CORA Cork Open Research Archive
Cartlann Taighde Oscailte Chorcaí

Title	Fitness for trial in the District Court: the legal perspective
Authors	Whelan, Darius
Publication date	2007
Original Citation	Whelan, D., 2007. Fitness for trial in the District Court: the legal perspective. Judicial Studies Institute Journal, 2007(2), pp.124-140.
Type of publication	Article (peer-reviewed)
Link to publisher's version	http://www.jsijournal.ie
Rights	©Judicial Studies Institute Journal
Download date	2026-11-04 10:04:57
Item downloaded from	https://hdl.handle.net/10468/232



UCC
University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

FITNESS FOR TRIAL IN THE DISTRICT COURT: THE LEGAL PERSPECTIVE

DARIUS WHELAN*

Reform of the law on fitness to plead has been discussed for decades. For example, in 1978, the Henchy Committee produced a report outlining major changes which were necessary.[1] The Criminal Law (Insanity) Act 2006, enacted 28 years after the Henchy report, finally came into force on 1 June 2006 and introduces significant changes to the law in this area.

There are a number of useful sources which may be consulted for description and analysis of the law prior to the enactment of this new legislation.[2] The Act does not change the common law definition of unfitness to plead, but instead the changes it introduces concentrate on important procedural questions such as the introduction of automatic periodic reviews of detention and provision for appeals from fitness to plead decisions.[3]

---

* Lecturer in Law, Faculty of Law, University College Cork. This article is based on the text of an address delivered at the Annual Conference of the District Court, organised under the auspices of the Judicial Studies Institute, on 27 April 2007.

[1] *Third Interim Report of the Interdepartmental Committee on Mentally Ill and Maladjusted Persons. Treatment and Care of Persons Suffering from Mental Disorder Who Appear Before the Courts on Criminal Charges* [Chair: Henchy J.] (Prl. 8275, J85/1, Stationery Office, Dublin, 1978).

[2] See for example, McAuley, *Insanity, Psychiatry and Criminal Responsibility* (Round Hall Press, Dublin, 1993); Casey & Craven, *Psychiatry and the Law* (Oak Tree Press, Dublin, 1999); Charleton, McDermott & Bolger, *Criminal Law* (Butterworths, Dublin, 1999); Hanly, *An Introduction to Irish Criminal Law* (2nd ed., Gill and Macmillan, Dublin, 2006); McIntyre & McMullan, *Criminal Law* (2nd ed., Thomson Round Hall, Dublin, 2005); Whelan, "Some Procedural Aspects of Insanity Cases" (2001) 11(3) *Irish Criminal Law Journal* 3; Whelan, "Fitness to Plead and Insanity in the District Court" (2001) 11(2) *Irish Criminal Law Journal* 2.

[3] For general reviews of the Act see McGillicuddy, "The Criminal Law (Insanity) Act 2006" (2006) 11 *Bar Review* 95 and Whelan, "The Criminal Law (Insanity) Act 2006" (2006) *Irish Current Law Statutes Annotated*. For commentary on earlier versions of the Bill, see Conway, "Fitness to Plead in

One of the reasons the Act was introduced was to attempt to satisfy the requirements of the European Convention on Human Rights. Under Article 5(4) of the Convention, everyone who is deprived of their liberty by arrest or detention is entitled to take proceedings by which the lawfulness of their detention will be decided speedily by a court and their release ordered if the detention is not lawful. According to media reports, the Trial of Lunatics Act 1883 was being challenged as a breach of the Constitution and the European Convention.[4]

This paper concentrates on fitness for trial in the District Court and will deal with the topic under two main headings: firstly, how does the District Court determine fitness for trial and secondly, the consequences of a finding of unfitness for trial.

