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Mental incapacity and criminal liability: redrawing the fault lines?

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Abstract

The proper boundaries of criminal liability with respect to those with questionable mental capacity are currently under review. In its deliberations in the areas of unfitness to plead, automatism and the special verdict of not guilty by reason of insanity the Law Commission for England and Wales has been cognizant of particular difficulties in fairly attributing criminal responsibility to those whose mental capacities may or may not have impinged on their decisions, either at the time of the offence or at trial. And they have referenced the potential breaches of the European Convention on Human Rights (ECHR) posed by the state of our current laws. However, in their efforts to remedy these potential deficiencies is the Law Commission heading in a direction that is fundamentally incompatible with the direction embodied by the United Nations Convention on the Rights of People with Disabilities (CRPD)? Whether one must cede sensibly to the other, or whether some compromise might emerge, perhaps through an extension of supportive services or through the development of disability-neutral criminal law, forms the subject of this paper.

Introduction

Questions of fitness to plead, automatism and the special verdict of not guilty by reason of insanity are raised in only a very small number of criminal cases in England and Wales. Fitness to plead has, admittedly, increased somewhat following procedural revisions over the last two decades but it still arguably falls short of its latent potential. This situation is not necessarily mirrored in other jurisdictions, where, for example, unfitness or lack of competence is a much more common finding (see, for example, the situation in the US, Mossman et al., 2007). However, whilst the focus of this article is on arrangements in England and Wales, the issues it raises exist in many, if not most, other jurisdictions. What are the proper limits of criminal responsibility with respect to those with mental disorder or disability; and how does the importation of a capacity test affect trial participation and the various defences based on mental disability? Fitness to plead, automatism and the special verdict of not guilty by reason of insanity thus provide a vehicle for examining some wider questions about developments in these fields.

The Law Commission have recently been reviewing all three problematic areas; and the theme of mental capacity – or lack of it – runs through their deliberations, and has, in part, structured their provisional recommendations (Law Commission 2010, 2012, 2013a, 2013b & 2014). If this is the direction future law is to take, it would be welcomed in providing a more coherent basis than those which we currently have, dating back as they do to the 19th century.¹

¹ *R v Pritchard* (1836) 7 C & P 303; the *M’Naghten* rules (1843) 10 Cl & F 200.

But one tension is clear. The Law Commission's recommendations are seemingly cognizant of a lack of compliance in some areas with the European Convention on Human Rights (ECHR). And whilst it is possible that their recommendations will help to remedy these shortcomings, it is possible they will find themselves in conflict with the direction advocated by the United Nations Convention on the Rights of People with Disabilities (CRPD). The state of our laws in these areas is arguably already non-compliant with what the CRPD seems to demand, albeit the UK government generally has been in something of a state of denial about this (Office for Disability Issues, 2011). However, in their latest publication on unfitness (Law Commission, 2014: paras 2.69-2.83) the Commission themselves express concern about this. It is perhaps not surprising that the ECHR and the CRPD would drive the mental capacity based areas in different directions, since the philosophies underlying the two Conventions are not on a par with one another; the ECHR endorsing the marginalisation of those with disabilities in certain circumstances and the CRPD seeking to make unlawful such segregation from mainstream justice on the basis of disability (Fennell and Khaliq 2011: 665). Is there, however, any way in which they can be reconciled through revised law or enhanced procedures?

This article partly addresses that issue and the question of why it matters. In short, whilst this appears an arcane matter it is important in three respects. First, the question of justice: the consequences of unjustifiable findings of guilt cannot be underestimated, and in a field which intersects with questions of mental health, getting those findings right can be peculiarly demanding. Imprisoning the innocent is manifestly wrong, but the alternative for those with mental disabilities can sometimes be, not acquittal, but

psychiatric detention with compulsory treatment. Second, altering the balance between who falls into the remit of the mental health sector and who goes into the penal system has significant financial and resource consequences. Third, the questions of disposal are in some instances stark in their disparities, and in others subtle (for example, with respect to the supervision order); but such disposals all need to be better understood since their spectre appears to have an important role in shaping the decisions that precede them, and in some circumstances appear to drive them. And if mental capacity is to underpin these decisions or play a greater role in it, then its role in turn needs to be examined.

The territory with respect to the CRPD has already been explored by Peter Bartlett (2012:776) who has rightly warned that “The requirement that criminal law move away from engagement with mental disability is counter-intuitive”. Drawing attention to the current over-representation of those with mental disabilities in our prison population, he further argues that to reduce the scope of our mental condition defences will exacerbate rather than ameliorate the problem. Over-representation is evident in all parts of the criminal justice system for those with mental and intellectual disabilities, and particularly with respect to the prison population (Peay, 2014). Whilst accurate numbers are always hard to come by, the recent report from Her Majesty’s Inspectorate of Constabulary, with respect to those with intellectual disabilities in the criminal justice system, notes that it is a sizeable minority, “possibly as high as 30%” (HMIC, 2014:2). As they observe

We were particularly concerned to find that the processes, absence of services or a simple lack of knowledge and training often led to offenders with a learning disability being perceived as a problem to be processed, rather than an individual with particular needs requiring individual treatment. HMIC (2014:4)

Summarising the position with respect to the ECHR is not straightforward, in part because of the complex interplay between victims' and offenders' rights in the arena of criminal justice and in part because of the state's duty to provide, in practice, an adequate framework to protect against acts of violence (Law Commission, 2013b, para 1.68). But it is fair to say that our current rules on not guilty by reason of insanity (the *M'Naghten Rules*) are sufficiently narrow so as to exclude some seriously ill offenders. Drawing the line too conservatively here has consequences: some such convicted offenders may be dealt with in hospital or the community under conventional sentencing arrangements, but serious offenders will most likely find themselves in a penal setting, with all of the risks of suicide and self-harm that entails, and in turn the potential breach of the Article 2 right to life requirements. With a broader insanity defence based on capacity, these individuals would be ineligible for a penal disposal (see Law Commission, 2013b at para 1.70). Equally with respect to unfitness to plead, its exclusion of those who do not satisfy the *Pritchard* criteria can mean that those who cannot effectively engage with the trial process are nonetheless exposed to it, potentially in breach of their Article 6 rights to a fair trial (Law Commission 2010 para 2.101). This may be particularly pertinent with respect to people with intellectual disabilities (Jacobsen & Talbot, 2009).

All of these deficiencies could be addressed by adopting mental capacity, or its absence, as the underpinning concept. The exclusionary basis of the law would thus be expanded, arguably offering more protection from criminal liability to those with a disability; but it would arguably also bring the law into greater conflict with the CRPD.

So how have we got into this pickle and what might be done about it?

