospital orders are most frequent, the use of supervision orders and absolute discharges are also important types of disposal. This shows that the flexibility of disposal is important.

# A Real Case Study



- The law on the island of Jersey is modelled on English Law but is independent and has its own legal system.

# **Attorney General v O'Driscoll [2003] JRC 117**

The test for unfitness to plead had never been before the Jersey courts.

# Attorney General v O'Driscoll



Sir Phillip **BAILHACHE**, **BAILIFF** at para. 10

The Crown placed before me a report of Professor R D Mackay, upon which Miss Fogarty relied. Professor Mackay had been asked by counsel to advise

- (1) whether the test of unfitness to plead accepted by English law was open to challenge under the Human Rights Act 1998 and
- (2) if so, how the test could be altered to comply with the European Convention on Human Rights.

I have derived a great deal of assistance from the opinion of Professor Mackay, but it does not seem to me necessary or indeed appropriate to adjudicate upon either of those specific issues. It might be necessary if I were minded to adopt as part of the law of Jersey the English test set out in *Pritchard*. But as I propose, for reasons that will appear below, to adopt a different test, such adjudication would be otiose and, I think, unseemly. It is for English Courts to determine whether the *Pritchard* test is compatible with the Human Rights Act 1998.

# Attorney General v O'Driscoll

## Para. 18

- The reports of the two Law Commissions and other academic writing do seem to me, however, unsurprisingly no doubt, to have common threads. One such thread is the notion that the test for incapacity should underline the requirement for rational decision-making.

# Basis of the Jersey Test

## Para 27

- I am reluctant to adopt a test laid down in England more than one hundred and sixty years ago, when it is open to me to follow a new road which has been essentially engineered by the intellectual efforts of many specialists in this field. Social conditions have changed, and the importance of protecting the human rights and dignity of those afflicted by mental or physical incapacity is nowadays more widely appreciated. In my judgment I should adopt a test which is consonant with the European Convention on Human Rights, conscious of developments in medical science in the last one hundred years or more, and appropriate to the social needs of this jurisdiction in the twenty-first century. I propose to formulate a test which draws on elements of both suggested tests that have been placed before me.



# The basis of the Jersey test

## **Para. 28**

It seems to me desirable to pay particular regard to the jurisprudence of the European Court of Human Rights. The capacity to participate effectively in the criminal process has been seen to be the key factor in that European jurisprudence. I propose to adopt that factor as the central theme of the test to be applied.

# The Jersey Unfitness test

## Para. 29

‘An accused person is so insane as to be unfit to plead to the accusation, or unable to understand the nature of the trial if, as a result of unsoundness of mind or inability to communicate, he or she lacks the capacity to participate effectively in the proceedings.

In determining this issue, the [court] shall have regard to the ability of the accused –

- (a) to understand the nature of the proceedings so as to instruct his lawyer and to make a proper defence;
- (b) to understand the substance of the evidence;
- (c) to give evidence on his own behalf;
- (d) **to make rational decisions in relation to his participation in the proceedings, (including whether or not to plead guilty), which reflect true and informed choices on his part.’**

# Decisional Competence

- Recognised in Unfitness to Plead in the new test adopted in Jersey.
- Not recognised in the test for Unfitness to Plead currently adopted in English law.

# The Jersey Test Doubt?

In *Harding* [2009] JRC 198 at paras. 38 and 39

The President of the Jersey Court of Appeal, Sumption, JA., made the following remark:

Sir Philip considered that this test differed from the English law test; mainly it seems in requiring that the accused should have been capable of making rational decisions in relation to his participation in the proceedings. For our part, we are satisfied that the test which he stated in *O'Driscoll* is correct, **but we do not regard it as any different in principle from that which has been held to apply in England.**

# The Modernisation of the *Pritchard* Test in England

In *R v Janner* (2015) Openshaw J stated:

Whether the defendant is fit to plead or to be tried depends on whether he is able to understand the charges; whether he can enter an informed plea to those charges; whether he can instruct those acting for him as to his answer to the charges; whether he can understand such advice as is given to him; whether he can properly exercise his right to challenge jurors for cause; whether he can follow and effectively participate in the proceedings (with assistance if necessary); whether he can give evidence on his own behalf (again with assistance if necessary) **and whether he can make an informed choice as to whether he should do so** and whether any other evidence should be called on his behalf. I have attempted to modify the test as laid down in *R v Pritchard* (1836) 7 C and P 303 ('the Pritchard criteria') in accordance with modern conditions.

# Law Commission Report

- Published alongside a draft Bill on 13<sup>th</sup> January 2016.
- In its Overview the Commission states:  
“The current framework for addressing a defendant’s unfitness to plead is outdated, misunderstood and inconsistently applied. Our recommendations aim to modernise the law...making it fair, effective and accessible”

# Law Commission Report

- The Commission recommends replacing the *Pritchard* test with a new a new statutory test which is designed to take into account the demands of the particular proceedings which the defendant faces together with increased assistance designed to facilitate engagement in the process.

# A New Legal Test

- The Commission considers that the *Pritchard* test has been applied inconsistently and sets the threshold for unfitness too high. So it needs to be reformulated by statute and should be focussed on assessing “the defendant’s capacity to participate effectively in his or her trial” to be applied in the context of the particular proceedings. .



