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Effective participation

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INTRODUCTION

The notion of "effective participation" is now firmly embedded in the discourse around unfitness to stand trial. It signifies what is essential in determining whether a person has the capacity to be an engaged participant in criminal proceedings. Although it is a concept which has assumed a high profile in the jurisprudence of unfitness to stand trial, both in New Zealand and other English common law jurisdictions, it is still poorly understood. In particular, it is still unclear how "effective participation" engages with statutory and other non-statutory criteria for determining unfitness to stand trial. Does effective participation, in some sense, represent a "flowering" of what is implied in fitness to plead, or does it stand as an independent construct superimposed on statutory and common law rules governing unfitness to stand trial?

In order to better understand this relationship, it is necessary to step back to consider how other non-statutory criteria have impacted the development of unfitness to stand trial before the advent of the effective participation construct. This will involve considering the emergence of the criteria laid down in *R v Presser* [1956] VR 45 (SC) and the impact of that decision on the growing fitness jurisprudence in New Zealand. This will provide a framework to reflect on the essential elements of fitness to stand trial out of which the broader construct of effective participation has, arguably, emerged. The article concludes with the outline of a theory of effective participation.

R V PRESSER

In *Hanara v R* [2022] NZCA 608, currently the leading case dealing with effective participation in New Zealand, the Court of Appeal endorsed the development of the common law criteria for fitness developed in *R v Presser.* It noted that the *Presser* criteria had become "well established" in both Australia and New Zealand (at [99]). In the seminal case of *P v Police* e *[2007] 2 NZLR 528* (HC) at [43], mentioned with approval in *Hanara,* Baragwanath J had observed that the extended list of incapacities identified in *Presser* was more "discriminating" than the single-issue common law test. (The relevant abilities enumerated by Smith J were for the defendant (1) to understand what they are charged with; (2) to plead to the charge and exercise their right of challenge; (3) to understand generally the nature of the proceeding, that is, an inquiry as to whether they did what they are charged with; (4) to follow the course of the proceedings so as to understand what is going on in court in a general sense; (5) to understand the substantial effect of any evidence that may be given against them; (6) be able to make their defence or answer the charge; (7) be able to give counsel necessary instructions and let counsel know what their version of the facts is, and if necessary, tell the court what it is; (8) to have the capacity to decide what defence they will rely on and; (9) be able to make their defence and version of the facts known to the court and counsel.) Furthermore, it is now well established that the criteria in *s 4(b)* of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the CPMIP Act), and the introduction of the word "includes", laid out *examples* of factors which, if present, would result in a finding of unfitness, but were not exhaustive requirements (see *P v Police,* above). The word "includes" implies a degree of latitude to judges to take into account other factors not expressly mentioned in the statute but considered, to add weight to the statutory test.

In *Nonu v R [2017] NZCA 170* Collins J held that the adoption of the *Presser* criteria represents an *evolution* of the *Pritchard* criteria (*R v Pritchard (1836) 7 Car & P 303*, *(1836) 173 ER 135* (KB)). The question arises how did *Presser* come to articulate the "minimum standards" for fitness to plead? Immediately before outlining the minimum standards a defendant needs to meet before he can be tried "without unfairness or injustice to him" (*Presser* at 48), Smith J referred to an Australian High Court decision of *Sinclair v R* [1946] HCA, (1946) 73 CLR 316, where Dixon J said (at 334):

> The matters to be considered are whether the form of insanity of the prisoner arraigned allows him to comprehend the course of the proceedings so as to make a proper defence, to challenge any juror to whom he may wish to object and to comprehend the details of the evidence. It does not seem to have been noticed by the text writers how high a degree of intelligence this test might demand if it were literally applied.

The three capacities identified in *Sinclair*, namely, comprehend the proceedings so as to make a defence, be able to challenge jurors to whom the defendant may object and be able to comprehend the details of the evidence, clearly express the common law test outlined in *R v Pritchard*. However, what is less clear is where the remaining standards outlined by Smith J in *Presser* come from. It would seem that they arise from Smith J's reasonable and common sense intuitions as to what capacities are necessary for a fair trial to occur (Smith J suggested that the test for fitness should not be applied in any extreme or overliteral sense, but in a reasonable and common sense fashion). In this sense they do represent an evolution from *Pritchard*, but not in any obviously systematic or categorical manner. This is evidenced by Smith J's qualification, "I think", on 5 occasions in the relevant part of the judgment.

This also raises the question whether there might be further "*Presser*" criteria not articulated by Smith J. In the same way that the elements of effective participation are not governed by a statutory test, it is arguable that the *Presser* criteria are capable of further expansion, despite the fact that they have been incorporated into legislation in a number of Australian jurisdictions (see Crimes Act 1900 (ACT), s 311; Criminal Code (NT), s 43J; Criminal Law Consolidation Act 1935 (SA), s 269H; Criminal Justice (Mental Impairment) Act 1999 (Tas), s 8; Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic), s 6; Criminal Law (Mentally Impaired Accused) Act 1996 (WA), s 9).