Some basics

It would be fair to start by explaining that there is no single conception as to the function our mental condition defences serve. However, all three of the areas under discussion – fitness to plead, not guilty by reason of insanity and insane automatism - are located at the intersection of legal principles (in particular, those relating to criminal liability) and therapeutic values (in particular, those relating to compulsory detention and treatment). However, the intersection is one that is policed by the legal system, so it is perhaps not surprising to see that in many situations it is the legal ethic which prevails over the therapeutic ethic. Thus, the dominant pressure seems to be to move people towards a legal resolution (trial) and not a therapeutic interregnum (unfit to plead) or therapeutic disposal (not guilty by reason of insanity/ insane automatism). But not always.

Indeed, there is not even full agreement as to whether some procedures in which accused persons become embroiled by way of alleged offending are essentially criminal or civil proceedings. For example, the Law Commission have disagreed with the House of Lords in *R v H* (2003).² The Law Commission have concluded that the s.4A hearing, which takes place after a finding on unfitness, is potentially in breach of Article 6(2) since it is a hybrid procedure, rather than a civil one as the House of Lords have asserted, and thus

² *R v H (Fitness to Plead)* [2003] UKHL 1.

violates the presumption of innocence under Article 6(2) since there is no proper examination of the accused's *mens rea*. The Commission would rectify this by having a s.4A hearing which required the prosecution to prove both the accused's conduct and fault states. Yet the House of Lords has deemed the disposals following a finding of unfitness to plead to be essentially civil, even though their implications look and feel like penal disposals where protection of the public rather than the therapeutic interests of the individual take precedence.³ In legal terms, this neatly sidestepped the prior issues around the relevance of the presumption of innocence.

The terrain that unfitness to plead, not guilty by reason of insanity and insane automatism occupy thus take in a broad sweep of potential criminal liability, civil disposals and medical treatment imperatives and values. There is a limited ragbag of outcomes⁴ which manage neither fully to recognize the individual's autonomy (which perhaps they ought as there has been no criminal conviction) nor, contrarily, fully absolve individuals of the taint of unlawful conduct (since the conduct elements of criminal offending have been established) or the seeming need for compulsory state intervention. Thus, whilst Article 14(1)(b) of the CRPD notes that "the existence of a disability shall in no case justify a deprivation of liberty" it is easily outmanoeuvred where there has been a criminal

³ *R v H* concerned a 13 year old charged with indecent assault on 14 year old. The House of Lords deemed that orders made on a jury finding adverse to the accused following a finding of unfitness are not punitive. They approved a disposal of absolute discharge together with notification requirements under the *Sex Offenders Act 1997* and *Rehabilitation of Offenders Act 1974* arguing that these were to protect the public and for the purposes of rehabilitation. So, they were not punitive orders.

⁴ Under the *Criminal Procedure (Insanity) Act 1964* as amended these are discharge, a supervision order, and admission to hospital (on the equivalent of a s.37 order with or without a restriction order under s.41 of the *Mental Health Act 1983*).

conviction. But where there has not, as in these cases, the taint of criminality hangs uneasily with the CRPD's bold assertions. There is inevitably going to be conflict.

And each of these three designations embraces at least two different interpretations. Hence, some would argue that a finding of "unfit to plead" places an accused person in limbo with respect to the potential non-resolution of their criminal culpability whilst exposing them to compulsory treatment for mental disorder. This is because under s.4A of the *Criminal Procedure (Insanity) Act 1964*, as amended, a positive finding can be made which exposes an individual to the possibility of compulsory detention and treatment, even though full criminal responsibility (that is, including establishing the person's *mens rea* for the offence) has not been made out. Others would say it protects vulnerable individuals from the risk of unfair convictions due to their lack of ability to engage with various crucial aspects of the trial process, and currently provides a route out of the criminal justice system where the prosecution cannot establish that the individual committed the *actus reus* of the offence.

Equally for the special verdict of not guilty by reason of insanity; this is a jury based finding of lack of criminal culpability based on the presence of a defect of reason from disease of the mind which causes the accused not to know the nature and quality of the act he was doing, or not to know that what he was doing was legally wrong. The defendant's insufficient capacity exposes him to a risk of compulsory treatment for mental disorder in detention, and is a highly stigmatic finding. Others would say the verdict protects such individuals from inappropriate criminal convictions.

And finally, insane automatism has similar consequences to a finding of not guilty by reason of insanity. It is based on a finding of non-criminal responsibility attributable to a complete absence of voluntary control over one's actions, which would otherwise be criminal, but which has a cause "internal" to the accused (that is, it is not attributable, for example, to the proverbial swarm of bees causing the driver of a car do to something illegal she would not otherwise have done: this is regarded as simple automatism with an external cause which results in a complete acquittal). It thus, others would argue, protects the blameless from being held culpable for things they could not have prevented.

The Law Commission's proposals

Since in all three areas the Law Commission's proposals are far from finalized, it would be foolish to go into any great detail at this point. However, a brief synopsis might assist.

First, with respect to unfitness to plead. Here the Law Commission (2010) have discussed replacing the *Pritchard* test with a functional test of decision-making capacity, which would better reflect the ECtHR's requirements for effective participation.⁵ Under the Mental Capacity Act 2005 a person lacks capacity if they are unable to make a decision in relation to the matter in hand because of "an impairment of, or a disturbance in the functioning of, the mind or brain"⁶ Having capacity would need to reflect, amongst other things, the accused's ability to understand the information relevant to the decisions that he or she would have to make in the course of his or her trial. The Commission would also require the prosecution to establish in the trial of the facts that

⁵ *SC v UK* (2005) 40 EHRR 10.

⁶ S.2(1) Mental Capacity Act 2005.

not only did the accused do the act or make the omission charged but also that there are no grounds for an acquittal; thus the prosecution would have to prove all the elements of the offence- both *actus reus* and *mens rea* - and negate any viable defences. If implemented, this would counter the potential breaches of the ECHR. Notably, in its latest publication (Law Commission, 2014: para 2.83) the Commission explicitly seek the views of consultees as to whether the UK's obligations under the ECHR and the CRPD can be accommodated through a combination of supportive decision-making facilitating effective participation in conventional trials and a functional approach to assessing mental capacity, albeit they are cognizant of the possibility of criticism given a literal reading of Articles 12 and 13 of the CRPD (Law Commission, 2014: para 2.78).

Second, for not guilty by reason of insanity (Law Commission, 2012 & 2013b) the Commission have provisionally proposed a new defence of

not criminally responsible by reason of recognised medical condition. This would be a defence founded on complete loss of capacity; mere impaired capacity, even substantially impaired capacity, would not be enough for the defence to succeed. This is such a significant "bright line" that a court would address it first: if the accused could not adduce sufficient credible evidence that he or she had wholly lacked a relevant capacity as a result of a recognised medical condition, then the court would not allow the defence to go forward. (2013b: para 1.87).

