

Mental Disorder and Liability to Punishment: Recent English Developments

Kris Gledhill, Barrister (London)

Academic Lawyer, Auckland

Editor, Mental Health Law Reports

English Statutory Framework

- Mental Health Act 1983 (MHA) as amended
 - Wide definition of “mental disorder” – any disorder or disability of mind – includes learning disability and personality disorder
 - Civil detention for assessment and treatment
 - Criminal orders may be made as well
 - Hospital order
 - Hospital and restriction order
 - Hybrid order
- Other statutory provisions re overlap between mental disorder and criminal justice - fitness to stand trial, diminished responsibility etc

Criminal Orders

- Hospital Order – s37 MHA
 - Civil criteria for detention (including need for 2 doctors to support diagnosis) plus
 - “most suitable disposal” – factors including nature of offence, antecedents, other options
 - Effect = becomes civil patient
- Restriction Order – s41 MHA
 - Hospital order plus
 - “necessary for protection of public from serious harm”
 - Effect = various decisions – leave, transfer – need central government permission; release – which depends on risk - invariably conditional and subject to recall
 - So restriction order regime in many ways similar to indeterminate prison sentence – lifelong, risk-based
 - Note imprisonment/detention for public protection – to be imposed for dangerousness, with life imprisonment if particularly culpable – Criminal Justice Act 2003 – IPP abolished under Legal Aid, Sentencing and Punishment of Offenders Act 2012 but not retrospectively; life sentence remains, and presumptively to be passed for second particularly serious offence.

Hybrid Order

- Serving prisoners can be transferred from prison to hospital if needed – s47/49 MHA – treated as restricted patient until sentence ends, then become s37 patient; can be transferred back to prison if sentence still in place
- Section 45A added in 1997 – allows court to impose sentence and transfer to hospital (and hence prospect of return to prison); originally only for those with severe personality disorder who might not be treatable, but now covers all forms of mental disorder

Sentencing Themes and Context

- Repeated arguments -
 - Mitigation value of mental disorder
 - When should discretion to impose hospital order be used?
 - What is relationship between indeterminate prison sentence and indeterminate hospitalisation (ie restriction order regime)
 - If hospital order proper, should it be combined with restriction order (numerous cases about this – invariably emphasising that open to judge to impose restriction order even if doctors not support it, though often following medical view)
- Important context
 - nature of psychiatry such that diagnoses often clarified over time – Lady Hale in *R (B) v Ashworth Hospital Authority* [2005] UKHL 20 - “not an exact science”
 - Risk of placing people with mental disorder in prison setting – risk to life (suicide), self-harm, deterioration in mental condition – numerous instances in which findings of breaches of Arts 2 or 3 ECHR from failures in this regard – eg *Keenan v UK* (2001), *Renolde v France* (2008), *MS v UK* (2012)

Mental Disorder as Mitigation

- Inconsistent theme. Sometimes clearly mitigation:
 - *R v Alan Kenneth Levey* [2012] EWCA Crim 657, [2012] MHLR 268 – minimum term for murder (stabbing of alcoholic acquaintance – pre-planned) reduced from 26 years to 22 years to take into account personality disorder of defendant
 - *R v Lee Robert Foye* [2013] EWCA Crim 475, [2013] MHLR 182 – 35 year minimum term for 2 murders by man with severe personality disorder not excessive (and took into account disorder)
 - *R v Cameron Lee McFly* [2013] EWCA Crim 475, [2013] MHLR 182 – minimum term for murder reduced from 24 to 21 years in light of severe personality disorder
- But sometimes barely so:
 - *R v Darren John Yates* [2012] EWCA Crim 1657, [2012] MHLR 313 – repeated shop robber – events caused by disengaging from treatment for schizophrenia and abusing drugs – treatment prior to sentence meant not need to be in hospital – detention for public protection upheld, though minimum term reduced from 4 to 2 years, but not on account of mental illness – little mitigation from that because should have been aware of risk from disengaging.
 - *R v Nicola Caroline Edgington* [2013] EWCA Crim 2185, [2014] MHLR 290 – 37 year minimum term for murder committed by woman under treatment for schizophrenia at time upheld – mental disorder NOT reduce culpability to any significant extent. (Previous conviction for manslaughter of mother led to restriction order : on conditional discharge but back in hospital because of concerns.)
- Note – in some of the above, diminished responsibility rejected. In Coroners and Justice Act 2009, new test for diminished responsibility – no longer need abnormality of mind, but recognised medical condition that causes substantial impairment of ability to understand nature of conduct, form rational judgment or exercise self-control. *R v Stephen Andrew Dowds* [2012] EWCA Crim 281, [2012] MHLR 153 – this does not allow acute voluntary intoxication to count.