In other jurisdictions, a judge in a court at equivalent level to the District Court might well have a larger number of possibilities open to him or her in dealing with a person who has a mental disorder. For example, in England and Wales, courts have wider powers to remand a person to hospital for a report on their medical condition, or to make a hospital order without conviction.[5] There are also more developed policies and schemes for diversion of people with mental disorders from the criminal justice system.[6] In some other jurisdictions, mental health courts have been established to cope with the complexity of the interaction between criminal law and mental health.[7]

Light of the Criminal Law (Insanity) Bill 2002" (2003) 13(4) *Irish Criminal Law Journal* 2; Mills, "Criminal Law (Insanity) Bill 2002: Putting the Sanity Back into Insanity" (2003) 8 *Bar Review* 101; Robinson, "Crazy Situation" (2003) 97 (1) *Law Society Gazette* 12.

[4] Mary Carolan, 'Man who threw daughter from bridge challenges his detention', *Irish Times*, 21 June 2005.

[5] See Bartlett & Sandland, *Mental Health Law: Policy and Practice* (3rd ed., Oxford: Oxford University Press, 2007), chapter 6. For statistical analysis see Mackay, Mitchell & Howe, "A Continued Upturn in Unfitness to Plead - More Disability in relation to the Trial under the 1991 Act" [2007] *Criminal Law Review* 530.

[6] For the current situation in Ireland, see O'Neill, "Liaison between Criminal Justice and Psychiatric Systems: Diversion Services" (2006) 23(3) *Irish Journal of Psychological Medicine* 87.

[7] Erickson *et al*, "Variations in Mental Health Courts: Challenges, Opportunities, and a Call for Caution" (2006) 42 *Community Mental Health*

Given the limited number of options which are available to the courts under our current arrangements, judges must attempt to choose between the alternative courses of action available, bearing in mind such principles as the right to liberty, the right to a fair trial and the duty to protect the accused person and/or the public in appropriate cases.

I. DETERMINATION OF FITNESS FOR TRIAL

Where a person is before the District Court charged with a summary offence, or with an indictable offence which is being or is to be tried summarily, any question as to whether the accused is fit to be tried must be determined by the District Court.[8] However, in the case of an indictable offence which is *not* being tried summarily, the question of fitness for trial must be determined by the court of trial to which the person would have been sent forward if he or she were fit to be tried and the District Court must send the person forward to that court for the purpose of determining the issue.[9]

Problems may arise if the accused is unable, due to a mental disorder, to consent to summary trial of an indictable offence. One interpretation would require that in such a case the person must be sent forward for trial in another court. However, another interpretation might permit the District Court to determine the question of fitness for trial as the Act specifically states that the question of the accused's ability to elect for a jury trial is one of the questions relevant to fitness to be tried.[10] McGillicuddy has considered this point in detail.[11]

Journal 335; Schneider *et al*, *Mental Health Courts: Decriminalizing the Mentally Ill* (Toronto: Irwin Law, 2007).

[8] S.4(3)(a) Criminal Law (Insanity) Act 2006.

[9] S.4(4)(a) Criminal Law (Insanity) Act 2006.

[10] S.4(2)(c) Criminal Law (Insanity) Act 2006.

[11] McGillicuddy, "The Criminal Law (Insanity) Act 2006" (2006) 11 *Bar Review* 95 at 96 and "The Criminal Law (Insanity) Bill 2002", 2 April 2006, www.lawlibrary.ie, p.5.

A. The Definition of Unfitness for Trial

The Act restates the common law definition of unfitness for trial in section 4(2) as follows:

> An accused person shall be deemed unfit to be tried if he or she is unable by reason of mental disorder to understand the nature or course of the proceedings so as to —
>
> (a) plead to the charge,
>
> (b) instruct a legal representative,
>
> (c) in the case of an indictable offence which may be tried summarily, elect for a trial by jury,
>
> (d) make a proper defence,
>
> (e) in the case of a trial by jury, challenge a juror to whom he or she might wish to object, or
>
> (f) understand the evidence.

‘‘Mental disorder’’, as defined in section 1, includes mental illness, mental disability, dementia or any disease of the mind, but does not include intoxication.