Both intoxication and personality disorder would be excluded from the defence, albeit the personality disorder would only be excluded where it comprised solely or principally of

abnormally aggressive or irresponsible behaviour. Thus, not all medical conditions would qualify as “a recognised medical condition”. As the Commission summarises (2013b: para 1.94)

a defendant should not be held responsible where he or she could not have reasoned rationally about what he or she was doing, could not have understood that it was wrong, or could not have controlled his or her physical actions.

But the defence would not apply where the accused simply found these difficult.

Third, for automatism. Here the Commission would require at the time of the offence a total loss of capacity by the accused to control his or her actions which was not caused by a recognised medical condition; this would result in a complete acquittal (2013b; Para 1.110). But if the loss of capacity is based on a medical condition known to the defendant, for example intoxication or hypoglycaemia, then the jury should convict. With no warning of such an episode then the special verdict would result; “insane automatism” thus would come under the new special verdict above; and be a verdict to which the Commission asserts no moral blame would attach.⁷ But the new special verdict would also embrace some of those cases currently classified as non-insane automatism, thereby narrowing the ambit of the complete acquittal. For example (2013b: para 1.112), if the loss of capacity was the result of a medical condition such as sleep apnoea, causing sudden loss of consciousness, then the special verdict would reflect that fact. And the

⁷ See *Harrison* [2004] EWCA Crim 1527: the accused pleaded guilty to a charge of dangerous driving, but successfully appealed the period of disqualification on the basis that he had suffered a hypoglycaemic attack which he could not have anticipated.

court would then have the power to order a more protective disposal, in contrast with a simple acquittal.

Thus, unfitness to plead would be broadened; and not guilty by reason of insanity would become the special verdict of not criminally responsible by reason of recognised medical condition. It would embrace a different subset of individuals, but all of them would have to be absent of capacity based on a recognised medical condition – a high threshold to cross. And insane automatism would disappear as a verdict, being embraced by the new special verdict; sane automatism would remain for such situations as the “swarm of bees” where there was a total loss of control; thus retaining or indeed narrowing further its current very narrow basis, and that would result in an acquittal.

Thus the proposals are imbued with either a loss of decision-making capacity due to an impairment of, or a disturbance in the functioning of, the mind or brain; or for the purposes of the special verdict, a total loss of capacity to do certain things, due to a recognized medical condition or to a total loss of control, due to a recognized medical condition. In all three cases the underlying premise for the special arrangements relate to states that could arguably be regarded as a disability for the purposes of the CRPD, albeit for those who suffer a loss of control based on a condition of which they were aware, a conventional conviction would result.⁸ And for this final subset of individuals, it should be stressed that the Commission’s proposals might arguably be CRPD compliant; some might suggest that having a disability which increases the likelihood of breach of the criminal law is no different from having a known propensity, for example, to drive too

⁸ The position of those with diabetes or epilepsy, and especially those experiencing a first occurrence, could be problematic: would they be regarded as disabilities?

fast. In both cases the law requires us to restrain our inclinations and if we fail to do so, we can be held culpable.

So far, so good.

The role of the CRPD

Enter the CRPD (and, for the sake of completeness, disabilities include mental disabilities in Article 1). The CRPD came into force in May 2008. Whilst it is not intended to create new rights, but rather to bring together existing rights from other universal treaties, its principles of non-discrimination, autonomy and inclusion “ensure that it marks a paradigm shift in the concept of disability under international law” (FRA, 2012:3). In short, people with disabilities are to be treated equally.

As Bartlett (2012) argues, the CRPD is based on a social model of disability which locates the problem in individuals’ relationships and/or in barriers between individuals and society. Society needs to adapt to and accommodate the needs of those with disabilities: in the physical arena this entails, for example, wheelchair access for those with major mobility problems. And for those whose decision-making capacities are limited or impaired it entails the need for supportive services. Such supportive services can go a long way to bringing such individuals back into the sphere of ability, but there are, inevitably, some limits to this approach which ought to be acknowledged. The social

model of disability is also to be distinguished from a medical or social welfare model which locates the problem either within the individual, or as one which attempts to remedy the problem by providing care, possibly of an institutional or guardianship nature. Thus, rather than being the recipients of care, those with disabilities are the holders of inherent rights. These rights reflect an essential human dignity worthy of equal protection with all other persons. The thrust of the CRPD is one of supporting people with disabilities to make their own decisions, rather than making those decisions for them through some scheme of “substituted decision-making”, even one that takes account of what the person lacking in capacity would have wanted; or worse, simply depriving them of all legal capacity and imposing a decision that a third party, perhaps the state, regards as appropriate (Szmukler et al, 2014).⁹

This robust line is, of course, less controversial where the implications of the decision have negative consequences only for the individual. But even this limited application underestimates the extent to which we are all interdependent on others and interconnected with them; so our decisions about ourselves have ramifications for others. It would also be foolish to suggest that it is unproblematic to see an individual making a decision that one might regard as harmful to them, and one which one would regard as harmful to oneself, were one in their shoes. But times have changed. No longer does the need for treatment automatically trump human rights considerations. Dying with your rights on, albeit in a dignified way, is now more properly regarded as a reflection of one’s essential human dignity, rather than as a failure to care (see Treffert, 1974 for an earlier

⁹ For a discussion of some of the problems surrounding supported decision-making, and of giving expression to the person’s “will and preferences” (Article 12 (4)) see also Banner and Szmukler (2013). The “will and preferences” approach is also highlighted as a potential problem solver by the Law Commission (2014:para 2.81).

exploration of these themes).¹⁰ But where the consequences of such independent rights-respecting decision-making are either harmful to others, or harmful in the extreme to that individual and that individual's core decision-making capacities are in doubt, questions can legitimately be raised about the wisdom of a robust line and whether an alternative approach might be preferable (Richardson, 2013, 2012).

And the particular problem for the analysis here is that the CRPD's focus on the right to integrity and the right to liberty are both confronted by the processes of involuntary detention and the subsequent involuntary treatment of those who fall within the three categories of unfitness, insanity and insane automatism. After all, these are exactly the consequences that can follow from establishing criminal non-culpability in circumstances relating to a broadly criminal context (where respecting the accused's autonomy is undermined by partial justifications for protective interventions). Of course, such involuntary treatment and detention is permitted under the ECHR provided certain procedural safeguards are in place; and notably those procedural safeguards can make the experience significantly more acceptable to those subjected to it, and who arrive at compulsory treatment and detention through an initially criminal route. But it would not make such disposals lawful from the perspective of the CRPD. Indeed, those jurisdictions that move people with mental disabilities who commit criminal acts into the civil system, as arguably occurs under processes of diversion in England and Wales, cannot dodge the problem since the CRPD objections apply to civil compulsion as well, as discussed further below.

¹⁰ Needless to say the case law is complex and the examples agonized; see for example *E v A Health Authority* [2012] EWHC 1639 (CoP) and the case of Kerrie Woolterton (*Telegraph*, 30 Sept 2009).