# The Relevant Abilities Underpinning Capacity to Participate Effectively

- (a) an ability to understand the nature of the charge;**
- (b) an ability to understand the evidence adduced as evidence of the commission of the offence;**
- (c) an ability to understand the trial process and the consequences of being convicted;**
- (d) an ability to give instructions to a legal representative;**
- (e) an ability to make a decision about whether to plead guilty or not guilty;**
- (f) an ability to make a decision about whether to give evidence;**
- (g) an ability to make other decisions that might need to be made by the defendant in connection with the trial;**
- (h) an ability to follow the proceedings in court on the offence;**
- (i) an ability to give evidence;**
- (j) any other ability that appears to the court to be relevant in the particular case.**

# The Relevant Abilities: Decision Making Capacity

- The absence of decision-making capacity from the current test undermines its ability to identify all those who require the protections available under unfitness to plead procedures.
- The solution: **There should be an explicit reference to decision-making capacity in terms similar to the Mental Capacity Act 2005.**

# Ability to Make a Decision

An ability to make a decision is to be regarded as consisting of—

- (a) an ability to understand information relevant to the decision,
- (b) an ability to retain that information,
- (c) an ability to use and to weigh the information when making the decision, and
- (d) an ability to communicate the decision.

# ***A separate test of ability to plead guilty***

The Commission also recommends the introduction of a second test, one of capacity to plead guilty, for defendants who would otherwise lack the capacity to participate effectively in trial. This would enable those defendants who would otherwise be diverted into alternative procedures to plead guilty and be sentenced in the usual way, where they are able and wish to do so. This would enhance the autonomy of vulnerable defendants and would increase the courts' capacity to protect the public whilst contributing to public confidence in the criminal justice process.

# ***A separate test of ability to plead guilty***

At para. 3.145 of the Report the Commission remarks:

There is academic recognition of this distinction. Professor Ronnie Mackay notes that there may be a difference between the cognitive demands of running a defence and entering a plea...Professor Mackay's empirical research also suggests that there may be significant numbers of individuals who are found unfit to plead on the basis of other deficiencies, yet are considered by clinicians to be able to plead to the charge(s). His research demonstrates that psychiatrists conducting the assessments of defendants more commonly find unfit defendants to have the ability to plead than any other of the required abilities in the *Pritchard test*.

# Pritchard Criteria Addressed and Applied

Mackay, Mitchell and Howe [2007] Crim LR p. 536, Table 6

Criteria applied → Issue Addressed ↓	Cannot	Can	Total
Instruct counsel	318	38	356
Understand Proceedings	304	26	330
<b>Ability to Plead</b>	<b>165</b>	<b>126</b>	<b>291</b>
Challenge Juror	159	33	192
Understand Evidence	156	23	179
Other Criteria			403

# Marcatonio v R [2016] EWCA Crim 14

- Per Lloyd Jones LJ at para. 8

The current test as developed in the judicial authorities is expressed as a single, indivisible test which must be met in its entirety. A defendant will not be fit to plead or stand trial if any one or more of the specified competences is beyond his capability. **In particular, the current test does not distinguish between capacity to participate effectively in a trial and capacity to plead guilty.** It seems to us that a strong case could be made out for a test which draws such a distinction. There will be cases in which the defendant would be unable to follow proceedings at trial or to give evidence but would not lack the decisional capacity necessary for entering a plea of guilty. We would question the desirability of denying such a defendant the option of pleading guilty once it is established that a defendant who intends to plead guilty has the capacity to do so and that his plea is a sound basis for a safe conviction

# ***A separate test of ability to plead guilty***

**We recommend that the separate test of capacity to plead guilty would be one applied only in cases which satisfy the following requirements:**

- (1) the defendant has been found to lack the capacity to participate effectively in a trial;**
- (2) two suitably qualified experts have specifically addressed in oral or written evidence the defendant's capacity to plead guilty notwithstanding the defendant's lack of capacity to participate effectively in a trial; and**
- (3) the defence apply, immediately following a determination of lack of capacity for trial, for the court to determine whether the defendant has the capacity to plead guilty**



# The relevant abilities for Capacity to Plead Guilty

- (a) an ability to understand the nature of the charge;
- (b) an ability to understand the evidence adduced as evidence of the commission of the offence;
- (c) an ability to understand what it means to plead guilty and the consequences of a plea of guilty;
- (d) an ability to give instructions to a legal representative;
- (e) an ability to make a decision about whether to plead guilty or not guilty or to change a plea (as the case may be);**
- (f) an ability to make other decisions that might need to be made by the defendant in connection with the plea of guilty;**
- (g) an ability to follow the proceedings in court on the offence;
- (h) any other ability that appears to the court to be relevant in the particular case.

# Ability to Make a Decision to Plead Guilty

For the purposes of (e) and (f), an ability to make a decision is to be regarded as consisting of—

- (a) an ability to understand information relevant to the decision,
- (b) an ability to retain that information,
- (c) an ability to use and to weigh the information when making the decision, and
- (d) an ability to communicate the decision.

# Law Commission

- The Report on Unfitness to Plead and the Criminal Procedure (Lack of Capacity Bill can be found on the Commission's website at:
- <http://www.lawcom.gov.uk/project/unfitness-to-plead/>

# Fin