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Précis Paper

Fitness / Unfitness for Trial

This paper provides a summary of the law as it relates to fitness in the criminal jurisdiction of the District and Supreme Courts. Different considerations apply to fitness in the Local Courts' criminal jurisdiction which will be covered in a separate edition of BenchTV.

Discussion Includes

- **Statutory framework for unfitness in the District and Supreme Courts**
- **The relevant common law**
- **A recent case of unfitness dealt with by Evan James**
- **Ethical obligations on the practitioner**
- **The Presser Criteria**
- **Fitness and bail applications**
- **Dealing with fitness in the District and Supreme Courts**

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Fitness / Unfitness for Trial

1. **In this edition of BenchTV, Karen Weeks (Principal Solicitor, Criminal and Mental Health Lawyers) and Evan James (Barrister, Eleventh Floor Garfield Barwick Chambers) discuss fitness/unfitness for trial in the criminal jurisdiction of the District and Supreme Courts.**

Statutory framework for unfitness in the District and Supreme Courts

2. **The *Criminal Procedure Act 1986* (NSW) is the first port of call. Its provisions and protocols must be followed leading up to trial.**

3. **Part 2 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) (ss 4-30) confirms the procedure to be followed once fitness is raised.**

The relevant common law

***R v Presser* [1958] VR 45**

4. **The Presser Criteria as set out in *R v Presser* [1958] VR 45 are well known and essential to understanding the fitness of an accused. However, this is not the only important case in this area. The issue of fitness has been alive in the common law for hundreds of years and can be traced as far back as the 1700s.**

***Proceedings in the case of John Frith for High Treason* (1790) 22 Howell's State Trials 307 at 318**

5. **The first recorded case is an English decision dating back to 1790 (*Proceedings in the case of John Frith for High Treason* (1790) 22 Howell's State Trials 307 at 318). This case is cited with authority by Justice Gaudron in *Eastman v The Queen* [2000] HCA 29 at 64:**

> ***"Traditionally, an accused person has not been put on trial unless fit to plead because of 'the humanity of the law of England falling into that which common humanity, without any written law would suggest, has prescribed, that no man shall be called upon to make his defence at a time when his mind is in that situation as not to appear capable of doing so.'"***

6. **Back in the 1700s most cases of unfitness may well have been related to mental illness. However, since then there has been an acknowledgement and a recognition that unfitness is not confined to mental illness and can also result from other situations, for example an acquired brain injury.**

Early Australian decisions involving indigenous persons

7. **Many of the early decisions of the High Court relating to fitness involved indigenous persons who had been charged with serious offences but who were either non-conversant in English or who were deaf, dumb and mute.**

8. **In the case of *Pioch v Lauder* (1976) 13 ALR, the accused was a deaf-mute indigenous person and the court found that the powers of a magistrate in its summary jurisdiction after applying the Presser Criteria could go no further and had to discharge the accused.**

9. **The Pioch case was later picked up by the Supreme Court in *Mantell v Molyneux* [2006] NSWSC 955; (2006) 165 A Crim R 83 as authority for the inability of a Local Court to take any further action against an unfit accused.**

10. **Likewise, in *Ngatayi v The Queen* (1980) 147 CLR 1 the accused, being a mute indigenous person, was charged with murder. The court adopted the Presser Criteria and found that the accused had to be discharged if there were no other statutory powers that gave the magistrate the power to detain.**

11. **Similarly, in a 1983 decision of the Federal Court, the accused was indigenous and found unfit. The court again said that it had no power to detain the accused and that he had to be discharged. This case also referred to a Supreme Court decision of the United States, *Jackson v Indiana*, 406 U.S. 715 (1972), which was used as authority for the point that, in the absence of the unfit accused falling under the diversionary powers contained in sections 32 and section 33 of the *Mental Health Act 2007* (NSW), they cannot be held any longer than is reasonably necessary to determine unfitness.**

***Eastman v The Queen* [2000] HCA 29**

12. **Justice Gaudron's judgment in *Eastman v The Queen* [2000] HCA 29 is particularly helpful in going through the common law as it relates to an unfit accused.**

13. **In this case Justice Gaudron confirmed that fitness is not something that is restricted to an accused with a mental illness and that it extends to a wide variety of mental health impairments.**

14. **Further, Justice Hayne remarked,**

> ***"but the unstated premise from which these descriptions of the criminal trial process proceed is that the accused is fit to plead and fit to stand trial. There can be no trial at all unless the accused is both fit to plead and to stand trial because the question of fitness is one which affects whether the accused has the capacity to make a defence or answer the charge. It is a question for the trial judge to consider regardless of whether the prosecution or the accused raise it. In that respect it is a question which falls outside the adversarial system. Indeed, it must fall outside the adversarial system because the very question for consideration is whether there is a competent adversary."***