The CRPD

A number of its Articles are relevant, but Articles 1, 5, 12, 13, 14 and 16 are reproduced in the Appendix.¹¹

At first sight one can readily see that the intentions of the CRPD to transform the lives of those with disabilities, and to transform them in areas that go well beyond the usual civil and political limits of human rights documents, is admirable. The consequences are also legion. The CRPD touches on educational, employment and housing opportunities. But it also makes unlawful areas where special legal provision exists in the form of compulsory measures for those who lack the capacity to make decisions about their lives and who accordingly run risks to their own well-being and pose risks to the well-being of others (see MDAC, 2013). And this has resulted in the High Commissioner for Human Rights at the UN arguing that the CRPD requires the abolition of laws that allow for the detention and removal of legal capacity where those laws are based on mental disability (UN High Commissioner for Human Rights, 2009). And the Commissioner has also argued, consistently but arguably perversely, that the CRPD calls for the abolition of criminal defences where those defences rely on mental disability.

Bartlett (2012:776) cites extensively from the High Commissioner's Annual Report; Bartlett picks out paragraph 47, which falls under the section on *Recognition before the law, legal capacity and decision-making*. Here the Commissioner observes (2009: para 47)

¹¹ The full text of the UNCRPD is available at <http://www.un.org/disabilities/convention/conventionfull.shtml>

In the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability. **Instead disability-neutral doctrines on the subjective element of the crime should be applied, which take into consideration the situation of the individual defendant.** Procedural accommodations both during the pre-trial and trial phase of the proceedings might be required in accordance with article 13 of the Convention, and implementing norms must be adopted. (emphasis added)

But paragraph 43, which precedes this, also stresses

Article 12 of the Convention requires States parties to recognize persons with disabilities as individuals before the law, possessing legal capacity, including capacity to act, on an equal basis with others. **Article 12, paragraphs 3 and 4, requires States to provide access by persons with disabilities to the support they might require in exercising their legal capacity and establish appropriate and effective safeguards against the abuse of such support. The centrality of this article in the structure of the Convention and its instrumental value in the achievement of numerous other rights should be highlighted.** (emphasis added)

And paragraph 45 notes its application in civil law

Whether the existence of a disability is a direct or indirect ground for a declaration of legal incapacity, legislation of this kind conflicts with the recognition of legal capacity of persons with disabilities enshrined in article 12, paragraph 2. Besides abolishing norms that violate the duty of States to respect the human right to legal capacity of persons with disabilities, it is equally important that measures that protect and fulfil this right are also adopted, in accordance with article 12, paragraphs 3, 4 and 5.

It is thus worth observing that whilst the Commissioner appears to be making reference to areas of civil law in these latter quotations, the disposals following unfitness to plead, not guilty by reason of insanity and automatism *are* all, albeit controversially, civil disposals, since no criminal conviction has arisen (see Peay, 2010). And these civil disposals raise many problems for the CRPD (see FRA, 2012).

Of course, like all Conventions the CRPD is not wholly internally consistent. So Article 13, relating to access to justice, clearly envisages giving all sorts of support to those involved in legal proceedings. But how does access to justice respond to the notion that for some people with disabilities, gaining justice may be impossible because of the very nature of their disability? So, if you are so depressed that you believe you should be punished for the death of a child and refuse to engage with a criminal justice system that

could offer you a reduced sentence based on your disability¹² (for example, via diminished responsibility) is it really in your interests to have the system treat you on a par with mentally capacitous individuals? This is an unresolved question for, as Craigie has observed,¹³ in some situations the law does respect one's right to do what is not in your (objective) interests; hence giving primacy to the principle of autonomy (see also David et al, 2010).¹⁴

But, as Bartlett (2102:759) notes, might Article 16 be thought to require the state to be proactive in protecting someone with a disability, sometimes in a way that might be considered coercive? Hence, when the state makes provision to divert those with mental disabilities from the punitive and damaging elements of the criminal justice system towards a therapeutic environment via unfitness to plead, is the state merely fulfilling its obligations under Article 16?

On the other hand, should there be some restraint in this (CRPD justified?) therapeutic endeavour? One obvious problem arises once one adopts a position that those with mental incapacity should be treated differently by the criminal justice system. If counsel is unable to take proper instructions from an accused because of lack of capacity, what role should counsel perform? As Perlin has noted, in one state in the US (Perlin, 2013:180) counsel can even raise the insanity defence over objections from the accused (thus conceding that the accused did the act); and in a number of jurisdictions the court can impose it over the accused's objections (Perlin, 2013: 191), thus arguably putting the dignity of law put above dignity of the accused. And all of this protective endeavour, and

¹² *R v Murray* [2008] EWCA Crim 1792.

¹³ Personal communication.

¹⁴ See again the Kerry Woolterton case at footnote 10 above.

risk avoidance on behalf of an unwilling accused, does feel a little curious where the accused has already been found competent for the purposes of the trial.

Brief mention should also be made of the Committee on the Rights of Persons with Disabilities (2014). Their General Comment on Article 12 was published in April 2014. This document notes that the type and intensity of support which should be provided to those with disabilities to enable them to access the justice system will vary between individuals, but as paragraph 35 notes

Article 12 of the Convention guarantees support in the exercise of legal capacity, including the capacity to testify in judicial, administrative and other adjudicative proceedings. Such support could take various forms, including recognition of diverse communication methods, allowing video testimony in certain situations, procedural accommodation, the provision of professional sign language interpretation and other assistive methods. The judiciary must also be trained and made aware of their obligation to respect the legal capacity of persons with disabilities, including legal agency and standing.

But as Article 12 calls for universal legal capacity, without discrimination based on disability, its implications in the area of criminal responsibility are considerable (Minkowitz, 2014)¹⁵ since it includes responsibility for one's conduct towards others. Minkowitz observes that the preparedness to exculpate those with physical disabilities from responsibility under criminal law (presumably through the exercise of prosecutorial discretion) does not seem to extend so easily to those with mental disabilities. How true

¹⁵ Minkowitz was commenting on the earlier Draft General Comment from September 2013, but its essence remains the same in the final version.

this is here is debatable, but her point that the law's response is doubly discriminatory is well made: holding them neither as equal citizens in the process of criminal adjudication, whilst simultaneously imposing control measures with respect to psychiatric detention on the grounds that they cannot be deterred by conventional punitive responses.

The irreconcilability of this dilemma has already been recognised by Baroness Hale in *Cheshire West* [2014].¹⁶ In this Supreme Court case she acknowledged (at para 45) not only that it was axiomatic that those with disabilities have the same human rights as the rest of the human race, but also that those rights “have sometimes to be limited or restricted because of their disabilities”.

But might there be solutions that cut into the fault lines much earlier in the process of adjudication?

This article will now consider four possibilities. First, greater supported decision-making for those who fall on the borders of unfitness. This would be consistent with the demands of the CRPD. Second, disability-neutral defences. Third, disability-neutral burdens on the prosecution. Both the second and the third are complex and potentially contentious. Finally, it will conclude with some observations about the tensions between outcomes and process, which arguably illustrate, in part, a helpful problem-solving mentality in the courts.