Hospital or Custody

- Core question - *Attorney General's Reference No 54 of 2011* [2012] MHLR 87 – hospital order and restriction order unduly lenient and replaced by indeterminate detention for public protection (with minimum term of 6 years) – defendant convicted of manslaughter of gang rival, and diagnosed as having schizophrenia; indeterminate prison sentence allows protection against risks other than those arising from mental disorder and needed on facts.
- Some case law suggests no need for causal link between offending and mental disorder to have hospital disposal - *R v Paul Lee Smith* [2001] EWCA Crim 743, [2001] MHLR 46; most of case law in context of how to deal with risky individuals - question of whether too great a willingness to find risks other than from mental disorder?

Recent cases where CA substitutes hospital disposal

- Various instances of misdiagnosis at time of sentence:
 - *R v Carlton Fitzwarren Channer* [2012] EWCA Crim 1667, [2012] MHLR 350 – imprisonment for public protection in 2005 quashed in 2012 and replaced with ss37/41 orders on basis of evidence that what was thought at time of sentence to be transient psychotic state was schizophrenia
 - *R v Paul Teasdale* [2012] EWCA Crim 2071, [2012] MHLR 387 – life sentence replaced with ss37/41 orders – defendant (with many previous convictions) sentenced for further offences in 1998 – had refused to cooperate with medical reports at time, when thought to have personality disorder and psychotic illness; later transferred to hospital and diagnosis of schizophrenia, causative of offending. (Court noted value of having specialist release and aftercare.)
 - *R v Ashley Searles* [2012] EWCA Crim 2685, [2013] MHLR 47 – hospital order in place of 2 years’ detention for street robbery in light of fresh evidence that defendant had schizophrenia; concerns had been raised at time of sentence, but judge had declined to adjourn, commenting that transfer under ss47/49 was possible (as indeed had happened).
 - *R v Alan Fletcher* [2012] EWCA Crim 2777, [2013] MHLR 50 – imprisonment for public protection imposed in 2006 for arson reckless as to whether life endangered changed to orders under ss37/41 MHA – evidence at time of sentence of unstable personality traits and low IQ; updated evidence – mental impairment that was treatable only in hospital
 - *R v Imtiaz Ahmed* [2013] EWCA Crim 99, [2013] MHLR 65 – imprisonment for public protection changed to ss37/41 MHA – manslaughter – at sentence time, only one doctor supported hospital, but after sentence, transferred to hospital and now two doctors supported hospital disposal; court noted imprisonment might be proper if culpability or risks arising other than from mental disorder, but determined need for treatment more important on facts
 - *R v Jaimie Angela Evans* [2013] EWCA Crim 1193, [2014] MHLR 285 – life sentence for 1998 arson reckless as to endangering life (when diagnosis was of untreatable personality disorder) replaced with ss37/41 on basis treatable (as shown since transfer to hospital in 2002 under ss47/49)
 - *R v Ioannis Marinos* [2013] EWCA Crim 652, [2014] MHLR 20 – imprisonment for public protection replaced with ss37/41 orders – difference of medical opinion at time of sentence now replaced with agreement as to schizophrenia
 - *R v Matthew Colborne* [2014] EWCA Crim 286, [2004] MHLR 381 – imprisonment for public protection in 2006 – subsequent diagnosis of schizophrenia and transfer under ss47/49 (and some comments that should have been diagnosed in 2006) – CA imposes ss37/41.

