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"I DON'T KNOW, I JUST GET TOLD TO COME INTO COURT. THAT'S ALL I DO"

FITNESS IN THE LOCAL COURT

PART II

PRACTICAL ASPECTS

Christopher Yee
Solicitor
Legal Aid NSW

- *The purpose of this presentation is to provide some practical assistance to practitioners dealing with clients in the Local Court who are unfit to plead or stand trial. The theoretical component of this paper is covered in Part I.*

- *This paper refers only to proceedings dealt with in the summary jurisdiction and does not address in any detail matters which are prosecuted on indictment.*

1. HOW DO I IDENTIFY IF MY CLIENT IS UNFIT?

1.1 INDICATORS

As criminal lawyers, we are constantly engaging with clients who suffer from mental illness or cognitive impairment. The very nature of our work means we are all experienced when it comes to recognising mentally disordered clients. However, for the purposes of this practical guide, we have listed some of the factors which, in our experience, are tell-tale signs that a client may be suffering from a mental condition:

History of treatment for mental illness or admissions to mental health unit or hospital.

History of brain injury or hospitalisation for serious motor vehicle accident or other head trauma.

Attends Court with a carer; ADHC support worker; guardian etc

Required special needs classes at school or attended a special need school.

In receipt of a Disability Support Pension (otherwise than for a physical injury/ condition).

- Evidence of thought disturbance or delusion. *For example: grandiose ideations, references to aliens or messages from God.*
- Physical self-harm. *For example: striking head on cell wall or window*
- Prior matters on criminal history dealt with under S.32/S.33.

- Does not attend court or appointments and does either not provide a reason, or reports with no knowledge of the court or appointment date.
- Unable to read and/or write.
- Struggles with verbal communication.
- Unable to answer personal questions about themselves *For example: answering "I don't know" or "I don't remember" in response to basic personal questions.*
- Unable to answer questions about the offence or matter before the court.

1.2 THE PRESSER TEST

- If you become aware of one of the above issues whilst meeting a client in the course of a busy list day, it is likely you will need an adjournment in order for you to investigate the matter further and, if necessary, obtain a report from a psychiatrist or psychologist.
- In *R v Presser* [1958] VR 45, Smith J set out the minimum standards that an accused person needs to equal before he or she can be tried without unfairness or injustice.
- Where fitness is in issue, the Court will be asked to consider whether, on the evidence, your client meets the standards set out in *Presser*. That evidence will ordinarily be in the form of an expert report from a psychologist or psychiatrist.
- Even in the context of a list day where time is limited, you should be asking questions of your client to identify whether they are likely to meet the *Presser* standards.

Below is an abridged list of the Presser standards with some example questions.

1. To be able to understand what it is that he or she is charged with.

- *Q. Do you know why you are at Court today?*
- *Q. Do you know why you are in gaol?*
- *Q. Do you know why the police came to arrest you?*
- *Q. Did the police tell you what this is all about?*
- *Q. Where/when was this supposed to have happened?*
- *Q. Do you know (the victim) or (the witnesses)?*
- *If the client cannot answer, explain the charge(s) and then ask the client again a few minutes later.*

2. To be able to plead to the charge and to understand the nature of the proceedings as an inquiry into his or her guilt of the charge.

- *Q. Do you know what the police say happened?*
- *Q. Do you agree with what the police say?*
- *Q. Can you tell me what the truth is instead?*
- *Q. Do you know what 'guilty' means?*
- *Q. Do you know what 'not guilty' means?*
- *Q. Do you know what will happen if you agree with what the police say?*

3. To be able to follow the course of the proceedings so as to understand what is going on in court in a general sense.

- *Q. What is my job as your solicitor when we go to court?*
- *Q. What does the Magistrate do in court?*
- *Q. What does the Prosecutor do in court?*
- *Q. Do you know who decides whether you are guilty or not guilty?*

4. To be able to understand the substantial effect of any evidence that may be given against him.

- *Q. Do you know what it means to take an oath?*
- *Q. What happens if someone lies after taking an oath?*
- *Q. Do you know what witnesses do in court?*

5. To be able to make his defence or answer to the charge and give necessary instructions to counsel.

- *Ask client to give a version of events. If client is unable to do so, this should be a fairly obvious warning sign*

It is advisable to make a note of the questions and answers in the event that you are required to prepare an affidavit at some later stage.