1. Unfitness and supported decision-making

¹⁶ *P v Cheshire West and Chester Council and another: P and Q v Surrey County Council* [2014] UKSC 19.

One area where the ECHR and the CRPD appear to be on the same footing concerns supportive decision-making and its potential role in avoiding the discriminatory processes in place under unfitness to plead proceedings. This is a solution where the accused can be supported so as to have a fair “conventional” trial or to tender a fair guilty plea. It does not, of course, resolve the issue for those for whom no amount of supportive mechanisms can make a trial fair for them, and for these people unfitness proceedings (in the absence of a disability-neutral approach) will arguably remain in breach of the CRPD. Of course, whilst the proceedings might be unfair, the disposals could be made fair if, after a positive finding in a s.4A hearing, they were voluntary. But it is hard to conceive of how such disposals could be truly voluntary if the individual did not have the capacity to consent to them. And whilst the capacity to engage in a fair trial might be greater than the capacity needed to consent to a therapeutic disposal (making the individual capable of going voluntarily into treatment) it might not be. Indeed, it might be greater.

What is meant by supportive decision-making in this context? The ECHR in the case of *SC v UK* (2005)¹⁷ dealt with an 11 year old with limited intellectual ability and a poor attention span, who was convicted of robbery and sentenced to two and a half years detention. His lawyers had submitted that to try him, given his inability to follow proceedings in court, would amount to an abuse of process, but the Court of Appeal rejected this and the case went before the ECtHR on the basis of a breach of Article 6(1). The appellant was successful. The ECtHR held that it was not a breach *per se* to attribute criminal responsibility to an 11 year old, provided the child was able to participate

¹⁷ *SC v UK* (2005) 40 EHRR 10.

effectively in the trial. Indeed, in *T and V v UK* (1999)¹⁸ the ECtHR had found an Article 6 breach even though it was satisfied that the child defendants were fit to stand trial, clarifying that effective participation and fitness to stand trial are different concepts. Effective participation entails, according to the ECtHR, the right to be present, to hear and follow proceedings, and for those proceedings to be conducted in such a way as to reduce as far as possible the child's feelings of intimidation and inhibition.¹⁹ Many of these adjustments can readily be made in the case of children: for example, accused individuals can be familiarised with the court layout prior to a trial commencing, judges can remove their wigs, child defendants can sit in the body of the court with their social workers and that frequent breaks are taken so that issues can be explained as the process moves along (McEwan, 2013).

In short, the right to effective participation in criminal trials requires

- a broad understanding of nature of trial process and what is at stake
- to follow general thrust of what said in court, including by prosecution witnesses
- to explain own version of events to lawyers
- point out areas of disagreement
- make lawyers aware of facts relevant to own defence
- understand significance of any penalty

¹⁸ See *T v UK; V v UK* [2000] Criminal Law Review 187.

¹⁹ The Lord Chief Justice in England and Wales issued a practice direction following *T and V* to facilitate compliance in the case of child defendants (Practice Direction, *Trial of Children and Young Persons in the Crown Court*, Feb. 2000).

And it can readily be seen why such requirements ought to be fulfilled, especially with respect to those with significant intellectual disability, before any trial could be regarded as fair. It is clear that revision of the *Pritchard* criteria, to make the substantive test of unfitness fair, would require an independent statutory initiative, but dealing with the process should be less complex. Paradoxically, the helpful s.104 of the *Coroners and Justice Act 2009* permits examination of an accused through an intermediary to ensure a fair trial; but it is notable that, by December 2014, s. 104 was still not in force, albeit judges can use their inherent jurisdiction to achieve similar ends through the discretionary appointment of an intermediary. This alone seems at odds with Baroness Hale's observation that disability places on the state "the duty to make reasonable accommodation to cater for the special needs of those with disabilities".²⁰

The costs of all of these measures are no doubt at the forefront of the minds of those who might implement the statutory provision under the 2009 Act, but perhaps the costs of not implementing them should be equally in the foreground. Indeed, a fair trial and verdict may be significantly cheaper than a long-term mental health disposal under the unfitness regime. Thus, the Law Commission's seeming drift in the direction of effective participation as a way of tackling unfitness to plead is to be welcomed. This is also a direction of travel on which the CRPD could clearly bring useful pressure to bear.

²⁰ See *Cheshire West* above at para 45

2. Disability-neutral defences

What might disability-neutral doctrines on the subjective element of a crime, which take into consideration the situation of the individual defendant, look like? Attaining gender neutral legislation has a fraught history, so the prospects for disability-neutral legislation do not look promising. But how might they manifest themselves?

One obvious place to start would be with the defences of, for example, self-defence and duress, both of which include subjective and objective elements (what did the defendant subjectively believe and was the force used necessary/proportionate based on that honest belief [self-defence] or would a sober person of reasonable firmness have resisted the threats [duress]?). Over time, the evolution of these defences has produced a subtle blend of the objective and the subjective, which, like blending paint, can be difficult to reproduce or sustain with any consistency.²¹ And when thinking about a “reasonable belief” whether one places the emphasis on reasonable, or on belief, can seemingly transform an objective interpretation into a subjective one. Perhaps understandably, our courts have been historically extremely reluctant to allow mental disability to be a factor in determining whether the prosecution has satisfied the burden of proof in making out *mens rea*; indeed, such issues have been described as “esoteric”.²² In practice, such issues can either be excluded by the court from the deliberations of juries or are used to push the accused in the direction of an insanity plea.

²¹ See, for example the cases of *R v David Paul Martin* [2000] 2 Cr App R 42, which broadened a disability-neutral approach in duress and the subsequent case of *R v Anthony Martin* [2001] EWCA Crim 2245, which arguably narrowed the disability-neutral approach by excluding psychiatric evidence with reference to the relevant characteristics of the comparator reasonable person “except in exceptional circumstances which would make the evidence especially probative” para 67.

²² See *Martin* [2000] above at 49.

However, in the defence of duress, mental disorder type factors have been permitted to be taken into account when considering the comparable actions of a person of reasonable firmness, albeit the courts have only been prepared to accept evidence relating to “a recognised mental illness or psychiatric condition” (which is in itself a problematic status-based test).²³ Thus, in *R v Bowen* [1997]²⁴ those words were approved, but the defendant’s abnormal suggestibility, his vulnerability and his low IQ were not permissible characteristics. The issue with respect to self-defence is somewhat less clear; here you get judged on the basis of your honest belief about the threat, real or perceived, which you believed yourself to be under. But if your honest belief is mistaken and based on voluntary intoxication you will not be able to rely on it for actions that you take in “self-defence”.²⁵ However, if your mistaken belief is based on a misperception attributable to your mental incapacity, *R v Anthony Martin* [2001], the first limb of the test, the situation is less clear, albeit if the accused gives evidence the honesty limb of this test will be for the jury to decide and psychiatric evidence will not be deemed appropriate. Getting juries to distinguish the actions which an honest person might take in response to a belief informed by a misperception brought about by mental disorder, and the actions which a reasonable person might take, without an underlying mental disorder, but informed by the abnormal beliefs about the particular situation, is indeed esoteric. But, it is arguable that the situation has become even more complex with the

²³ Albeit not all recognised mental disorders are thought sufficient for the Courts’ purposes: see *R v Dowds* [2012] 1WLR para 31 where it was noted that disorders that get included in eg ICD 10 are not necessarily the same or sufficient for the legal term mental disorder – so even if capacity is impaired it may not be sufficiently impaired for legal purposes.