The definition does not appear to cover a person with a physical disability, such as a deaf person who cannot understand sign language interpretation. It has been suggested that the common law rules regarding fitness to plead of people with physical disabilities will continue to apply.[12] The 2006 Act does not repeal s.28 of the Juries Act 1976, which states that: “[w]henever a person charged with an offence to be tried with a jury stands mute when called upon to plead, the issue whether he is mute of malice or by the visitation of God shall be decided by the judge and, if the judge is not satisfied that he is mute by the visitation of God, the judge shall direct a plea of not guilty to be entered for him.”[13]

---

[12] McGillicuddy, “The Criminal Law (Insanity) Act 2006” (2006) 11 *Bar Review* 95 at 96.

[13] See Ryan & Magee, *The Irish Criminal Process* (Mercier Press, Dublin and Cork, 1983), p.268; Walsh, *Criminal Procedure* (Dublin: Thomson Round Hall, 2002), p.779.

It is arguable that the test for unfitness for trial should require a higher level of analytical capacity.[14] The opportunity could have been taken to develop the criteria beyond the traditional cognitive ones (whether the person can understand the nature and course of the proceedings so as to make a proper defence, instruct a lawyer, etc.) to a broader test of intellectual capacity. Is it really sufficient that a person may be tried on a very serious criminal charge on the basis that he or she understands what is going on? It has been persuasively argued elsewhere that the law should require a person to have "decisional capacity" so that they can be a true participant in the process.[15] In addition, the Scottish Law Commission[16] has proposed that the test for unfitness for trial should be based on the person's ability to participate effectively in the proceedings, based partly on European Court of Human Rights case-law such as *Stanford v. United Kingdom*[17] and *T. and V. v. United Kingdom*.[18] Such a widening of the scope of unfitness for trial would be more protective of the person's constitutional right to a fair trial. Conway notes, however, that it is possible to argue that the inclusion of the general ground of ability to make a proper defence in the criteria for unfitness for trial allows the criteria to be widened beyond the traditional cognitive ones.[19]

B. Procedure Prior to Determination of the Issue

The 2006 Act does not require that medical evidence be heard before a finding of unfitness for trial is made.[20] Nor does it

---

[14] Schneider & Bloom, "*R v Taylor*: A Decision Not in the Best Interests of Some Mentally Ill Accused" (1995) 38 *Criminal Law Quarterly* 183.

[15] Mackay, *Mental Condition Defences in the Criminal Law* (Oxford: Clarendon Press, 1995), pp.244-245.

[16] Scottish Law Commission, *Discussion Paper on Insanity and Diminished Responsibility* (2003) and *Report on Insanity and Diminished Responsibility* (2004)

[17] Series A, No.282, 25 January 1994.

[18] (2000) 30 E.H.R.R. 121.

[19] Conway "Fitness to Plead in Light of the Criminal Law (Insanity) Bill 2002" (2003) 13(4) *Irish Criminal Law Journal* 2 at 3-4.

[20] If arguments arise about the applicability of Article 6 of the European Convention on Human Rights to determinations of fitness for trial, reference may be made to the English cases in which it was held that such determinations are not part of criminal proceedings: *R. v. M., K. and H.* [2001] E.W.C.A.

require that the person be committed to a hospital at this stage for assessment of their mental condition. Even though medical evidence is not required by the Act at this stage, it would obviously be desirable to hear such evidence where appropriate. For that purpose, the Court may wish to allow time for medical evidence to be obtained.

There are two main choices open to the District Court if the question of fitness for trial arises and the parties are not ready to proceed with the issue on the day, or if reports need to be prepared prior to determining the issue: remand to a prison[21] or remand on bail. In the case of remand on bail, possibilities such as attachment of conditions may be considered.