Before you do anything else, if possible, obtain a written authority from your client to access medical records.

2. I HAVE IDENTIFIED THAT THERE MAY BE A FITNESS ISSUE. WHAT NEXT?

2.1 SUMMARY OFFENCES

In circumstances where you identify that your client may not be able to meet the *Presser* criteria and you have difficulty obtaining instructions, you will almost always need to adjourn the matter to carry out further investigations.

If your client tells you that he or she wishes to plead guilty, but you have concerns that it is not a plea accompanied by a genuine consciousness of guilt on the basis of your observations or answers to your questions, it would be unwise to enter a plea at the first opportunity.

Most Magistrates are willing to allow a short adjournment of at least 2 weeks to allow you to obtain further instructions. You should obtain as lengthy an adjournment as possible to ensure that you are prepared on the next occasion.

If the matter has already been adjourned *(and the mental health issue not previously identified)* and the Magistrate insists on having a plea entered, you may be able to rely on Chapter 5.6 Local Court Practice Note Crim 1 which allows for adjournments/ departures from the ordinary timetable if it is in the interests of justice to do so.

In the case of Domestic Violence offences, it is important to note Chapter 10 of Local Court Practice Note Crim 1 which only allows for a 14 day adjournment without a plea being entered.

Use the adjournment period wisely. It is important to move swiftly in procuring the items referred to in Chapter 3. Delay is undesirable in matters such as these, particularly if your client has difficulties getting to court.

In the event that a further adjournment is not granted and the court seeks a plea, it may be necessary to enter ‘no plea’ and list the matter for a section 32 application. In the event of a ‘no plea’, the court will invariably interpret this as a plea of not guilty and make brief service orders.

2.2 TABLE OFFENCES

When dealing with a Table 1 or Table 2 offence, there may be a tactical advantage in delaying your disclosure to the prosecution that fitness is in issue until the prosecution decide whether or not they will elect to proceed on indictment.

If the prosecution are aware of a possible fitness issue, they may elect to have the matter proceed on indictment. This will prevent you from making a s 32 application and will also have an impact on proceedings in relation to fitness.

The prosecution are required to make an election at a time fixed by the Local Court[1]. Chapter 5.3(b) Local Court Practice Note Crim 1 specifies that the prosecution must elect on or by the first return date after brief service orders are made. There may be some merit in requesting that the Court make a formal order that the prosecution elect on or by the return date.

It is worth noting, however, that the prosecution may seek leave to elect after the time set by the court if 'special circumstances' exist. If the court grants leave, the prosecution may make an election up until the point where prosecution evidence is taken in a summary hearing[2].

The Court will generally require a plea on a first mention for a Table offence, in compliance with the Practice Note. In the absence of instructions, the safest option is to put on record that there is 'no plea'. The court will invariably interpret this as a plea of not guilty and make brief service orders.

Another factor to consider is whether your client is capable of comprehending advice and giving instructions to elect in relation to Table 1 offence. It is likely that if your client is unable to provide instructions on a plea, they will also be unable to provide instructions in relation to this.

[1] *Criminal Procedure Act 1986* (NSW) S 263(1)
[2] *Criminal Procedure Act 1986* (NSW) S 263(2), (3)

2.3 WHAT IF THE PROSECUTION ELECT?

Part 2 *Mental Health (Forensic Provisions) Act* 1990 sets out the procedure where fitness is raised in the course of proceedings before the District Court and Supreme Court.

The procedure in the higher courts is outside the scope of this paper, however, the procedure can be briefly put: Where the question of fitness is raised prior to arraignment, the court must then determine whether an inquiry should be conducted before proceeding to hear the matter.