²⁴ *R v Bowen* [1997] 1 WLR 372.

²⁵ *R v O’Grady* 85 Cr App R 315.

case of *R v B(MA)* [2013].²⁶

R v B(MA) concerned a man with schizophrenia/schizo-affective disorder charged with the double rape of his partner. The facts are complicated but, in short, he asserted that he believed that he had sexual healing powers and his partner consented to intercourse. The Court of Appeal noted that the *Sexual Offences Act 2003* required the prosecution to prove penetration, an absence of consent by the victim, and that the defendant had no reasonable belief in the presence of that consent. The test was not based around whether the defendant honestly believed in the victim's consent. The shift from a subjective honesty-based test²⁷ to the new objective approach under the 2003 Act was one explicitly intended by the legislature. In keeping with this the Court of Appeal concluded, assuming that the defendant's state of mind did not amount to insanity, that

beliefs in consent arising from conditions such as delusional psychotic illness or personality disorders must be judged by objective standards of reasonableness and not by taking into account a mental disorder which induced a belief which could not reasonably arise without it. (para 40)

And by an objective standard of reasonableness they meant one held by a comparator free from irrational beliefs, so for these purposes the defendant's mental illness was irrelevant (for information it is important to know that the Court of Appeal was satisfied that the defendant had the ability to understand whether the victim was consenting). A genuine

²⁶ *R v B(MA)* [2013] EWCA Crim 3.

²⁷ *DPP v Morgan* [1976] AC 182.

belief in consent was insufficient; it also had to be one that was reasonable in the circumstances.²⁸ Thus, a belief by a sexual predator deriving from a disorder which caused the defendant to believe that he was irresistible to women would not absolve him from the proper application of the law of rape, since that belief would be unreasonable in the circumstances.

However, the decision in *R v B (MA)* leaves open a chink for a disability-neutral defence where the defence is based on a honest belief (as it is in self-defence, albeit the response has to be reasonable in the circumstances), regardless of the reasonableness of it, since a mistaken honest belief can apply to anyone, regardless of their diagnostic status. Thus, a delusional belief can be genuinely held. So it is arguable that a defendant's misperceptions attributable to mental disorder could be relevant to judging whether he acted in a way deemed necessary and proportionate given the circumstances as he believed them to be.²⁹ Similarly, with respect to charges of criminal damage, to which consent is a defence. Here a defendant's honest/genuine belief based on his mental disorder that the owner consents to what has been done would make the act lawful, regardless of how unreasonable the belief was. This approach would also apply to offences of dishonesty where, under the Theft Act 1968 s.2(1) (a),(b) and (c), which cover the definitions of what is not dishonest, a subjective disability-neutral approach

²⁸ Issues relating to the interpretation of beliefs are in themselves extremely tricky (see Banner & Szmukler, 2013).

²⁹ See also *MM* [2011] EWCA Crim 1291, which draws a distinction between an honest belief held by a defendant which may have been reasonable in the circumstances (to which mental disorder may be relevant) and a belief held by a reasonable man in the defendant's circumstances, where mental disorder would not be relevant.

prevails. Indeed, the *Ghosh* test,³⁰ which applies to offences of dishonesty, is also subjectively-based where it focuses on whether the defendant believed that his behaviour was dishonest according to the standards of ordinary people. That one false belief in, for example, consent should be judged potentially relevant but another not, according to whether the defence is objective or subjective, is legally explicable. However, conveying its implications to disordered defendants and ordered juries looks a taller order than even those generally applicable to defences based on mistaken belief. And the implications for defendants who choose to run an honesty based defence, which would necessarily entail giving evidence, may in turn run up against the issue of adverse effect discrimination; namely, the notion that treating everybody the same can still be discriminatory.

Whilst one might conclude that the Court of Appeal's observations are merely a restatement of the general rule about honest mistakes, two other aspects of the *B(MA)* case are relevant. First, the Court did not wholly discount "interpretation" situations

where the personality or abilities of the defendant may be relevant to whether his positive belief in consent was reasonable. It may be that cases could arise in which the reasonableness of such belief depends on the reading by the defendant of subtle social signals, and in which his impaired ability to do so is relevant to the reasonableness of his belief (para 41)

Thus, people may hold beliefs which are not irrational, albeit others in those circumstances would probably not arrive at the same conclusion about what the victim might or might not be consenting to. For example, someone with an intellectual disability

³⁰ *R v Ghosh* [1982] 2 All ER 689. Getting jurors to grapple with the defendant's beliefs about the beliefs of others is already a notably complex exercise.

might misinterpret behavioural cues and arrive at a conclusion that is not unreasonable on the particular facts. The acknowledgement that those with intellectual disabilities can make reasonable mistakes is welcome, albeit it really does no more than restate what should be the generally applicable position. But notably, the Court reiterated that it was not open to a jury to treat plainly irrational beliefs as reasonable.

Second, in reviewing the troubled history of endeavours to import the characteristics of those with mental disorder into the reasonable comparator, it was implied that down that route lay madness: how could a jury judge how “the reasonable glue sniffer” would have responded in that situation?³¹ The Court also noted a recent move away from such disability-infused reasonableness comparators in the area of provocation, and in the statutory defence of loss of control.³²

Thus, it can be seen that disability-neutral defences are not wholly impossible in principle. They can arise in cases where the subjective element is based on honest or genuine beliefs; and in cases where consent arises, again in situations requiring an honest belief by the defendant. It is also possible that there is some scope for going down an extended *Bowen* type route: this would provide a potential for more disability-neutral defences, albeit on the basis of the Court of Appeal’s observations in *R v B (MA)* this does not look likely to be popular (or legally coherent) and would depend very much on specific factual situations. Whilst such initiatives would inevitably encounter the

³¹ *R. v Morhall* [1995] 2 Cr. App. R. 502. Or in the judicial language used “unworkable, as well as wrong in principle” *R v B(MA)* para 29.