If the Court remands the person on bail, the question of fitness to enter into a recognisance would arise. In *R. v. Green-Emmott*,[22] it was held that a person who has been certified as insane cannot enter into a binding recognisance. Walsh J. referred to this precedent in *State (C.) v. Minister for Justice*[23] and concluded that if the District Court decided that the person was unfit for trial, the Court would have no alternative but to remand the person in custody as he or she would not be able to enter into a recognisance.[24] It is unfortunate that the 2006 Act did not address this problem, for example by abolishing the mandatory recognisance in cases where the defendant is mentally unfit.[25]

If the person is fit to enter into a recognisance, the Court might consider attaching conditions to the recognisance, relating to the person's mental disorder. The Bail Act 1997 states that the recognisance may be subject to such conditions as the Court

---

Crim. 2024; [2002] 1 W.L.R. 824, *R v. Grant* [2001] E.W.C.A. Crim. 2611; [2002] 1 Q.B. 1030 and *R. v. H.* [2003] U.K.H.L. 1; [2003] 1 W.L.R. 411.

[21] If the person is remanded to prison, it is possible for him or her to be transferred to the Central Mental Hospital under s.15 of the Criminal Law (Insanity) Act 2006. The transfer is directed by the Governor of the prison, on receipt of appropriate psychiatric certification, and no court appearance is required.

[22] (1931) 22 Cr. App. R. 183; 29 Cox C.C. 280.

[23] [1967] I.R. 106 (S.C.).

[24] [1967] I.R. 106 at 126 (S.C.).

[25] The Henchy Committee proposed adjournments of up to six months if a person was unable by reason of mental disorder to enter into a recognisance: *supra*, note 1, draft Bill, s.37.

considers appropriate having regard to the circumstances of the case.[26] The conditions might include a requirement that the person attend a particular psychiatric centre on an outpatient basis.[27] Alternatively, conditions could require that the person permit himself or herself to be admitted to a psychiatric centre.[28]

The Court does not have a statutory power to remand the person in custody to a local hospital. However, the Court might in some cases comment on the possible need for treatment of the person. If the Court is satisfied that the person will seek treatment on a voluntary basis, then that may be sufficient. Otherwise, the Court could inquire of the Gardaí whether they have considered using their power to take a person believed to have a mental disorder into custody under section 12 of the Mental Health Act 2001. This taking into custody must be followed forthwith by an application to a doctor for a recommendation for admission to an approved centre under the 2001 Act. Alternatively, the Gardaí may make an application under section 9 of the 2001 Act, without taking the person into custody.

It has recently been recognised that in some cases if a person with a mental disorder is released from detention due to a breach of a statutory requirement, courts may take account of the person's mental disorder and need for treatment and ensure that arrangements are put in place for a fresh application for detention to be made.[29] By analogy, an argument could be made that the

---

[26] S.6(1)(b) Bail Act 1997.

[27] See discussion of the English equivalent in Bartlett & Sandland, *Mental Health Law: Policy and Practice* (3rd ed., Oxford: Oxford University Press, 2007), p.215.

[28] See O'Neill, "Diverting the Mentally Ill from District Courts: Consequential Options", Annual District Court conference, Adare, 2007, slide 24, where an example of conditional bail is given: The prison governor and a general practitioner complete forms in advance for admission under the Mental Health Act 2001; the bail conditions are that the accused permits himself to be brought to hospital, will remain there until discharged if he is admitted, will afterwards reside with his sister, accept appropriate treatment and abstain from illicit drugs.

[29] *H. v. Russel*, High Court, unreported, Clarke J., 6 February 2007; *A.M.C. v. St. Luke's Hospital, Clonmel*, High Court, unreported, Peart J., 28 February 2007. See also Cunningham & Keane, "Summary of Article 40.4 Judgments since the Commencement of the Mental Health Act 2001" (Dublin: Mental Health Commission, 2007)

District Court may in appropriate criminal cases facilitate involuntary civil detention of a person under the Mental Health Act 2001.