The inquiry is heard by a Judge alone and where a person is held to be unfit, the matter is then referred to the Mental Health Review Tribunal. If the Tribunal determine that the person will not, during the 12 months that follow the finding, become fit to be tried, the court is required to conduct a ‘special hearing’ unless the DPP take no further proceedings.

A special hearing is conducted to ensure that the person is acquitted, unless on the evidence available, the offence can be made out beyond reasonable doubt. At the conclusion of a special hearing, the judge or jury may return a verdict of either ‘not guilty’, ‘not guilty on the ground of mental illness’, ‘on the evidence, the person committed the offence’ or ‘on the evidence, the person committed an alternative offence’.

You will note from this very brief outline that the procedure for unfit clients in the District and Supreme Courts is far more onerous and lengthy. It goes without saying that there are other advantages in keeping Table matters in the summary jurisdiction.

3. GETTING AN EXPERT OPINION

3.1 PRELIMINARY INVESTIGATIONS

It is often possible to make preliminary investigations about your client's mental health condition or cognitive impairment without significant expenditure. This is no different than what most of you would do in the case of a section 32 application and will be of no surprise to most.

These records can also be provided to a psychologist/psychiatrist is a report is prepared.

1. Obtaining hospital discharge papers and records

- These can be requested from the hospital medico-legal department without the need for a subpoena.
- You will need a medical authority from your client (original is sometimes required).
- Please note there are often lengthy delays if no subpoena is issued.
- Cost is generally low, sometimes free, depending on the hospital.

2. Contact family members to obtain previous records/ discharge papers or reports

- Again, it will be necessary to have your client's authority before doing this.

3. Subpoena Justice Health records if client is in custody

4. Obtain a report from the Court- appointed mental health nurse/practitioner

5. Check old CASES files *(Legal Aid in-house practitioners only)*

- Look for previous psychologist/psychiatrist reports that might have been attached to the CASES file.
- If possible, obtain the physical file to see if there are reports or letters that have not been attached to CASES.
- Sometimes, if the reports are contemporary and relevant, you may be able to re-use them.

3.2 BRIEFING A PSYCHOLOGIST/ PSYCHIATRIST

If you are of the opinion that your client is suffering from a mental illness, it is preferable to obtain a report from a psychiatrist. Alternatively, if you believe your client has a cognitive disability, a report from a psychologist would generally be more appropriate.

You should brief your chosen psychologist/psychiatrist in writing. Ideally, you will choose a practitioner who has experience in preparing written reports for court purposes.

The expert report will form the evidentiary basis that your client is unfit to be tried.

It is important that you provide the psychologist/ psychiatrist with as much information as possible to ensure that the report is thorough and detailed. An example might be including a copy of your client's ERISP DVD which clearly demonstrates your client's demeanour and behaviour at or around the time of the offence.

Your letter should contain at least the following:

1. Some background information about your client.
2. The nature of the charges and the next court date.
3. That the practitioner read and acknowledge the Expert Witness Code of Conduct
4. Request for the expert to assess if your client would be eligible for disposition under section 32 and to recommend a treatment plan
5. Request for the expert to assess if your client is fit to be tried.

You should attach the following to the letter:

1. Police facts.
2. Relevant brief items. *For example: ERISP DVD.*
3. Criminal record.
4. Prior psychologist/psychiatrist reports.
5. Pre Sentence Reports.
6. Copy of the UCPR Expert Witness Code of Conduct.
7. Copy of relevant legislation and case law. *For example: S.32, R v Presser*

SEE EXAMPLE LETTER

For Legal Aid in-house practitioners:

1. CASES Letter LH9 – precedent fitness letter (indictable offences).
2. CASES Letter LH3 & LH4 – precedent s.32 letter (summary offences).