³² *Attorney General for Jersey v Holley* [2005] UKPC 23; *R. v James* [2006] EWCA Crim 14. The partial defence of loss of control (see s.54 of the *Coroners and Justice Act* 2009) excludes from consideration those characteristics of the defendant which bear on his capacity for tolerance and self-restraint. Mental illness reducing that capacity would thus not be relevant to the defence.

difficulties of adverse effect discrimination in some situations, these initiatives could go some way to ensuring that the majority of those with problematic mental capacities would be treated on an equal basis with other potential offenders. And such an approach could have a doubly positive effect in conjunction with appropriate initiatives on effective participation discussed above.

3. Disability-neutral prosecution burdens

Another area of interest concerns the duty on the prosecution to prove specific intent. In the recent case of *R v Harris* [2013],³³ a case of aggravated arson where the accused had a history of depression and alcoholism, the Court of Appeal were seemingly content to quash the conviction.³⁴ They held that the judge had misdirected himself that this was a case of voluntary intoxication, subject to the *Majewski* rules, rather than one where the prosecution had to establish recklessness in the presence of a mental disorder. As the Court of Appeal observed (para 59) “In our view he was entitled to have tried the question of whether, in the condition in which he was, he was actually aware of the risk which he created for his neighbours.” The defendant had maintained that a risk to his neighbours had simply not occurred to him because of his mental disorder: he was taking both anti-psychotic and anti-depressant medication. Again, this is arguably disability-neutral since the burden on the prosecution is to establish evidence of recklessness or

³³ *R v Harris* [2013] EWCA Crim 223.

³⁴ Notably, at the time of the offence the accused was sober, albeit possibly under the effects of withdrawal.

specific intent (that is that the defendant gave some thought to the matter) in all defendants on this charge.

What is also interesting about this case is that the Court heard evidence that (para 58) the defendant was at the time of the offence suffering from

mental disorder with psychotic symptoms which included the hearing of voices and hallucinations. One of the doctors described the condition as follows:

“Alcoholic psychosis describes a cluster of different psychotic conditions relating to alcohol misuse. It includes delirium tremens and alcoholic hallucinosis...

The occurrence of agitation paranoia, auditory and visual hallucinations and confusion following sudden withdrawal of alcohol would point towards a diagnosis of delirium tremens. In certain circumstances there might be seizure associated with it. I note that Mr Harris has a history of seizures in the past.... The complete resolution of symptoms is usually within a few days of stopping alcohol, with or without medication.”

Thus, the historic use of alcohol had a role to play, and presumably the Court could have taken a more robust and traditional line had it so wished, and perceived the case as one of being intoxication dominated – alcohol withdrawal psychosis – of which he should have been aware. Yet they did not. Perhaps they were influenced by the seemingly good outcome (by the time of the appeal) the defendant was undergoing on a

community order under the *Criminal Justice Act* 2003 with a mental health treatment condition attached. They saw no need for a retrial given the prior admission of the offence of simple arson.

This decision notably puts *Harris* in the same position as someone acquitted on grounds of not guilty by reason of insanity, albeit disposal options exist for those found not guilty by reason of insanity. Both parties can be still subject to a continuing mental disorder, and still a danger to others; and yet in *Harris*, had the prosecution failed to make out the necessary *mens rea* for aggravated arson, he would have been free to leave the court. Whereas those subject to not guilty by reason of insanity are liable for one of the three disposals (discharge, supervision in the community (under the *Criminal Justice (Insanity) Act* 1964) or hospital detention, with or without a restriction order). So, whilst emphasising the burden on the prosecution to prove the requisite mental element in the offence is disability-neutral, sending an accused person down the not guilty by reason of insanity route is not; unless, of course, it were to be argued that in so doing the court was attempting to preserve or restore the individual's true will and preferences (see Banner & Szukler, 2013).³⁵

So, if the law is content to allow mentally disabled individuals to avoid conviction in this way, why would that not be sufficient in all cases? Put the prosecution to proof in all cases with the defendant arguing that his mental disorder/disability prevented him forming the requisite intent, or indeed being reckless. Thus, in theft charges, the

defendant did not act dishonestly or with an intention to permanently deprive; in fraud cases there was no dishonesty etc. That would not, of course, so readily assist with those offences based on negligence or with strict liability offences, which are legion. But it would be a start on a disability-neutral agenda.

4. Outcome vs. Process

One final conflict which is evident in the reported cases is worth exploring briefly. Namely, that between a desire to achieve the “best” outcome (which might be regarded as a paternalistic form of reasoning and one not likely to find favour with the CRPD) and a desire to be seen to be adhering to a correct process.

R v B [2012]³⁶ is a case of voyeurism; the accused was of limited intellectual ability, had no sexually deviant tendencies and was a man of previous good character. The offences involved two young boys whom it was alleged the accused had observed in the changing rooms of a swimming pool, but the case went down the unfitness to plead route and a positive finding was made after a s.4A trial of the facts. On appeal, the Court applied the legal principles robustly; with a fine detailed analysis of the conduct elements required to make out the new statutory offence of voyeurism the Court was able to quash the positive finding that the accused “had done the act or made the omission charged” on the grounds that the jury had been wrongly directed. The trial judge had told them to ignore the need for the prosecution to prove that the defendant’s subjective purpose had been sexual

³⁶ *R v B* [2012] EWCA Crim 770.

gratification, since without this element no injurious act would have been committed (thus, casual observation of an inquisitive nature of naked young boys does not amount to voyeurism) and the accused could have been acquitted. The orders which the trial judge had imposed were based on his assertion that the “public deserve to be protected from people who behave as if they were voyeurs” (para 20). These were (i) a supervision order (ii) registration on the sex offenders’ register (mandatory, albeit not clearly necessary) and (iii) a Sexual Offender Prevention Order (SOPO) for 5 years whereby *B* could not visit leisure centre changing rooms or those in shops without being accompanied by a family member. The Court of Appeal held that since *B* was not seen to be a sexual predator nor was it necessary to protect the public from serious sexual harm, either physical or psychological, the SOPO order was not justified in any event. Of course, the analysis might have been different in the case of a more serious offence or where the accused was seen to be sexually predatory, but here the potential to import subjective *mens rea* elements, through a detailed focus on the statutory wording of the offence, into what has been a conduct-based assessment was notable. It is also notable that the Law Commission’s (2010) consultation on unfitness would propel the law in a similar direction, embracing *mens rea* elements.

It is notable that there are orders, known as supervision orders, which can follow either a criminal conviction, or a positive finding in a s.4A unfitness trial of the facts hearing. The former, a community order with a supervision requirement under the *Criminal Justice Act 2003*, can last for up to three years; the latter for only two years. The unfitness supervision order is a civil disposal and there is no sanction for non-compliance; the former is a criminal disposal, it requires the consent of the defendant but

no longer requires evidence from a s.12 appointed doctor under the *Mental Health Act* 1983. In cases of subsequent breach (or non-compliance with treatment – albeit this is tricky if it is the only form of breach) the offender can be brought back to court and resentenced. Of course, the courts will not be faced with a direct choice between the two since the proceeding process will determine which is available. But, it is evident that the longer criminal based intervention has been seen as both preferable (see Walls, below) and is more likely to be CRPD compliant.