The Criminal Procedure Act 1967, as amended, provides that if the District Court is satisfied that any person who has been remanded is unable by reason of illness or accident to appear or to be brought before the court at the expiration of the period of remand, the Court may, in his or her absence, remand the person on bail or in custody for an extended period.[30] There are authorities which support the use of this power in cases of mental disorders.[31] Care must be taken to comply with all the requirements of the section, *e.g*. it can only be used when the person has already been remanded at least once, and the person must be "unable" to appear in court.

An argument might be made that section 4(6) of the 2006 Act allows the District Court to commit the person to the Central Mental Hospital[32] for up to fourteen days before determining the question of fitness for trial. Section 4(6) provides as follows:

> (a) For the purpose of determining whether or not to exercise a power under *subsection (3)* or *(5)* the court –
>
> (i) for that purpose, may commit him or her to a designated centre for a period of not more than 14 days, and
>
> (ii) shall direct that the accused person concerned be examined by an approved medical officer at that centre.
>
> (b) Within the period of committal authorised by the court under this subsection, the approved medical officer concerned shall report to the court on whether

---

[30] S.24(5) Criminal Procedure Act 1967, as substituted by s.4 Criminal Justice (Miscellaneous Provisions) Act 1997. See also Order 19(4) of District Court Rules 1997, S.I. No.93 of 1997.

[31] *In Re Dolphin: State (Egan) v. Governor of Central Mental Hospital*, High Court, unreported, Kenny J., 27 January 1972; *State (Caseley) v. Daly & O'Sullivan*, High Court, unreported, Gannon J., 19 February 1979.

[32] The Act refers to a "designated centre". At present the Central Mental Hospital is the only such centre.

> in his or her opinion the accused person committed under *paragraph (a)* is—
>
> (i) suffering from a mental disorder (within the meaning of the Act of 2001) and is in need of in-patient care or treatment in a designated centre, or
>
> (ii) suffering from a mental disorder or from a mental disorder (within the meaning of the Act of 2001) and is in need of out-patient care or treatment in a designated centre.

It seems unlikely that section 4(6) allows committal *before* determining fitness for trial. The contents of the psychiatric report which must be produced by the approved medical officer as specified in section 4(6)(b), are relevant to the question of making an appropriate order in relation to the person *after* he or she has been found unfit for trial. If the psychiatric report were to assist the Court in determining fitness for trial, then the sub-section would require that the report address the person's ability to understand the nature and course of the proceedings.[33] In addition, section 4(6) refers to the "exercise" of a "power" under subsections (3) or (5), and this seems to apply to making an appropriate order after the person has been found unfit for trial[34] rather than the sub-section which refers to the "question" of fitness for trial being "determined" by the court.[35] Finally, it is only in the sub-section concerning making an order after a finding of unfitness for trial[36] that reference is made to the Court considering the psychiatric report adduced under section 4(6).

---

[33] S.4(2) Criminal Law (Insanity) Act 2006.
[34] S.4(3)(b).
[35] S.4(3)(a).
[36] S.4(3)(b).

C. Raising the Issue

The question of fitness for trial may arise at the instance of the defence, the prosecution or the court.[37] The defence must have notified the prosecution, within ten days of the accused being asked how he or she wishes to plead, that it intends to adduce evidence of the accused's mental condition.[38]

The duty of the District Court to consider the issue of fitness for trial arose in *Leonard v. Garavan & D.P.P.*[39] The applicant, Ms. Leonard, had been convicted in the District Court of public order offences and assault. A Garda gave evidence that she was "roaring about God and the Devil and was calling down curses upon all those present." In the witness box, she made a fifteen-minute speech about her crusade against drug dealers. She had no legal representation during the trial. She had been asked about representation and said she would represent herself. She continuously shouted and interrupted the judge. Once convicted, she was transferred from Mountjoy to the Central Mental Hospital. She applied to the High Court for *certiorari* of the convictions and there was medical evidence to the effect that she was in a manic state and had bipolar affective disorder. McKechnie J. quashed the convictions, saying that the applicant did not have any appreciation of what was going on and she was effectively "unfit to plead." The case should not have proceeded, or alternatively, there was sufficient evidence before the judge to warrant an inquiry into her mental state, which should have taken place. He also held that she should have been offered legal representation again at sentencing stage.