15. **Justice Hayne's remarks above show that the trial judge must take on an inquisitorial role. The judge must look at the accused person and make a determination as to their fitness, assisted by the prosecution and by the defence.**

***R v Miles* [2002] NSWCCA 276**

16. **There is an excellent discussion of the common law by his Honour Chief Justice Wood in *R v Miles* [2002] NSWCCA 276. This decision, although long, is recommended reading for anyone working in this area as it traces the common law decisions and the expansion of unfitness beyond mental illness. It also raises questions about the extent of a Local Court's power when dealing with an unfit accused.**

***Mantell v Molyneux* [2006] NSWSC 955; (2006) 165 A Crim R 83**

17. ***Mantell v Molyneux* [2006] NSWSC 955; (2006) 165 A Crim R 83 is authority for the proposition that if a person is unfit to be tried in respect of a summary matter they must be discharged. This decision by Justice Adams picks up a body of caselaw from the higher courts through the 1980s and 1990s and the older decisions.**

<u>A recent case of unfitness dealt with by Evan James</u>

The facts

18. **The client's sons brought him to Evan James after a family holiday had gone very wrong. The client had had a break with reality and thought that his wife of over 40 years was having an affair with a stranger in a lift. He had taken an axe and chased his wife around the hotel, which was completely out of character for him. He was also suffering from stage 4 cancer and was highly medicated.**

19. **The solicitors found it very difficult to take instructions from the client. English was not his first language and even the translator had difficulty understanding him because he was not speaking in coherent sentences.**

20. **Evan James raised the issue of fitness with the Director of Public Prosecutions (DPP) and it was agreed that an independent expert would be briefed. The family's financial situation precluded a second expert being briefed and so they relied upon the DDP's procedure of appointing a joint-expert.**

21. **The joint-expert interviewed the client and was unable to come to a conclusion as to the cause of the break with reality. He did however conclude that the client:**
    - **was unwell,**
    - **was unable to provide coherent instructions, and**
    - **was not able to understand the available defences to any extent capable of instructing his solicitors to put forward any of those defences to the court.**

22. **In spite of the joint-expert's report, the DPP maintained that the client was fit by relying on the Presser Criteria, which it applied in a very strict sense.**

23. **The Presser Criteria, which will be dealt with below in more detail, are a guide and should not be followed in a prescriptive sense.**

The outcome

24. **The matter was listed before the list judge in the District Court, who ended up hearing the matter. The joint-expert's report was tendered, and the situation explained. The judge read the report and agreed that the client was unfit.**

25. **The matter was then sent to the Mental Health Review Tribunal (MHRT). The client's bail was continued, and he was allowed to remain in his palliative care facility. The matter was then to be dealt with in 12 months' time, which time has not yet lapsed.**

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26. From the client's medical reports, it is understood that he may pass away before the end of the 12-month period; or if not, he will likely be off the medication allowing for a more formal diagnosis to be made. Evan James expects that he will still be found to be unfit.

27. This case shows the difficulties in trying to identify the exact reason for unfitness whilst still allowing one to maintain the flexibility and utility of the procedures to have someone dealt with by way of unfitness rather than a trial.

<u>Ethical obligations on the practitioner</u>

28. There is an ethical obligation on the legal practitioner to flag the issue of unfitness at the earliest opportunity. Part 2 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) clearly provides that unfitness should be raised prior to arraignment.

29. Where the signs of unfitness are subtle, the legal practitioner may not address the issue. Similarly, a practitioner may turn their mind to the issue but then choose not to act in accordance with their obligation to raise it.

30. Given that many unfit accused have been committed to stand trial and then go to the District Court at a time where the Local Court does not actually have the power to commit an unfit accused, it is obvious that unfitness is being overlooked by many practitioners.

An example of unfitness overlooked

31. Karen Weeks was involved in a case where a man in his 30s, with an extensive criminal history, was involved in a car accident and suffered a traumatic brain injury as a result.

32. The MRI scan conclusively showed extensive brain damage and it was obvious that the client was not feigning unfitness. However, when talking to the client, the signs of brain damage and subsequent unfitness were subtle. If a person was unaware of his medical history, they may simply have assumed that he was a person of low intellect.

33. His unfitness was overlooked by his two previous lawyers and he was committed to stand trial.

34. Karen Weeks was then contacted by the client's father and they arranged to have the client assessed. He was found to be unfit in the District Court and referred to the MHRT which agreed that he was unfit.