R v Walls [2011]³⁷ was another case of a man of limited intellectual ability, in this instance facing charges of sexual assault. The case went down the conventional criminal route and he was convicted and given a 3 year supervision order. On appeal, on the retrospective issue of fitness to plead, the Court of Appeal was critical of the psychiatrists who gave evidence for not addressing the *Pritchard* criteria, and particularly critical of the psychiatrist who failed properly to address his mind to the significance of the original police interviews. Perhaps unsurprisingly the Court of Appeal was unwilling retrospectively to interfere with the original criminal conviction, arguing that the s.4A unfitness route deprived the accused of very significant rights and constrained the Court's disposal options. The relief the Court of Appeal manifested was evident. It readily acknowledged that the criminal conviction enabled the defendant to be on a three year supervision order where an unfitness finding would have resulted in less attractive and protective outcomes, if a non-hospital based disposal had resulted. The historic tendency to find an accused fit by resort to a low threshold for fitness propels defendants through to a final legal adjudication (rather than towards a therapeutic and possibly indefinite

³⁷ *R v Walls* [2011] EWCA Crim 443.

disposal); broadening the criteria for unfitness, as the Law Commission have intimated, would arguably lessen the protections available to disordered accused individuals, unless the Commission's proposals with respect to the subjective elements of offences were also embraced in revisions to the s.4A hearing.

When redrawing the fault lines with respect to either the ECHR or the CRPD different groups will be advantaged and disadvantaged. Or not, depending on the value system by which such revisions are appraised. As Lucy Scott-Moncrieff put it when recently discussing the case of *Re C* [1994], the precedent-setting gangrenous leg case,³⁸ she was extremely pleased about the legal aspects of the case, in that her client obtained what he wanted (and that the judgment endorsed the “living will” approach for the first time), but that she was personally sad as she thought he might die as a result (albeit he didn't).³⁹ Paradoxically, as someone who had had a wealth of experience in the area of representing mentally disordered clients, Scott-Moncrieff volunteered that she now thought she was wrong with respect to his capacity; a conclusion to which she had only come after recognising he did not have the capacity to make a will as he seemingly did not believe he was at any risk of dying in a conventional sense. In turn, this could have made questionable the Court's original conclusion that he had capacity with respect to the decision not to have his leg amputated. These are undoubtedly tricky cases.

Conclusions

³⁸ *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 All ER 819.

³⁹ Lucy Scott-Moncrieff in the Radio 4 programme “The Legacy of Mr C part 2” broadcast on Tuesday 4th February 2014.

If it is accepted that neither the existing law on unfitness, insanity and automatism, nor their potential replacements, are CRPD compliant on a literal reading, it is arguable that the opportunities discussed in this article with respect to greater supported decision-making, and the promotion of more disability-neutral initiatives, might ameliorate what might otherwise be seen as implicit defiance by the UK. And this could be achieved by heading-off any final resort to unfitness and insanity by making conventional trial processes less discriminatory in their impact on accused persons with disabilities. However some, including the Law Commission (2014: para 2.80), take the view that there will always be a small group of defendants for whom no amount of supportive measures will make conventional trials appropriate: and not to have alternative disability-based procedures for them would breach their right to a fair trial under Article 6 of the ECHR. Indeed, can it be right that a system of criminal law which permits the continuation of objective liability would not make any special provision for those who cannot comply where the CRPD gives precedence to attaining equal rights over any concession to a welfarist-based model? For the time-being, in a potential tussle between the ECHR and the CRPD, it seems, at least from the perspective of the Law Commission, that the domestically incorporated ECHR will trump the CRPD.

Thinking through the implications of the CRPD for criminal liability is not easy. Whilst the Law Commission are likely to recommend that the culpability fault lines be redrawn, subsequent implementation looks much less probable. The alternative potential routes discussed could assist compatibility, including the extension of disability-neutral defences or the closer inspection of what is required of the prosecution to demonstrate culpability. Yet such disability-neutral approaches are unlikely to be welcomed by all;

both the courts and the legislature have demonstrated hesitancy, if not outright opposition; examples would be the shift in both rape and provocation/loss of control defences to a more objective-infused (less disability-neutral) stance. Disability-neutral approaches would also put greater reliance on either psychiatric testimony or on a jury's ability to discern the appropriate borderline between extreme but normal reactions to grossly abnormal circumstances and abnormal reactions to normal or abnormal circumstances. Moreover, where a defendant gives evidence, and in the potential consequential absence of psychiatric testimony, it would be for the jury to grapple with such concepts as deluded honesty where a subjective disability-neutral defence prevails. These are complex issues which have, to date, been ill-thought through, albeit the courts are aware of the possible unintended consequences of opening up objective defences to subjective approaches. One such example would be the possible acquittals of "ordered" sexual predators and less protection for potential victims of rape.

Other approaches could include non-prosecution and diversion from prosecution in less serious cases where the capacity to offend is in doubt, assuming, of course, that diversion does not just mean an alternative of compulsory civil confinement;⁴⁰ the introduction of voluntary transfer from prison to hospital, or to hospital following a finding of unfitness or the special verdict (see for discussion Szmukler, Daw & Dawson, 2010); and a stricter focus on process and not outcome. The relationship between lack of criminal capacity and lack of decision-making capacity (the latter being relevant to voluntary hospital

⁴⁰ And the £25 million scheme to trial mental health nurses in police stations and courts could assist here; see <http://www.england.nhs.uk/2014/04/04/1d-live/>

admission) is itself problematic.⁴¹ And unscrambling the intersections between effective participation in trials and the various prosecution and defence burdens should be seen in the context of the reality of the majority of criminal proceedings, where most defendants plead to offences. None of this is easy and there are no obvious solutions which do not entail different conglomerations of winners and losers.

Finally, whilst the potential role for the *Equality Act* 2010 is worthy of separate discussion, the curiously divisive role of discrimination and adverse effect discrimination is already evident. For example, the Law Commission (2010: para 2.146) see discrimination in terms of the current law as insufficiently embracing of those with disability; and the Mental Disability Advocacy Centre (2013) see it as in breach because those with disability should be treated without reference to disability. Whether one is levelling a playing field or giving someone an advantage is always tricky; but particularly tricky in the criminal field of play where one person's advantage can be seen as being to another's detriment.

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⁴¹ George Szmukler, personal communication

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Appendix UNCRPD – Selected Articles

Article 1 - Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Article 5 - Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Article 12 - Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be

proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 13 - Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 14 - Liberty and security of the person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
 - a. Enjoy the right to liberty and security of person;
 - b. Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

Article 16 - Freedom from exploitation, violence and abuse

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties

shall ensure that protection services are age-, gender- and disability-sensitive.

3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.

5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.