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ON BEING INSANE IN JERSEY: OBSERVATIONS *OBITER* AND THE ROAD TO PERDITION

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1 In the recent case of *Harding v Att Gen*,[1] the Jersey test on fitness to plead, decided by former Bailiff, Sir Philip Bailhache, in *Att Gen v O'Driscoll*[2] was considered by the Court of Appeal. The court, through the President, Jonathan Sumption, JA, after quoting the test itself, remarked—

> "Sir Philip considered that this test differed from the English law test, mainly it seems in requiring that the accused should have been capable of making rational decisions in relation to his participation in the proceedings. For our part, we are satisfied that the test which he stated in *O'Driscoll* is correct, but we do not regard it as any different in principle from that which has been held to apply in England. We make this point because issues may arise in future cases in Jersey on which it may be desirable to refer to the much more substantial body of English authority. This process serves the interests of legal certainty. We are reluctant to inhibit it by encouraging the notion that Jersey law on this question exists in a distinct juridical compartment from the corresponding law of England."[3]

2 If the Court of Appeal meant by this that the English and Jersey tests for fitness to plead are effectively identical, it was simply wrong. These *obiter* remarks demonstrate a fundamental misunderstanding of the purpose and effect of the judgment in *O'Driscoll*. It appears that the court had not sufficiently considered the judgment in its entirety, nor indeed the parallel judgment concerning the test for "insanity" as a defence to a criminal charge in *Att Gen v Prior*,[4] which seems not to have been drawn to the attention of the court.

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[1] 2010 JLR 239.
[2] 2003 JLR 157.
[3] 2010 JLR 239, at 242, para 5.
[4] 2001 JLR 146.

3 In *Competencies of Trial—Fitness to Plead in New Zealand*, the Jersey test in *O'Driscoll* and the case of *Harding* in the Court of Appeal were considered in a chapter entitled "Unfitness to plead in the United Kingdom". One of us (RM) made the following remarks upon the Court of Appeal's observations above—

> "Everyone to date, including the Law Commission for England and Wales in its Consultation Paper 'Unfitness to Plead', has opined that the two tests [*Pritchard* and *O'Driscoll*] are radically different. Indeed, the Law Commission's entire discussion about a new test is premised on that basis. So it is remarkable that the President should have reached this view without any real discussion of how it can be justified, apart from the weak notion that it is better to keep the law of both jurisdictions in tandem. This in turn seems like an over paternalistic view which, taken at face value, would prevent Jersey law from developing in its own right. Granted there is a more substantial body of English authority on unfitness to plead, but this body of law has repeatedly confirmed the narrowness of the *Pritchard* test and it is difficult to conclude that it comes anywhere close to encompassing 'decisional competence'. It is to be hoped, therefore, that it is the endorsement of the correctness of the test in *O'Driscoll* by the Jersey Court of Appeal which will be regarded as of primary importance rather than the President's subsequent *obiter* remarks."[5]

4 The difficulty with the Court of Appeal's observation is that the English case law, decided on the test for unfitness to plead in *R v Pritchard*,[6] has developed on a basis that differs fundamentally from that underpinning the *O'Driscoll* test introduced by Sir Philip Bailhache. The case law in England concerning what constitutes unfitness to plead has focused almost entirely on disorders which affect cognitive capacity. However, in Jersey, the *O'Driscoll* test was formulated precisely in order to permit, in addition, consideration of volitional deficiencies, and the full spectrum of mental disorders. This was also the case in *Prior* when the court sat to determine a test for "insanity" sufficient to constitute a defence to a criminal charge. Indeed, when deciding both these cases, Sir Philip noted that his decisions in fact developed the law on "insanity" in this jurisdiction, insofar as it could be ascertained from the historical position as found in the First Report of the Commissioners appointed to enquire into the

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[5] Warren Brookbanks *Competencies of Trial—Fitness to Plead in New Zealand*, LexisNexis, 2011, chapter 5, p 139.
[6] [1836] 7 C&P 303.

state of the Criminal Law in the Channel Islands: Jersey (1847). He also remarked that in so doing, the test was consonant with rights under arts 5 and 6 of the European Convention on Human Rights.

5 References to the criteria set out in the case of *R v Pritchard* in English judgments exclude precisely those aspects of major illnesses (the volitional), and those mental conditions which are not major mental illnesses, which the Jersey test was formulated to include. Volitional impairment may be as much of an impediment to a defendant's ability to participate in his trial as cognitive deficiencies. Mental conditions other than the major mental illnesses may not lead to behaviour as obviously florid as is often the case in the major illnesses; yet these conditions may have effects just as debilitating upon the sufferer in so far as his ability to stand trial is concerned. Thus they bear significantly upon the ability of the accused to have a fair trial under art 6 of the Convention.

