3. Taking instructions and giving advice

Recognising unfitness - an advocate's ethical duties to court and to client

In order to properly administer justice in the exercise of their criminal jurisdiction, all courts have a duty to ensure that any trial is a fair trial.

An accused person cannot be tried for a criminal offence unless fit to stand trial: *R v Dashwood* [1943] KB 1; *R v Benyon [1957] 2 QB 111*; *Eastman v The Queen [2000] HCA 29; (2000) 203 CLR 1.* The issue of a person's fitness to stand trial relates to the accused's condition at the time of the trial. This is in contrast to defences of "mental health or cognitive impairment", which relate to the accused's condition at the time of the offence*: R v Dennison (unrep, NSWCCA, 3 March 1988); Ngatayi v The Queen [1980] HCA 18*; *(1980) 147 CLR 1*.

A trial of a person who is unfit is a nullity: *Eastman v The Queen [2000] HCA 29; (2000) 203 CLR 1* per Gaudron J at [62]. In *R v Dunn [2012] NSWSC 946*, Johnson J at [17] said,

> It is also appropriate to bear in mind that a legal practitioner for an accused person has an ethical obligation to raise the issue of fitness as part of the overriding duty to the Court, even without the client's instructions: *Eastman v The Queen [2000] HCA 29; 203 CLR 1 at 99 [297]; R v Zhang [2000] NSWCCA 344 at [29]*; Howard and Westmore, "Crime and Mental Health Law in New South Wales", 2nd edn, 2010, paragraphs 5.4-5.5.

A question of an accused person's unfitness may arise if it becomes apparent that, due to circumstances of that person that cannot be overcome, it would not be fair to try the person according to the usual procedures. Such a person is potentially "unfit to be tried". Legal training or experience does not necessarily qualify a legal representative to form an expert opinion on unfitness. However, an advocate should develop the basic skills to recognise when preliminary indications suggest that the question has arisen. See **Case Study 2** for an example.

The "fitness test" in s 36(1) of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 provides guidance on the kinds of difficulties that would lead to a person being unfit to be tried. The list is not exhaustive: s 36(2). See further ***6 The Fitness Inquiry***: Fitness to stand trial - the test.

A client may not realise that they may be unfit to stand trial. A defence legal representative will often have some impression from interactions with the client or his or her family members or treating doctors' reports. The representative should then take instructions on those factual circumstances which may bear on the question and advise the client as to the likely procedures that are indicated.

In many cases, a client with indications of possible unfitness will have an accessible history of the particular personal circumstances bearing on the question of unfitness and will be able to provide instructions on those circumstances. In the case of mental illness, instructions on past psychiatric diagnoses, a history of mental health medications and hospital admissions and current treatments are all relevant. In the case of cognitive impairment, instructions on past expert assessments, any neuro-psychological or other psychological reports and the history and management of the impairment is important. See further ***4. Expert witnesses***.

Where practicable, previous medical records, reports, assessments and diagnoses should be obtained with the signed authority of the client. If the client so instructs, family members may sometimes assist legal representatives to obtain relevant information.

Case Study - 1

A man was charged with a double murder. He had confessed to the killings. He maintained he was unemployed. He was remanded in custody. He confirmed his confession to his lawyer. After almost a year in custody he expressed grandiose ideas to his defence lawyer who then sought to have him assessed by a psychiatrist. The psychiatrist found he had a mental health impairment and recommended treatment in custody. After a period of more than a year of treatment in custody, his symptoms were reduced and his instructions changed. His instructions included that he was at work on the day of the killings. That was confirmed by his employer.

Case Study 2

Your client has been charged with aggravated robbery. He is alleged to have punched a person who had taken money out of an ATM and taken the person's wallet.

When you are interviewing your client, you notice that he sometimes giggles without any apparent reason. At other times, he looks to the side as if listening to something. When you ask him what he is laughing at, he tells you he's just remembered something funny that he saw on TV. You explain to him that you have seen CCTV footage of the victim being assaulted at the ATM. The person who is committing the assault is wearing the same clothes as your client was wearing when he was arrested by police an hour later. The victim's credit card was in his pocket. You ask if he has any explanation for this. He smiles and says, "I dunno". You ask him to explain to you what the evidence is against him. He says "I dunno". You explain to him he has the option of pleading guilty or not guilty, and the benefits and disadvantages of each course of action. At the end, he says again "I dunno" and giggles. You ask if he has ever spent time in a mental health facility and he says he has been to Cumberland Hospital a few times. You ask about his schooling and he says he left at 15, but didn't really go much after 12. He struggles to read and write.

Appropriate steps would include:

a) asking the client if there are family members you could speak to about his medical and social history; and

b) asking the client's permission to get medical records from any hospitals he has been admitted to, his GP or other practitioners.

Depending upon the material received, you may wish to obtain an expert report.

In summary, advocates should do the following:

a) recognise that a potential question of unfitness has arisen;

b) identify any further steps necessary to clarify the issue — for example obtaining a relevant report from an appropriately experienced and qualified forensic expert;

c) consider the implications for the client of raising the issue — including advising the client of the law and practical impacts;

d) form a professional judgement as to whether the time has come to raise the question in good faith with the court or prosecutor.