***PRESSER*: SUPPLEMENTARY OR SUPPLANTING?**

It is also important to understand, at least for the purposes of New Zealand law, that the *Presser* criteria have not replaced the statutory criteria in s 4 and are, at the present time, best regarded as being *supplementary* to, rather than *supplanting* the statutory test. Yet there are anecdotal accounts of forensic assessors going straight to *Presser* and completely ignoring the statutory test (see, for example, EP Larkin and PJ Collins "Fitness to plead and psychiatric reports" (1989 29 Medicine, Science and the Law 26. The authors found, in assessing 77 pre-trial psychiatric reports, that in 27 per cent, the criteria for assessment of fitness to plead were not explicitly mentioned by the report writers).

In *Solicitor-General v Dougherty* [2012] NZCA 405, *[2012] 3 NZLR 586* Simon France J said (at [57]):

> We also see merit in the expanded list of factors identified in *P v Police*. They provide useful guidance to the health assessors as to the types of decision that arise in a trial process. They are not themselves the test, because that is set out in *s 4* of the Act and must always be the ultimate question. But vagueness is a constant challenge in this area and something that helps focus the inquiry is of value. In this regard it may often be helpful for the nature of the charges and the apparent trial issues to be identified early on, so that the health professionals' assessment can be more case specific in terms of the task that will be required of the accused.

Here the Court is emphasising that the current test for fitness in *s 4* is a provision in a code. As Brewer J noted in *R v Epere* *[2022] NZHC 866* at [59], the CPMIP Act involves a prescriptive regime of inquiry that must be followed. There is no scope to ignore the express words of the statute. How much they may be added to remains an open question.

THE SCOPE OF *PRESSER*

At common law, where a defendant fails to meet any one of the *Pritchard* criteria he or she is deemed unfit to stand trial, whether or not the other capacities remain intact (*R v John M* *[2003] EWCA Crim 3452* [20]). This would also seem to be the case in New Zealand (see, for example, *R v S* (1991) 7 CRNZ 576 at 579). But it is not so clear what happens where any one of the *Presser* standards are not met. Since they are extra-statutory standards it would be hard to contend that the failure to meet any one or more of the *Presser* standards would render the accused globally unfit to stand trial as occurs at common law. Rather where a *Presser* criterion is not met (for example, understanding the substantial effect of evidence that may be given against him) it may not alone render a defendant unfit to stand trial. The England and Wales Law Commission proposed a draft Criminal Procedure (Lack

of Capacity) Bill dealing with unfitness to plead, in which it suggested, by cls 1(2) and 3 that a defendant may not be tried for the offence if his or her "relevant abilities" are not "taken together, sufficient to enable the defendant to participate effectively in the proceedings on the offence or offences charged" (R Fortson "Unfitness to Plead in England and Wales: A Practitioner's view of a Plea in Evolution" in R Mackay and W Brookbanks *Fitness to Plead: International and Comparative Perspectives* (OUP, Oxford, 2018) at 41). This seems to imply, at least in England and Wales, that fitness is likely to become a cumulative assessment, which is relevant to the analysis of the elements of effective participation.

DOMINANCE OF *PRESSER*

Regardless of what limitations may arise following failure to meet any one of the *Presser* criteria, it is now clear that *Presser* has become embedded in New Zealand fitness jurisprudence. In *T v R* [2022] NZCA 444, the Court of Appeal, having in the previous paragraph laid out the statutory test in s 4, stated that "the current and most authoritative exposition of the skills required to be fit to stand trial are those set out in *R v Presser* as endorsed and augmented in *R v Nonu*" (at [231]). This seems to imply a definitive statement of the capacities necessary to participate effectively in a trial — something significantly more than "useful guidance" for health assessors. Clearly both the s 4 criteria and the *Presser* criteria can, and in the case of s 4 *must*, be looked to in assessing trial competence. However, whether there is a particular order in which the standards should be considered and the consequences of failure to demonstrate any one of the nominated skills, are unclear. There is clearly a potential for confusion and, arguably, unfairness.

For these reasons there is an urgent need for a legislative review of what, exactly, are the agreed criteria for determining unfitness to stand trial and a clear statutory formulation of the process for applying them. The urgency surrounding this issue is exacerbated by the mainstreaming of the concept of effective participation which is both an overarching principle of participatory trial rights and a filter for assessing the efficacy of a fitness to plead determination. Yet there is still no agreed understanding of the scope or content of the effective participation paradigm.

EFFECTIVE PARTICIPATION

Unlike the s 4 CPMIP Act test for unfitness to stand trial, there is no test governing what effective participation means in practice (see Editorial "Modernising Fitness to Plead" (2019) 59(3) Medicine, Science and the Law 131). Case law has determined its content to broadly comprise abilities to hear and pay attention, to offer a person's own account, and communicate with counsel (Editorial, above). The concept was first articulated in New Zealand by Collins J in *Nonu v R*, where his Honour made the following oft-cited observation (at [29]):

> An inquiry into a defendant's fitness to stand trial, however, involves more than an assessment of whether or not the defendant can participate in his or her trial by simply performing relevant trial functions. A defendant must also have the capacity to participate effectively in his or her trial. This involves an assessment of the defendant's intellectual capacity to carry out relevant trial functions. The reason for the need to inquire into the defendant's capacity to participate effectively in his or her trial is that the principles we have explained above are not honoured in cases where, for example, a defendant superficially appears to participate in his or her trial but in reality is, because of intellectual disability, nothing more than a bystander.