D. Deferral of the Issue

---

[37] S.4(1) Criminal Law (Insanity) Act 2006.

[38] S.19.

[39] [2003] 4 I.R. 60 (H.C.). See also the earlier case of *D.P.P. (Murphy) v. P.T.* [1999] 3 I.R. 254 (H.C.), where a fifteen year old boy was charged in the District Court with larceny of a sports jacket. The boy was placed in the care of the Eastern Health Board and the judge adjourned the proceedings to chambers to consider his medical and psychiatric condition. Documents appear to have shown a preliminary diagnosis of Asperger's Syndrome. The judge later decided to inquire into his fitness to plead of his (the judge's) own initiative. McGuinness J. in the High Court confirmed that the District Court was under a duty to enquire into P.T.'s fitness to plead.

Where the question arises as to whether or not the accused is fit to be tried and the Court considers that it is expedient and in the interests of the accused so to do, it may defer consideration of the question until any time before the opening of the case for the defence.[40] There is a similar statutory provision in England, s.4 of the Criminal Procedure (Insanity) Act 1964, and it has been held there that deferral may be used where the prosecution case is thin.[41]

II. CONSEQUENCES OF A FINDING OF UNFITNESS FOR TRIAL

If the District Court determines that an accused person is unfit to be tried the Court must adjourn the proceedings until further order.[42] If the Court determines that the person is fit to be tried, the case continues.[43]

Committal for examination and medical report are obligatory if the Court wishes to detain a person found unfit for trial or order out-patient treatment in the Central Mental Hospital (CMH) for him or her. If the Court considers that the person does not require either in-patient or out-patient treatment in the CMH, then the Court has the power to release the person immediately.[44] This power might be used, for example, in a case where a person is unfit for trial due to dementia but is already being well cared for either in their home or in a residential setting.

If the Court is considering in-patient or out-patient treatment in the Central Mental Hospital, the Court commits the person to the Hospital for up to 14 days and directs a psychiatric report from an approved medical officer.[45] This 14-day period for examination cannot be extended.[46]

---

[40] S.4(7).
[41] *R. v. Burles* [1970] 2 Q.B. 191. See also *R. v. Webb* [1969] 2 Q.B. 178.
[42] S.4(3)(b).
[43] S.4(3)(c).
[44] Under the European Convention on Human Rights, a person may only be detained if he or she has a mental disorder warranting detention at that time.
[45] S.4(6)(a).
[46] Contrast insanity cases – s.5(3)(b) of 2006 Act.

The Mental Health Commission recommended that the Bill should be amended to facilitate remand of the person on bail in order to attend for assessment on an outpatient basis.[47]

Keys has argued that the power of the court to refer for assessment based on its own view and without a medical assessment may be contrary to the principle in *Winterwerp v. The Netherlands*[48] that detention in psychiatric care must be based on objective medical expertise.[49]

The District Court may, if it is satisfied, having considered the evidence of the approved medical officer and any other evidence, that the person is suffering from a mental disorder (within the meaning of the Mental Health Act 2001) and is in need of in-patient care or treatment, commit the person to the Central Mental Hospital.[50] Note that it is only possible to detain the person in the Central Mental Hospital, not in any other psychiatric facility. The duration of the detention will be until an order is made under section 13.[51] An order under section 13 is an order by the Mental Health (Criminal Law) Review Board making such order as it thinks proper in relation to the patient *e.g.* further care, conditional discharge, unconditional discharge, out-patient treatment or supervision.