Why fitness matters

The decisions of *R v MB (No 2)* *[2014] NSWSC 1755*, *R v MB (No 3)* *[2014] NSWSC 1796* and *R v MB* *[2017] NSWSC 619* (see **Case Study 3**) show the importance of an accused being fit to stand trial. It also illustrates how criminal proceedings can recommence after a person is found fit during the period of a limiting term.

Case Study 3

MB was alleged to have drowned her baby in 2010. She was found to be unfit to stand trial and a special hearing was conducted. In 2014 she was found on the limited evidence to have committed the offence of murder. The defence of substantial impairment was raised but not made out. A limiting term of 20 years was nominated.

In 2016, she was found fit to stand trial, by which time she had spent 334 days in custody at Silverwater and the Forensic Hospital and a further 246 days in quasi-custody at the Cumberland Hospital before obtaining bail. MB pleaded not guilty to murder and guilty to the manslaughter of her baby on the basis of substantial impairment. She was able to agree to a set of facts that included that at the time of the baby's death she was suffering from a psychotic disorder, which later became more pronounced, but then went into remission with treatment. She was convicted of manslaughter and directed to enter into a good behaviour bond for 4 years.

In sentencing MB in 2017, Beech-Jones J said that "Notwithstanding the seriousness of MB's crime, the need and the time for her punishment has passed. Instead, at this point the necessity for the supervision and reintegration of MB into the community predominates."

Recognising possible defences of mental health or cognitive impairment

In the conduct of a criminal matter, an issue of an accused's mental health impairment or potential cognitive impairment may come to the attention of a legal representative in any one or more of six general areas:

- an accused's interactions with legal representatives
- aspects of the allegations
- statements of the accused about the alleged offending conduct

- contemporaneous observations by intimate contacts of the accused — including for example housemates, family members, close neighbours, friends etc
- the mental health or cognitive-functioning history of the accused
- formal diagnoses of the accused relevant to the alleged offending conduct.

Where such issues arise, it is nearly always necessary to consider two further questions:

1. in the specific circumstances of the alleged offence, does the evidence of the particular impairment rise to the level of a possible defence?
2. if the impairment does rise to the level of an available defence, should it be raised necessarily in any trial of the particular matter?

An accused's interactions with legal representatives

On occasion, a legal representative will first have a preliminary indication of mental health or cognitive impairment after first interactions with the accused, who may display obvious signs of mental disturbance or incapacity, thereby leading to further investigations as to possible unfitness and possible defences.

Aspects of allegations

Some allegations may exhibit bizarre aspects which immediately suggest the possibility of some mental health or cognitive impairment.

Statements of accused

During or after an event in which an allegation arose, an accused may have been alleged to have made statements by way of explanation or admission which could only be understood as demonstrating some mental health or cognitive impairment.

Observations by intimate contacts

Close associates of an accused who had knowledge of events surrounding the alleged offence or may have been witnesses to some aspects of it may have provided statements to police describing behaviour at the relevant time which raises the possibility of mental health or cognitive impairment at the time of the alleged offence. See, for example, *R v Warren Scott (No 2)* *[2021] NSWSC 1201* per N Adams J and *R v Tonga* *[2021] NSWSC 1064* *per Wilson J*.

Close associates of the accused who may have no direct knowledge of the allegations may none-the-less have some knowledge of the mental health or cognitive impairment history of the accused which may have continued up to the time of the allegations.

History of the accused

If an accused has a history of a mental health or cognitive impairment, details should be obtained of past and present medication; any hospitalisations; and any past or present diagnoses.

Relevant formal diagnoses

Once credible and substantial evidence of a mental health or cognitive impairment becomes available, it is nearly always advisable to obtain an updated forensic psychiatric or forensic psychological or neuropsychological assessment which includes an expert opinion as to the availability of the relevant defence. See ***4 Expert witnesses*.**

Case Study 4

A young man with a history of psychiatric treatment for psychoses broke through a window into the residence of an elderly and frail next-door neighbour and seriously assaulted his neighbour before returning to his own home.

Police and ambulance were called to the location. Ambulance officers and police spoke to the victim. The victim gave an account of the attack and stated that his assailant was 'mad'. Police spoke to the accused. He admitted the offending. However, he claimed he was 'helping the government' by attacking his neighbour who was a member of a terrorist organisation, possessed firearms and had displayed insignia of terrorism on his balcony. None of the accused's claims about the victim's conduct was supported by any evidence.

The accused was psychiatrically assessed to have been subject to delusions at the time of the attack due to the presence at that time of a formally-reported psychiatric diagnosis.

Case Study 5

A middle-aged woman with no criminal history who had been medically managed for a serious psychiatric condition and compliant in the community for decades without incident sought to improve her condition when she encountered a well-known and active quasi-religious organisation whose members convinced her to reduce her medication and to pay money to the organisation to purchase a purification program. The organisation provided her vitamins in substitution for her medication. Within weeks of reducing the medication, she purchased a knife with the intention of finding a person to attack believing this would make her powerful and free from her problems. With the knife, she attacked an acquaintance who was aware of her psychiatric history. The attack was without warning or apparent prelude.

Shortly afterwards, the accused provided police with a lengthy electronically-recorded interview in which she fully disclosed her actions and reasons for them. She told police she did not think that what she had done was wrong.

Formal psychiatric diagnosis supported a conclusion that the defence of mental illness was available at the time of the attack. A close friend had made a statement to police which supported the history of the recently-reduced medication and contact with the quasi-religious organisation.