His Honour noted that the effective participation enquiry is a *contextual* enquiry recognising that a defendant may have the capacity to participate in a simple criminal proceeding like a shoplifting charge, but be unable to participate in more complex proceedings requiring the processing of information in real time and effective communication in order to advance a defence (at [31]).

UNDERSTANDING EFFECTIVE PARTICIPATION

How, then, is "effective participation" to be understood within a theoretical framework? Is it simply a new test for fitness to plead or merely "something that helps focus the inquiry"? I would suggest that as the notion has developed in recent case law something more is envisaged than an "illumination" of the definition in s 4.

The concept of effective participation is not derivative from fitness to plead. It is a much broader construct that has its origins in the European Convention on Human Rights, in particular art 6, which defines the rights to a fair trial. Although the language of "effective participation" is not expressly stated in art 6, "it is an implicit Article 6 guarantee"

(see A Owusu-Bempah “The interpretation and application of the right to effective participation” (2018) 22 (4) The International Journal of Evidence and Proof 321 at 323).

In what has been described as the most comprehensive statement of effective participation provided by the courts, the European Court in *SC v UK* (2005) 40 EHRR 10 said (at [29], emphasis added):

> ... ‘effective participation’ in this context presupposes that the accused has a *broad understanding* of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees, and make them aware of any facts which should be put forward in his defence.

In *Stanford v UK* App No 16757/90 (ECHR, 23 Feb 1994) the European Court of Human Rights said (at [26], emphasis added):

> ... Article 6, read as a whole, guarantees the right of an accused to *participate effectively* in a criminal trial. In general this includes, inter alia, not only his right to be present, but also to hear and follow the proceedings.”

The notion of effective participation “ensure[s] that the defendant is treated as the autonomous subject of the proceedings, and not simply the object for the imposition of conviction and punishment. In sum, a defendant cannot have a fair trial if they cannot participate effectively” (Bempah, above, at 323).

A THEORY OF EFFECTIVE PARTICIPATION

The case can, therefore, be made that the idea of effective participation, far from being an alternative descriptor for fitness to plead, is an all-encompassing principle of trial engagement. Considering it in terms of criminal law theory, as a principle of trial procedure it is a ‘higher level’ generalisation that must necessarily be satisfied wherever it is claimed a defendant has had a fair trial. In that sense it could be conceptualised as standing outside and above the rules governing unfitness to stand trial and existing as an ultimate norm governing participatory trial rights. As an ultimate norm, its legal development is subject to both statutory and case law developments, in the same way, for example, that the criminal law principles of mens rea and actus reus are subject to ongoing analysis and refinement through judicial analysis and inquiry. It might also be regarded as providing a conceptual umbrella under which the statutory rules governing unfitness to stand trial are located, but is not defined by those rules. Additionally, it could be said that the statutory rules governing unfitness to stand trial exist as a necessary subset of effective participation, but are not necessarily sufficient to meet the requirements of a fair trial. This is not to contradict the ruling in *Solicitor-General v Dougherty* (above) that in New Zealand *s 4* CPMIP Act is the test for determining unfitness to stand trial, but rather to say that the narrow prescription of the statutory elements may, in many cases, be an insufficient measure of an offender’s adjudicative and participatory competence, when a broader range of capacities is considered.

In addition to the requirement for effective participation, other guiding principles in this context might include zealous advocacy, procedural fairness and judicial impartiality, all of which together point to the ingredients for a fair trial. However, this is not the context in which to explore those principles in further detail.

CONCLUSION

Collins J observed in *Hanara v R* (above, at [114]), that “the effective participation by a defendant in his or her criminal trial is integral to assessing a defendant’s fitness to stand trial”. That is to say the measure of fitness to stand trial is more than simply displaying the rudiments of engagement in a trial process.

Furthermore, it may be implied that the elements of effective participation, which are distinguishable from the narrow statutory elements for determining unfitness to stand trial, are also indispensable in determining fitness; and express broader notions of what it means to participate in a fair trial. In fact, as occurred in the *SC v UK* case, although the applicant was found fit to plead, the Court found a breach of art 6 of the European Convention on Human Rights on the basis that he had been unable to participate effectively in his trial (see also *R v Murray* [2008]

EWCA Crim 1792). Evidence from a psychiatrist suggested that Murray was impaired in her ability to participate effectively, and the capacity to make decisions, yet was deemed fit to plead.

Finally, it may be useful to view effective participation as an *open-ended construct*, the content of which has yet to be fully explored. Arguably, it is a developing construct, the contours of which will emerge as case law around it grows, both in international and domestic spheres. It is reasonable to expect that new elements of effective participation will be identified as judges explore its relevance in new factual settings where the issue of fitness to stand trial is raised.□