But not always

- *R v Mohammed Mokshud Ahmed* [2013] EWCA Crim 1393, [2014] MHLR 58 – detention for public protection – diagnosis not clear at time of sentence; before appeal court, 2 doctors supported ss37/41 but one said malingering – CA preferred latter.
- *R v Nadia Ali Yusuf* [2013] EWCA Crim 2077, [2014] MHLR 288 – imprisonment for public protection in 2008 for arson reckless as to endangering life; medical evidence that untreatable personality disorder; transferred under ss47/49 – updated evidence indicating now met ss37/41 – but CA said evidence not indicate misdiagnosis or error in sentence – appeal rejected. (But personality disorder is an enduring feature!)
- *R v Darren Gabriel Anderson* [2013] EWCA Crim 2212, [2014] MHLR 324 – imprisonment for public protection from 2008 attack; further prosecution for hostage taking – by time of sentence in 2012, in hospital under ss47/49 – judge made ss37/41 orders; appeal vs original sentence dismissed – even though offence linked to personality disorder, risk of criminality not arising from personality disorder justified IPP

Recent instance favouring indeterminate prison sentence rather than mental health disposal

- *R v Shaun Edward Tudor* [2012] EWCA Crim 1507, [2012] MHLR 300 – man in hospital as restricted patient since 1988 indecent assault – mental impairment and personality disorder – allowed out on leave, committed further paedophile sexual assault – meets criteria for hospital, but doctor against admission as treatment had failed – judge’s refusal to adjourn to allow investigation of further medical placement, resulting in indeterminate sentence, not improper. (Failure to manage risk adequately?)

Also cases supporting use of hybrid order – ie imprisonment included

- *R v Shane William Jenkin* [2012] EWCA Crim 2557, [2013] MHLR 61 – defendant with long history of violent offending blinded partner after failing to take prescribed tranquilisers and drinking; life imprisonment with s45A order upheld
- *R v Peter Quirk* [2014] EWCA Crim 1052, [2015] MHLR ... - defendant with autism – repeatedly threw rocks off motorway bridges – various custodial sentences, and eventually life imprisonment plus s45A order – CA determined judge entitled to find culpability to justify prison, even though mental disorder involved and medical evidence preferred ss37/41
- Note – calls for it to be extended – *R v Ian Ruby* [2013] EWCA Crim 1653, [2014] MHLR 205 – detention for public protection and 45A – illegal because requires imprisonment (ie 21 or over) – CA substituted ss37/41, but endorsed calls in other cases for s45A to be extended. (Note similar mistake and similar outcome on appeal in *R v Jamie Daniel Fort* [2013] EWCA Crim 2332, [2014] MHLR 334. In both cases, CA found risks arose from disorder only.)

Ensuring Fitness to Stand Trial

- So minority (but significant number of cases) where elements of culpability despite clear involvement of mental disorder.
- Another aspect of recent developments – extended assistance to ensure that trials can go ahead – enhanced support for defendants – eg intermediaries to assist people with learning difficulties: effect is that have trial to establish guilt rather than trial of facts to determine if committed actus reus (leading to protective order)

Convention on the Rights of Persons with Disabilities 2006

- ECHR Art 6 and 14 – cannot differentiate on basis of status – including disability
- ICCPR Art 14 and 2 – same effect as ECHR; but Art 26 – equality before law
- CRPD – doesn't claim to extend rights, but to explain what they mean in context of disability

Discrimination – Art 2

- ... "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;
- ... "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

Justice – Art 13

- **Article 13 - Access to justice**
- 1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
- 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Capacity Building – Including to Stand Trial and Face Penalty?

- **Article 12 - Equal recognition before the law**
- 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
- 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
- 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
- 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

...