6 In our earlier article, "On Being Insane in Jersey: Again",[7] we commented on the undesirability of criminal justice being used as a therapeutic tool or a dumping ground for mental health cases. Our focus was on the fact that the issue of a defendant's fitness was a matter of law, not medicine, that the court will wish to be sure that the substantive criminal proceedings are not a farce, and that punishment rather than treatment is indeed warranted.

7 The English Law Commission Consultation Paper 2010 No 197 has echoed what we said in 2009 in our article. However, in a recent article, "Unfitness to Plead—Some Observations on the Law Commission's Consultation Paper",[8] one of us (RM) noted that the Law Commission fails to discuss either the *O'Driscoll* test or the *Harding* case, both of which are referred to in the paper. The last limb of the *O'Driscoll* test permits the court to focus on the *ability of the accused* to make rational decisions, rather on the need for decisions to be rational. The author suggests that the type of test represented by *O'Driscoll* may be preferable to one based exclusively on the Mental Capacity Act.

8 At para 2.86 of the Consultation Paper is written of a particular case, *Diamond*:

> "the unfairness of the present situation [in England and Wales] is demonstrated by the fact that a defendant may, for example, be delusional and yet fit to plead because he or she has an underlying cognitive understanding. Yet his or her delusional

[7] (2009) 13 J&G L Rev 331.
[8] [2011] Crim LR 433.

state may well be such as to impair his or her capacity to make decisions. This makes a mockery of what we know of the concept of participation because although the defendant may appear to be engaging in the trial process, the participation—such as it is—is not on the required level and is ultimately a sham in which legal professionals and the courts are required to collude."

9 The English Law Commission had said earlier at para 2.47—

"The *Pritchard* test really only addresses extreme cases of a particular type (usually bearing on cognitive deficiency) and, as we explain in paragraph 2.60 below, it continues to set a high threshold for finding an accused unfit to plead. It also fails to cover all aspects of the trial process (for example, the ability to give evidence) and therefore has the practical effect of limiting the number of people who are found unfit to plead. The *Pritchard* test was nonetheless approved by the Court of Appeal in *Friend (No 1)* [[1997] 1 WLR 1433] in the context of a decision concerning the application of Section 35 of the Criminal Justice and Public Order Act 1994."

And at para 2.69—

"The principal problem with *Pritchard* is that it represents a determination to focus on the intellectual abilities of the accused as opposed to his or her capacity to make decisions. The emphasis is therefore on cognitive ability. In *Robertson* [[1968] 1 WLR 1767], for example, the accused was able to comprehend the court proceedings but was found to be unfit to plead on the basis that he suffered from a paranoid illness and was thought to be unable to defend himself. The medical evidence was that 'delusional thinking might cause him to act unwisely or otherwise than in his own best interests'. The Court of Appeal overturned the finding of unfitness. It relied on *Pritchard* and held that the mere fact that the accused was not capable of doing things which were in his own best interests was an insufficient basis for a finding of unfitness. In other words an accused's capacity to understand proceedings is separated in law from the question of whether he or she is capable of sound decision-making in relation to the conduct of those proceedings. These concepts have been thought to be sufficiently discrete for the courts to be able to say that only the former will have any bearing on the fitness to plead of the accused. The position in England and Wales in this regard contrasts with the position which now exists in Jersey where it has recently been held that these two concepts cannot readily be divorced from one another and that accordingly, the capacity to make rational decisions is of relevance to the determination of the issue."

10 It is therefore obvious that for Jersey courts to follow English case law would represent a retrograde step. Jersey already has the type of test for unfitness for which the Law Commission in England is pushing, and it would be unfair to the mentally disordered offender in Jersey to sabotage this test by the application of case law derived from a different test set in 1836 when psychiatry as a discipline was at an embryonic stage of development, and mental conditions were not understood, or treated, to the extent that they are in the 21st century.

11 What is required, in order for this jurisdiction to build up a body of case law in this area, is for advocates practising in Jersey to familiarise themselves with the language of psychiatry and the mental conditions concerned, and to learn to ask the right questions about the diagnostic features of those conditions in a particular defendant's case with relation to each of the arms of the *O'Driscoll* test, in order to assist the court with the matter of whether that defendant is indeed fit to stand trial. It must be remembered that immediately after *Pritchard*, there existed no case law to which the English courts might refer, and only the lapse of years produced a body of authority on the application of that test by the English courts.

12 It is a matter of fact that the prison population in Jersey, as in England, includes a disproportionate number of persons with serious mental health problems. The question that remains to be answered is whether the Jersey test for unfitness to plead, as well as the test for insanity at law, will in fact filter out as intended those persons who should not be in the criminal justice system, leading ultimately to a diminution in the psychiatrically disturbed prison population and an increase in those who are the responsibility of the mental health services.

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