4. SECTION 32 MENTAL HEALTH (FORENSIC PROVISIONS) ACT

4.1 DO YOU NEED INSTRUCTIONS TO MAKE AN APPLICATION UNDER S.32?

Section 32(1) Mental Health (Forensic Provisions) Act (*The Act)* relevantly states:

(1) If, at the commencement or at any time during the course of the hearing of proceedings before a Magistrate,

it appears to the Magistrate:

(a) that the defendant is (or was at the time of the alleged commission of the offence to which the proceedings relate):

(i) developmentally disabled, or

(ii) suffering from mental illness, or

(iii) suffering from a mental condition for which treatment is available in a mental health facility,

but is not a mentally ill person

The wording of the section confers a power upon the Magistrate to make an enquiry into the mental health of the accused. The Magistrate may inform him or herself however he or she thinks fit.

Mental Health (Forensic Provisions) Act 1990 (NSW) s 36

On the face of the legislation, there is no requirement for the accused to make any election or put any positive case forward. Once it becomes apparent to the Magistrate that the accused may be suffering from a mental condition, the act gives the bench an investigative power.

In this light, it seems that the court could proceed to deal with a matter pursuant to s.32 even though the client has not given those instructions to his solicitor.

However, some ethical issues do arise:

1. What, if any, undertaking does the client need to give that he or she will comply with a treatment plan?
2. Does your client need to provide you with instructions to tender reports prepared about him or her?
3. What is the consequence of a breach of a treatment plan if your client cannot comprehend, or does not understand the significance of the plan?

The first two questions may be answered by the way in which practitioners deal with applications under s.33 of *The Act.* Section 33 requires only that if it “appears to the Magistrate” that the accused is mentally ill, the court is empowered to make certain orders.

In cases where a client is mentally ill, a court will often receive material and make orders without the client providing any instructions to the practitioner.

However, a clear ethical conundrum arises if your client strictly instructs you that either he or she will not comply with a treatment plan; or that they do not want the matter dealt with under section 32.

4.2 SHOULD YOU MAKE AN APPLICATION UNDER S.32 AND IF SO, WHEN?

Where there is evidence to suggest that your client is unfit, the most satisfactory outcome is that the proceedings are stayed and/or he or she is discharged. However, practically speaking, if a Magistrate is prepared to discharge your client under the provisions of s.32, there is great merit in having the matter dispensed with in this way.

The advantages of having a matter discharged under s.32 include, but are not limited to:

- The proceedings are likely to resolve sooner- which means less court appearances for your client.
- You are unlikely to become a witness in the matter.
- There is no requirement for the Magistrate to even consider the question of a plea and/or deal with the matter ‘otherwise at law’.

It is our view that if the Magistrate is prepared to discharge your client pursuant to s.32, then this is the preferred course. If you have evidence that would support a s.32 application, it would seem sensible to make one.

However, there will of course be circumstances where a Magistrate will refuse a s.32 application after considering the balancing exercise. In our experience, the most common reasons that s.32 applications are refused are:

- “The offending is too serious”.
- “The offender has a lengthy record”.
- “Section 32 applications haven’t worked in the past”.
- “The legislation only allows a period of 6 months supervision, not like the section 9 bond I can put them on instead”.
- “The treatment plan is insufficient”.

When applications are refused, normally after the Magistrate cites one of the above, you will normally be asked to enter a plea. So then what?

4.3 WHAT IF S.32 IS REFUSED?

There is an excellent paper written by Karen Weeks that was published in the Law Society Journal in February 2013. Some of the options discussed in the article are helpful in our context:

- Appeal to the Supreme Court- in the event of an error of law or denial of procedural fairness
- Make another s.32 application in the local court

If these options are not appropriate or do not lead to your client being discharged under s.32, the court will wish to either list the matter for hearing or, in the case where a plea has not yet been taken, require a plea to be entered.

5. OTHER REMEDIES

It would appear that there are two possible remedies in circumstances where a person is deemed unfit to be tried and a section 32 application has been unsuccessful.

There is a degree of confusion in the common law landscape as to whether these two remedies are in fact separate legal concepts, or the same remedy by different names.

The most straightforward application is that your client is unfit, and as a consequence, he or she should be *discharged.*

The second remedy is that your client is unfit, and if the proceedings were continue they would constitute an abuse of process. As such, the proceedings should be *permanently stayed.*

There is support in the common law for both of these remedies.