Alternatively, the court may order out-patient treatment in the CMH, in which case mental disorder as defined either in the 2001 Act or the 2006 Act may be involved.[52] As it is located in Dublin, the option of out-patient treatment in the CMH is not practical for people residing outside the Dublin region. The possibility of out-patient treatment was added as a late amendment to the Bill as Minister McDowell believed that "no one with a mental disorder should be inappropriately held in police custody or in prison."[53] He also referred to the Henchy report and the submission of the Mental Health Commission as

---

[47] Mental Health Commission, *Second Submission on Criminal Law (Insanity) Bill 2002*, January 2006.
[48] (1979) 2 E.H.R.R. 387.
[49] Mary Keys, unpublished paper on Criminal Law (Insanity) Bill 2002, p.5.
[50] The Central Mental Hospital is currently the only "designated centre" under the 2006 Act.
[51] S.4(3)(b)(i).
[52] S.4(3)(b)(ii).
[53] 616 *Dáil Debates* 2059 (Report and Final Stages, 23 March 2006).

reasons to introduce the possibility of out-patient treatment. Note, however, that out-patient treatment was not introduced as an option for those found not guilty by reason of insanity.[54] The possibility of out-patient treatment contrasts with the regime concerning civil detention under the Mental Health Act 2001, where Mental Health Tribunals may only confirm or revoke an admission order, and cannot order out-patient treatment.

The person can only be detained if he or she has a mental disorder within the meaning of the Mental Health Act 2001. Under s.3(1) of that Act, ''mental disorder'' means mental illness, severe dementia or significant intellectual disability where—

> (a) because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or
>
> (b) (i) because of the severity of the illness, disability or dementia, the judgement of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and
>
> (ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent.

It has recently been held that while definitions (a) and (b) are expressed as alternatives, in many cases there would be substantial overlap between the two and a person could be classified as falling under both definitions at once.[55]

Detailed definitions of mental illness, severe dementia and significant intellectual disability are provided in s.3(2) of the 2001 Act: "Mental illness" means a state of mind of a person

---

[54] S.5(2).

[55] *R. v. Byrne and Flynn*, High Court, unreported, O'Neill J., 2 March 2007.

which affects the person's thinking, perceiving, emotion or judgment and which seriously impairs the mental function of the person to the extent that he or she requires care or medical treatment in his or her own interest or in the interest of other persons. "Severe dementia" means a deterioration of the brain of a person which significantly impairs the intellectual function of the person thereby affecting thought, comprehension and memory and which includes severe psychiatric or behavioural symptoms such as physical aggression. "Significant intellectual disability" means a state of arrested or incomplete development of mind of a person which includes significant impairment of intelligence and social functioning and abnormally aggressive or seriously irresponsible conduct on the part of the person.

It is unclear whether section 8 of the Mental Health Act 2001, which states that a person cannot be detained under that Act solely because of a personality disorder, applies to a detention under section 4 of the 2006 Act. The 2006 Act specifically states that a person found unfit for trial can only be detained if he or she has a mental disorder within the meaning of the 2001 Act, but it is unclear whether the section of that Act prohibiting detention based on personality disorder alone has an impact on "a mental disorder within the meaning of the 2001 Act". Minister McDowell referred to section 8 and said: "It may or may not be that this is a tacit admission that mental disorder could include a personality disorder and, therefore, section 8 was necessary to take it out of that realm. Alternatively, the whole Act could be read as stating mental disorder under the 2001 Act was not intended to cover personality disorder."[56]

Note also that while a person is detained under section 4 of the 2006 Act using civil criteria from the 2001 Act, he or she does not have the same rights as a patient detained under the 2001 Act. For example, the civil patient is detained for an initial period of 21 days, within which there must be a review by a Mental Health Tribunal, while the case of a person found not guilty by reason of insanity need only be reviewed every six months by the Mental Health (Criminal Law) Review Board.

---

[56] 176 *Seanad Debates* 259 (Committee Stage, 7 April 2004).