35. **The client was then charged with further offences which brought up jurisdictional issues. He had summary offences in the Local Court, where the law relating to unfitness remains the common law.**

36. **The client was also charged with two more strictly indictable offences where the common law applies but which has since been amended with the new legislative reform relating to early guilty pleas. The legislature added a new s 93 into the *Criminal Procedure Act 1986* (NSW) giving the Local Court magistrate a discretion, if fitness is raised at committal, to refer the accused straight to the District Court where that issue is resolved.**

37. **Because the new s 93 of the *Criminal Procedure Act 1986* (NSW) is a discretionary provision, it is debatable whether the common law remains in these situations. The common law in this regard is essentially that an unfit accused cannot be committed because they cannot do certain things that are necessary for a committal hearing.**

Fairness

38. **Fitness is based on the principle of fairness to an accused and the idea that it is unfair to commit an accused when they cannot understand certain things.**

<u>The Presser Criteria</u>

39. **These criteria are considered the minimum standards used to determine the fitness or unfitness for trial of an accused.**

40. **They come from the case of *R v Presser* [1958] VR 45, where Justice Smith elaborated on a formula that arose out of *R v Pritchard* (1836) 7 C. & P. 303 to establish the minimum standards that the accused must comply with before they can be tried without unfairness or injustice.**

41. **They are as follows. The accused requires the ability to:**

    1. **understand the nature of the charge;**
    2. **be able to plead to the charge and exercise the right of challenge;**
    3. **understand the nature of the proceedings;**
    4. **follow the course of the proceedings;**
    5. **understand the substantial effect of any evidence that may be given in support of the prosecution; and**

6. make a defence to answer that charge.

42. These criteria are not an exhaustive list and are considered a useful guide. The failure to meet one or more of the criteria may not render the accused unfit; this depends on the degree to which the criteria are not met.

43. It is not enough for a solicitor to form an opinion that the accused does not meet the Presser Criteria. A medical report, either psychological or psychiatric, is required, and the medical professional must be instructed to look specifically at the issue of fitness and the Presser Criteria to make an objective assessment.

44. The Presser Criteria will be considered by the judge, rather than the jury, where fitness is an issue.

45. The issue of fitness is decided on the balance of probabilities, rather than the higher standard of beyond a reasonable doubt.

46. There is debate whether the prosecution or the defence bears the onus of proving that the accused is unfit.

Capacity distinguished

47. The ability to instruct counsel forms part of the Presser Criteria and is somewhat different to a client's capacity. Capacity often comes up in civil matters such as wills and estates, civil litigation, contract, and so on.

48. People less familiar with criminal law may incorrectly assume that if a person lacks capacity in a civil matter, they may be unfit for trial, but these are two very different concepts.

49. When talking about fitness or unfitness for trial, it is often referred to as 'fitness to plead', which is also incorrect. The accused's ability to enter a plea is only one part of the Presser Criteria.

<u>Fitness and bail applications</u>

50. Fitness is a very important consideration when a practitioner applies for his or her client's bail.

51. If the client appears to be unfit, or appears to need investigation into the Presser Criteria, it can be very difficult to get a forensic psychiatrist or psychologist to assess a potentially unfit client in custody.

52. In this situation, there is therefore a very strong argument that the client should be granted bail, even if only to a hospital or care facility, to get properly assessed for fitness.

53. It is also important to understand that without a supporting report from a forensic psychiatrist or psychologist, it is very difficult to persuade the court of a client's unfitness.

Dealing with fitness in the District and Supreme Courts

54. When an accused has been committed to the District or Supreme Court and there is an issue of fitness, the practitioner must flag the issue of fitness prior to arraignment.

55. The practitioner should raise the issue in good faith with the judge at his or her first appearance in the District Court on the matter, and ask for an adjournment.

56. An adjournment is necessary because the practitioner (particularly counsel) needs to investigate the fitness of the accused for themselves.

57. The practitioner should also raise the issue with the DPP and provide it with the relevant details, such as who is assessing the accused for fitness.

58. The judge will then set the matter down for a fitness hearing. Affidavit evidence will usually be tendered from the instructing solicitor, with the expert assessment reports attached.

59. In drafting the affidavit, the instructing solicitor must set out their observations and the relevant facts as clearly as possible for the judge, whilst at the same time being careful not to breach legal privilege.

60. Once the fitness hearing is held, the judge will decide whether, in light of the Presser Criteria, the accused is unfit for trial or not.

61. If the accused is found to be unfit, he or she is then referred to the MHRT, along with the material provided to the judge at the fitness hearing.