There are a number of favourable outcomes of having your client discharged or having the proceedings permanently stayed. It is likely that these aspects that will trouble the mind of a Local Court Magistrate!

- No supervisory regime or treatment plan
- No criminal record or conviction
- No power to detain the offender (as in the District or Supreme Court)
- No ability to return the matter to court due to non-compliance with treatment
- No ‘balancing’ or ‘seriousness’ test.

5.1 DISCHARGE

The decision of *Mantell v Molyneux* [2006] NSWSC 955 provides a highly persuasive authority that where an accused person is unfit to be tried, the appropriate remedy is that they should simply be discharged.

A single passage in the decision makes this clear:

> *"Even though, in the case of a charge being heard in the Local Court, there is no statutory enactment either dealing with determination of the question of fitness to be tried or as to what should occur if a person is found unfit to be tried, it seems to me that, where a defendant is found not fit to be tried, he or she must be discharged"*

This view was adopted in the decision of *Police v AR,* where it was held that an offender in the Children's Court should be discharged on the basis he was unfit.

In practical terms, the application to have the court discharge the unfit client would require you to provide the court with the evidence of your psychologist/psychiatrist and copies of the decisions of *Mantell v Molyneux* and *Police v AR.*

The argument is simply that upon the court making a finding that your client is unfit, the court would be bound to discharge your client.

What could possibly go wrong?!

Well...

A possible issue we identify is that the ‘discharge’ of an accused person is a term often associated with a power conferred under statute (For example, a discharge under s 32). As we know, there is no statutory power that allows the Local Court to discharge an accused person because they are unfit. Further, it seems that the quoted passage from Mantell v Molyneux has its origins in a provision of the Western Australian Criminal Code that relates to indictable trials. In the absence of this statutory provision in our jurisdiction, is there a basis to contend that such a power exists at all?

5.2 PERMANENT STAY OF PROCEEDINGS

There is, however, a wealth of authority to support the proposition that the Local Court has the power to order a permanent stay of proceedings.

However, the stay application is considerably more complicated and onerous than the *discharge* application discussed prior.

The essential elements of a permanent stay application are as follows:

1. The court has an inherent duty to protect against abuse of its own processes.
2. An Australian Court possesses the jurisdiction to stay proceedings that are an abuse of process
3. The onus is on the defendant to persuade the court that the proceedings should be stayed
4. In this sense here is no distinction between the Local Court and any superior court
5. The abuse of process is the inability of the court to ensure fairness to the accused
6. There must be a fundamental defect that goes to the root of the proceedings, such that there is nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences.
7. Where there exists unfairness to an accused that cannot be remedied by judicial direction nor the implementing of specific assistance, the unfairness would amount to an abuse of process.
8. Therefore, where a person is unfit to be tried, the defendant cannot receive a fair trial. This presents as a fundamental defect and as a consequence, the proceedings should be stayed.

Curiously, however, in Mantell v Molyneux, where the appellant sought a permanent stay of proceedings, the court decided that the appropriate remedy was that the defendant be discharged!

6.2 WHAT TO PREPARE

1. Written submissions

- Due to the complex issues involved and the vast amount of case law, it is advisable to prepare written submissions to hand up in support of your application.

SEE EXAMPLE SUBS

2. Preparing an affidavit

- It will usually be appropriate to prepare an affidavit which sets out the difficulties experienced by the solicitor in obtaining instructions from the client. The affidavit should include reference to any conversations with the client which support a finding that your client is unfit to be tried.

SEE EXAMPLE AFFIDAVIT

BE AWARE, however, that by swearing an affidavit as to the above, you may become a witness in the proceedings. If this occurs you must cease to act for the client.

If you are required to give evidence you may not continue to act as advocate in the matter.

See Solicitor Rule 27.1

6.3 DISCUSSION POINTS

1. My client has prior matters that have been dealt with according to law

2. The prosecution want to have their psychologist/psychiatrist examine my client

3. My client admits to the offence in the psych report or in an ERISP

4. Can my client be fit for some purposes, but not for others?