III. THE OPTIONAL "TRIAL OF THE FACTS"

There is no compulsory "trial of the facts" before a committal order is made. Instead, section 4(8) provides for an optional trial of the facts:

> Upon a determination having been made by the court that an accused person is unfit to be tried it may on application to it in that behalf allow evidence to be adduced before it as to whether or not the accused person did the act alleged and if the court is satisfied that there is a reasonable doubt as to whether the accused did the act alleged, it shall order the accused to be discharged.

The original Bill referred to evidence as to whether the accused person "committed" the act alleged, but this was later changed to "did" the act alleged. Minister Lenihan said that the word "committed" carries a connotation that people might have known what they were doing when they committed the act and that it could be argued the word "did" is more neutral in that regard.[57]

If a trial of the facts takes place, there are restrictions on media reporting of the case in s.4(9). The restrictions were introduced as if a court concludes that there is not reasonable doubt that an accused did the act alleged, such a conclusion could be prejudicial to the interests and good name of the accused thereafter or at any future trial.[58]

If the court is satisfied that there is a reasonable doubt as to whether the accused did the act, he or she is "discharged" and the word "acquitted" is not used. However, Minister McDowell stated:

> In effect, these provisions provide that where, despite the fact that the accused is unfit to be tried, the court is satisfied that there is a reasonable doubt that he or she committed the alleged act, it will acquit him or her. Accused persons may be unfit to be tried but if the court is, nonetheless, in a position to acquit them and say they

[57] 180 *Seanad Debates* 32 (Report and Final Stages, 19 April 2005).
[58] 180 *Seanad Debates* 33 (Report and Final Stages, 19 April 2005).

> are innocent, they should not be denied the benefit of having their innocence established merely by virtue of the fact that they have had some intervening mental illness.[59]

In England and Wales, a person who is found unfit to plead cannot be detained by a criminal court unless it has first been found that he or she did the alleged act.[60] It is regrettable that the new Act does not require a compulsory "trial of the facts" before a person who has been found unfit for trial can be detained. If a trial of the facts is being introduced, it is difficult to see why it ought to be optional.[61] The "trial of the facts" system serves the very useful purpose of ensuring that the strength of the prosecution's case is tested before it is possible to detain the person. While the defendant's mental disorder may well restrict his or her ability to contradict the prosecution's case, at least the defendant is given an opportunity to attempt to do so. If the defendant's efforts fail, the result is not a finding of guilt, it is a finding that he or she did the act or made the omission charged. Restrictions on media reporting of the 'trial of the facts' (as in s.4(9) of the 2006 Act) protect defendants' reputations, and ensure a fair trial if they become fit to plead at a later stage.[62] If the defendant successfully contradicts the prosecution's case, then the defendant is discharged and cannot be detained. The trial of the facts is also consistent with the right to a speedy trial under the Irish Constitution and Article 6(1) of the European Convention.

There has been contradictory case law in England on the question of the scope of an inquiry into whether the person "did" the act.[63] In *R. v. Antoine*[64] the House of Lords held that a trial of

---

[59] 171 *Seanad Debates* 771 (Second Stage, 19 February 2003).

[60] Section 4A Criminal Procedure (Insanity) Act 1964 as inserted by s.4 Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.

[61] Similarly, see Boland, "The Criminal Justice (Mental Disorder) Bill 1996" [1997] 4 *Web Journal of Current Legal Issues* in 'unfitness to plead' section.

[62] Connelly, "Insanity and Unfitness to Plead" [1996] *Juridical Review* 206 at 211.

[63] *R. v. Egan* [1997] Crim L.R. 225; Attorney General's Reference (No.3 of 1998) [1999] 3 All E.R. 40.

[64] [2001] 1 A.C. 340.

the facts is only concerned with the *actus reus* of the offence, not the *mens rea*. Defences such as mistake or self-defence may be considered if there is objective evidence concerning them. However, it has been held that provocation may not be considered.[65]

[65] *R. v. Grant* [2001] E.W.C.A. Crim. 2611; [2002] 1 Q.B. 1030.