62. The MHRT is then required to conduct its own investigation and make a determination as to whether the accused will or will not become fit in 12 months.

63. If the MHRT finds that the accused will become fit in 12 months, he or she will be sent back to the District or Supreme Court for trial. There are provisions in Pt 2 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) to cater for a situation where the accused again becomes unfit, in which case they are required to be reassessed by the MHRT.

64. If the MHRT finds that the accused will not be fit in 12 months, it must notify the DPP and the judge. The DPP then needs to decide if it is going to proceed with prosecution. At this point the practitioner may consider a stay application or a no bill, although these could be considered by the practitioner earlier in the matter as well.

65. If the DPP decides to proceed with the prosecution against the unfit accused, a special hearing then takes place.

66. This hearing is very different from a normal hearing in that instructions cannot be taken from the unfit accused and, because of this, a great deal of flexibility is afforded by the judge to counsel. It is almost always a hand-up brief where the information is simply tendered. The practitioner relies on the statements as they are and makes submissions. The judge sits in an inquisitorial role rather than an adversarial role.

67. It remains the prosecution's burden to prove beyond a reasonable doubt that the alleged offence was committed.

68. The provisions of the *Mental Health (Forensic Provisions) Act 1990* (NSW) allow the special hearing to proceed with or without a jury. It is a forensic judgment based on the nature of the charge and the evidence.

69. If an unfit accused is found guilty they cannot be sentenced in the normal way. The judge then has powers to sentence the accused to a limiting term, which is the maximum period of time that a person can be held before their sentence expires. This is different to the normal case where the convicted person is given a parole and non-parole period. The limiting term period provides for compulsory treatment and hospitalisation of the convicted person until such a time as they become well, or the sentence expires.

70. Prior to setting a limiting term, the judge must be satisfied that if he or she were sentencing in the normal way, the unfit person would have received a sentence of imprisonment. Therefore, a practitioner might be able to persuade the judge, due to a lack of prior convictions and/or the fact that the offence was not a violent one, that if the accused had been fit they would have received a non-custodial sentence. If the

practitioner succeeds in this argument, the unfit person may avoid detention and be able to remain in the community.

71. In terms of practical submissions, a practitioner's submissions should be very similar to the normal sentencing submissions. However, regard should be had to the fact that it is a limiting term and the final submissions will need to address that specifically. However, the practitioner should not assume that simply because the person is unwell and has been convicted, that the threshold in s 5 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) has been crossed.

72. If a limiting term is imposed, the convicted person is then sent back to the MHRT which will review the matter regularly and provide reports. Generally, counsel takes a step back at this stage and the solicitor takes more of a hands-on role.

73. The MHRT then has the power to decide when the unfit person, who is now a forensic patient, can return to the community, and if so, under what conditions. In making this decision, the MHRT will initially look at the judgment from the District or Supreme Court, including the judge's reasoning and sentence remarks, but as time progresses it will place more weight on the updated patient reports.

74. Given that this entire process of determining fitness can take upwards of 12 or 18 months, it is advisable to try and get the unfit accused into the community on bail after they are charged. If they are stable in the community during that time, the argument that the unfit person remain in the community under the MHRT's supervision becomes compelling.

BIOGRAPHY

Karen Weeks

Principal Solicitor, Criminal and Mental Health Lawyers – Sydney

Karen has more than 22 years of experience in private practice as a criminal defence lawyer in both serious and minor criminal matters, specialising in the area of mental illness. Karen regularly speaks at legal seminars on criminal and mental health law, and has authored many papers in the area, including two published in the *Law Society Journal*. She has run fitness inquiries and the defence of mental illness in the District Court. In the Local Court, Karen frequently runs s 32 and s 33 applications for her clients who have a wide range of cognitive or mental health impairments.

Evan James

Barrister, Eleventh Floor Garfield Barwick Chambers - Sydney

Evan commenced practice as a solicitor in 2010 and was called to the Bar in 2014, where he specialises in criminal law, mental health law, and Sports Law and the associated Tribunals. Evan has appeared in Royal Commissions and other Commissions of Inquiry, including the Northern Territory Inquiry into Stella Maris, the NSW Crime Commission, the Australian Crime Commission, and ICAC. He has also appeared in such tribunals as the Racing Appeals Tribunal, Administrative Decisions Tribunal (now NCAT), and has regularly appeared at the Mental Health Review Tribunal. Evan is a member of the Disciplinary Tribunal of Touch Football Australia.

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Legislation

Crimes (Sentencing Procedure) Act 1999 **(NSW)**
Criminal Procedure Act 1986 **(NSW)**
Mental Health Act 2007 **(NSW)**
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